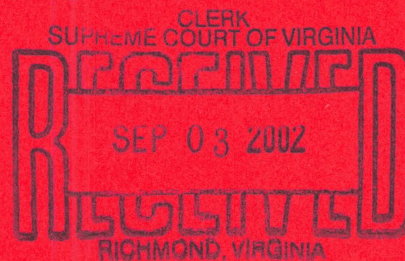


265 Va 334

IN THE
Supreme Court of Virginia

RECORD NO. 021181



PGI, INC.,

Appellant,

v.

RATHE PRODUCTIONS, INC.,

Appellee.

APPENDIX

**E. Duncan Getchell, Jr.
Amy M. Burden
MCGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030
(804) 775-1000**

**Sean F. Murphy
John S. Jenkins, Jr.
MCGUIREWOODS LLP
1750 Tysons Boulevard, Suite 1800
McLean, Virginia 22102-4215
(703) 712-5000**

Counsel for Appellant

**Edward J. Tolchin
FETTMANN, TOLCHIN
& MAJORS, P.C.
10509 Judicial Drive, Suite 300
Fairfax, Virginia 22030-7501
(703) 385-9500**

Counsel for Appellee

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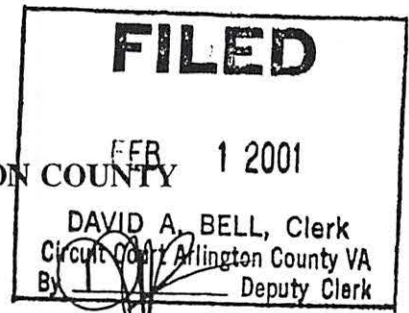
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VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY



PGI, INC.

Plaintiff,

4.00 ✓
v/s.
RATHE PRODUCTIONS, INC.
555 West 23rd Street
New York, New York 10011

Serve: Secretary of the Commonwealth

Defendant.

At Law No. CL 01-100 ✓

VERIFIED MOTION FOR JUDGMENT

Plaintiff PGI, Inc. ("PGI"), by counsel, states as follows in support of its Motion for Judgment:

PARTIES

1. PGI is a Delaware corporation with its principal place of business located at 2200 Wilson Boulevard, Arlington, Virginia 22201.

2. Rathe Productions, Inc. ("Rathe") is a New York corporation with its principal place of business located at 555 West 23rd Street, New York, New York 10011.

3. PGI is an international event and communications agency that creates, produces and markets exhibitions, conferences, consumer events and corporate meetings.

4. PGI provides a variety of services in creating and operating an exhibition or show for its clients. Exhibition services encompass show management and include vendor invitation, scheduling, logistics, advertising and supervision for both PGI and client-owned events.

5. Rathe Productions, Inc. is a specialty producer which creates exhibits, interiors, exposition pavilions, and special display constructions for industry and government.

STATEMENT OF FACTS

6. Beginning in the Spring of 1997, Rathe and PGI provided exposition management, logistics, display and financial services to the Smithsonian Institution ("Smithsonian") for "America's Smithsonian Exposition", a traveling museum show which displayed a variety of historic and cultural exhibits in selected cities in the United States ("the Exposition").

7. The Smithsonian had raised an initial capital contribution of forty million dollars from corporate sponsors to support the Exhibition's planned tour of ten cities. After touring five cities, the initial capital contribution was exhausted and the Smithsonian solicited bids for private operation and management of the Exposition.

8. PGI and Rathe submitted a proposal to manage and operate the Exposition and the Smithsonian selected the PGI/Rathe proposal. PGI and Rathe then engaged O'Dell & Simms to function as the corporate fundraiser to solicit additional corporate sponsorships to continue the Exposition.

9. Existing corporate sponsors were unwilling to continue financial support for the Exposition and additional corporate sponsors were unable to contribute sufficient funding to sustain the Exhibition. As a result, in the Fall of 1997, the Exposition ended after visiting eight of the ten planned locations.

10. PGI invoiced the Smithsonian for services performed managing the Exhibition in Portland, Oregon, Birmingham, Alabama and San Jose, California.

However, as the Exposition's finances were exhausted, PGI, Rathe and Odell & Simms were not reimbursed for direct expenses incurred in producing, managing and executing the Exposition.

11. Although the Exhibition concluded prematurely, the Smithsonian was encouraged by the attendance figures experienced at Exposition locations. As a result, the Smithsonian asked PGI and Rathe to conduct a market study (the "Market Study") examining the feasibility of producing a self-funded and self-sustaining international "America's Smithsonian Exposition" at a cost of \$250,000. Odell & Simms was retained to provide fundraising advice to PGI and Rathe for the Market Study.

12. During the Spring of 1998, PGI, with minimal assistance from Rathe, conducted the Market Study which concluded the risks of an international exposition or festival did not justify the potential rewards to the Smithsonian.

13. PGI Executive C.B. Wismar presented the Market Study findings and recommendation to the Smithsonian's leadership and the results were accepted. After completion and submission of the Market Study, PGI, on behalf of Rathe and Odell & Simms, invoiced the Smithsonian for the study's agreed cost of \$250,000 and also submitted PGI's invoices for the Exposition's management by PGI and Rathe. (Exhibit A.)

14. Despite PGI's demand, the Smithsonian did not pay either the Exhibition's direct expenses or the Market Study invoices.

15. Given the Smithsonian's refusal to pay PGI and Rathe for the Market Study, in the Summer of 1998, PGI's and Rathe's executive leadership met at PGI offices in Arlington, Virginia. At that meeting, Rathe's President, Robert Rathe, and PGI's

Chief Executive Officer, Darryl Hartley-Leonard, agreed that Rathe should continue efforts to collect amounts owed for the Market Study as Rathe had a continuing business relationship with the Smithsonian to produce museum display cases.

16. Robert Rathe also agreed to divide evenly between PGI and Rathe any amount Rathe obtained from the Smithsonian. PGI and Rathe would then pay Odell & Simms from these proceeds for its contribution to the Market Study.

17. Despite receiving payment for the Market Study, Rathe willfully concealed the Smithsonian's payment for the Market Study and deliberately converted PGI's portion of the payment by keeping those funds for Rathe.

18. It was not until December 2000 that Cynthia Engel, PGI's President, learned from John Simms, President of Odell & Simms that the Smithsonian paid Rathe in July 2000 the \$250,000 owed for the Market Study. Upon information and belief, the Smithsonian check for the \$250,000 was made payable to the order of both PGI and Rathe.

19. After learning the Smithsonian paid Rathe the \$250,000, Cynthia Engel called Rathe's Comptroller and demanded Rathe release PGI's funds. Rathe's Comptroller refused to release PGI's portion of the Smithsonian's payment.

20. In addition, Cynthia Engel made a written demand on Rathe to release to PGI \$125,000 representing PGI's portion of the Market Study payment.

21. Despite PGI's demand, Rathe has intentionally and consciously disregarded PGI's right to payment and has repeatedly refused to release PGI's funds.

22. Rathe presently owes PGI a total amount of \$125,000.

COUNT ONE
CONVERSION

23. PGI incorporates the allegations of Paragraph 1 through 22 as if set forth fully herein.

24. By receiving the \$250,000 Market Study payment from the Smithsonian, Rathe exercised control over \$125,000 of funds that belong to PGI's.

25. After failing to tender to PGI the funds the Smithsonian had entrusted to Rathe for PGI, Rathe's continued exercise of control over PGI's \$125,000 was wrongful.

26. Rathe has improperly converted to its own use \$125,000 of PGI's funds and has denied PGI its rightful possession and use of these funds.

WHEREFORE, PGI requests this Court award compensatory damages in the amount of \$125,000, punitive damages in the amount of at least \$250,000, plus interest, attorney's fees, costs and any other relief the Court deems appropriate.

COUNT TWO
ASSUMPSIT

27. PGI incorporates the allegations of Paragraph 1 through 26 as if set forth fully herein.

28. By performing the Market Study, PGI conferred a business benefit on Rathe.

29. Rathe knowingly accepted the benefit by receiving and retaining the Smithsonian's \$250,000 payment for the Market Study performed by PGI and Rathe.

30. PGI had a reasonable expectation of payment for services performed.

31. Rathe should have reasonably expected to pay PGI for the services performed.

32. Under the circumstances, Rathe's retention of the benefit conferred without paying for its value is inequitable and has damaged PGI in the amount of at least \$125,000.

WHEREFORE, PGI requests this Court award compensatory damages in the amount of \$125,000, plus interest, attorney's fees, costs and any other relief the Court deems appropriate.

PGI, INC.
By Counsel

McGuireWoods LLP
1750 Tysons Boulevard, Suite 1800
McLean, Virginia 22102
Phone: (703)-712-5000
Fax: (703)-712-5050

By: 

Sean F. Murphy, Esq. (VSB No. 28415)
John S. Jenkins, Jr., Esq. (VSB No. 37426)
Counsel for PGI, Inc.

AFFIDAVIT

This day Cynthia Engel appeared before me and stated under oath as follows:

1. I am an adult citizen of the Commonwealth of Virginia over the age of eighteen.
2. I am the President and Chief Operating Officer of PGI, Inc. and I am authorized to make this affidavit.
3. I have read the foregoing Motion for Judgment against Rathe Productions, Inc. and state the allegations therein are true and accurate.
4. Based on information and belief, defendant Rathe Productions, Inc. is a New York corporation with its principal place of business located at 555 West 23rd Street, New York, New York 10011.

PGI, Inc.

By: Cynthia Engel
Cynthia Engel
President and Chief Operating Officer

Subscribed and sworn to before me this 31st day of January, 2001

Gratha L. Campbell
Notary Public

Commission Expires: Feb 28, 2003



Production Group International
2300 Wilson Blvd.
Arlington, VA 22201-3024
tel 703.529.3494
fax 703.529.1724

2ND NOTICE

Mr. John Cobert, Director, Office of Contracting
Smithsonian
955 L'Enfant Plaza, S.W.
Suite P-114
Washington, DC 20024

September 9, 1998

Dear Mr. Cobert:

In keeping with the agreement between the Smithsonian Institution and Rathe/PGI for an in-depth study of the feasibility of a global tour similar in scope to the "America's Smithsonian" exhibition, Rathe/PGI, with support of O'Dell & Simms, have undertaken a worldwide research project.

The findings and conclusions of that project have been presented to the Smithsonian in written and verbal presentations on several occasions and the ensuing discussions (both internal to the Smithsonian and with Rathe/PGI) have led to the conclusion that a similar program will not be feasible within the guidelines established – self-funded, self-sustaining and profitable – even with the questionable support of the Board of Regents and museum Directors. The most recent conversation with Mr. Marc Pachter, and Mr. Dan Stevenson presented a quite divergent prospective on an international venture – one built around the "festival" concept similar to the American Folklife Festival held annually on the National Mall. Mr. Pachter was quite convincing in his view that the Board of Regents, the various museum Directors and the United States Congress would not be interested in an artifact-based international tour similar in scope and theme to "America's Smithsonian". He also questioned whether a festival tour would have the attraction and generate the interest that would allow it to be self-funding and self-sustaining.

Although intriguing, the concept of a festival is quite different than the original basis of the Rathe/PGI study. With that in focus, we have engaged in further feasibility exploration on the viability of the festival and have reached the conclusion that the risks do not justify the potential rewards and that the value to the Smithsonian as well as Rathe/PGI is minimal.

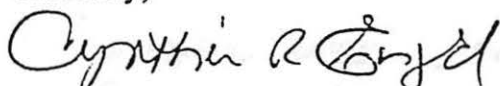
With this as background, we are focused to conclude that an international festival tour "branded" as a Smithsonian venture which would be made possible through significant corporate sponsorship and local funding is not feasible. In keeping with the Smithsonian/Rathe/PGI agreement dated May 9, 1997, we are therefore presenting the enclosed invoice in the amount of \$250,000, payment of which will conclude this feasibility study and will transfer all rights to research information and findings to the Smithsonian Institution for any additional right and use.

Also enclosed are copies of previously submitted invoices for reimbursement in connection with tour stops in Birmingham, Portland, San Jose, and prospective stops in Charlotte and Honolulu.

We have greatly valued our involvement with the Smithsonian through the conclusion of the "America's Smithsonian" exhibition tour and the ensuing research and evaluation of possible international ventures.

Should you have any questions or concerns, please feel free to contact me at (703)312-9148.

Sincerely,



Cynthia R. Engel
President and Chief Operating Officer

cc: Connie Newman



Production Group International
2200 Wilson Blvd.
Arlington, VA 22201-3324
tel 703.528.8484
fax 703.528.1724

Bill to:
Smithsonian
955 L'Enfant Plaza, S.W.
Suite P-114
Washington, DC 20024
Attn: John Cobert, Director

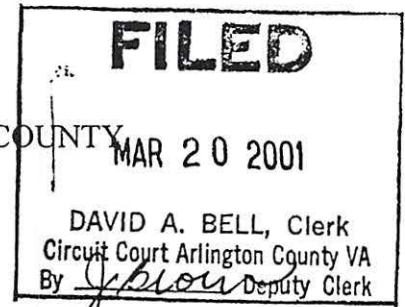
Invoice Number: 0007657H-IN
Invoice Date: 8/7/98
2ND REQUEST
DUE: September 19, 1998

CODE	DESCRIPTION	AMOUNT
<u>FEASIBILITY STUDY</u>		
EXPO	Management fee due in connection with completion of feasibility study	\$ 250,000.00
TOTAL DUE		<u>\$ 250,000.00</u>

cc: Connie Newman

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY



PGI, INC.

Plaintiff,

v.

RATHE PRODUCTIONS, INC.

Defendant.

At Law No. CL01-100

VERIFIED ANSWER AND GROUNDS OF DEFENSE

Defendant Rathe Productions, Inc., answers the Verified Motion For Judgment as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.
8. Denied.
9. Admitted.
10. Admitted.
11. Admitted.

12. Denied.
13. Admitted.
14. Admitted.
15. Admitted.
16. Denied.
17. Denied.
18. Denied.
19. Admitted that Rathe refused PGI's demand, but otherwise deny.
20. Admitted that demand was made and refused, but otherwise deny.
21. Denied.
22. Denied.
23. Defendant incorporates its answers to Paragraph 1 through 22 as if set forth fully herein.
24. Denied.
25. Denied.
26. Denied.
27. Defendant incorporates its answers to Paragraph 1 through 26 as if set forth fully herein.
28. Denied.
29. Denied.
30. Denied.
31. Denied.

32. Denied.

Defendant denies that Plaintiff is entitled to the relief requested or any relief whatsoever.

All allegations not admitted or denied above to which a response is required are denied.

AFFIRMATIVE DEFENSES

Defendant, in addition to denying that Plaintiff is entitled to the relief requested in Plaintiff's Verified Motion For Judgment or to any relief whatsoever, asserts Plaintiff is precluded from its claim against defendant based on the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by waiver.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by estoppel.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because they fail to state claims upon which relief may be granted.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by laches.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by Plaintiff's own actions in performing additional work and incurring additional costs and charges without first obtaining Defendant's written approval and consent.

SIXTH AFFIRMATIVE DEFENSE


Plaintiff's claims are barred by the Statute of Frauds.

SEVENTH AFFIRMATIVE DEFENSE

Defendant reserves the right to assert any additional or further affirmative defenses which may arise in the course of this proceeding.

WHEREFORE Defendant pray that Plaintiff's Verified Motion For Judgment be dismissed with prejudice, that the Defendants be awarded their costs in this matter, and such further relief as the Court deems just and proper.

RATHE PRODUCTIONS, INC.
Defendant, By Counsel



Edward J. Tolchin, Esquire VSB#
Fettmann, Tolchin & Majors, P.C.
10615 Judicial Drive, Suite 502
Fairfax, Virginia 22030
703-385-9500
703-385-9893 (Facsimile)
Counsel for Defendant

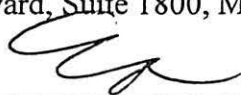
VERIFICATION

I have read the foregoing Answer and Grounds of Defense and, on behalf of Rathe Productions, Inc. of which I am Executive Vice President, I affirm that the answers herein are true to the best of my belief.

Richard Rathe, for Rathe Productions, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on 20th March, 2001, a true copy of Defendant's Verified Answer and Grounds of Defense was sent by first class mail, postage pre-paid, to John S. Jenkins, Jr., Esquire, at McGuire Woods LLP, 1750 Tysons Boulevard, Suite 1800, McLean, Virginia 22102.



Edward J. Tolchin

03/19 '01 16:20

ID:FETTMANN TOLCHIN MAJORS

FAX:7033859893

PAGE 5

SEVENTH AFFIRMATIVE DEFENSE

Defendant reserves the right to assert any additional or further affirmative defenses which may arise in the course of this proceeding.

WHEREFORE Defendant pray that Plaintiff's Verified Motion For Judgment be dismissed with prejudice, that the Defendants be awarded their costs in this matter, and such further relief as the Court deems just and proper.

RATHE PRODUCTIONS, INC.
Defendant, By Counsel

Edward J. Tolchin, Esquire VSB#
Fettmann, Tolchin & Majors, P.C.
10615 Judicial Drive, Suite 502
Fairfax, Virginia 22030
703-385-9500
703-385-9893 (Facsimile)
Counsel for Defendant

VERIFICATION

I have read the foregoing Answer and Grounds of Defense and, on behalf of Rathe Productions, Inc. of which I am Executive Vice President, I affirm that the answers herein are true to the best of my belief.


Richard Rathe, for Rathe Productions, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on ___ March, 2001, a true copy of Defendant's Verified Answer and Grounds of Defense was sent by first class mail, postage pre-paid, to John S. Jenkins, Jr., Esquire, at McGuire Woods LLP, 1750 Tysons Boulevard, Suite 1800, McLean, Virginia 22102.

Edward J. Tolchin

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

PGI, INC.

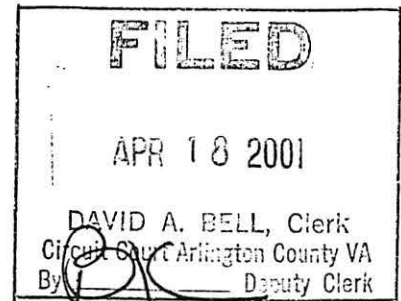
Plaintiff,

v.

RATHE PRODUCTIONS, INC.

Defendant.

CL 01-100



MOTION TO CONSOLIDATE ACTIONS FOR TRIAL

Plaintiff PGI, Inc. ("PGI"), by counsel, moves the Court for entry of an Order consolidating this action for trial with CL 01-171, styled as Odell, Simms & Associates, Inc. v. PGI, Inc. and Rathe Productions, Inc., currently pending before this Court. In support of its Motion, PGI states as follows:

1. On February 1, 2001, PGI filed its verified Motion for Judgment ("CL 01-100") seeking to recover \$125,000 in compensatory damages and punitive damages resulting from Rathe Production, Inc.'s ("Rathe") conversion of funds paid by the Smithsonian Institution ("Smithsonian") to Rathe and PGI for conducting a feasibility study (the "Feasibility Study") pursuant their contract with the Smithsonian (the "Notice to Proceed"). (See Exhibit A.) PGI further alleged that the Smithsonian paid \$250,000 to Rathe by check made payable to Rathe/PGI and that Rathe, having negotiated the Smithsonian's check, wrongfully converted the \$125,000 belonging to PGI.

2. On March 1, 2001, Odell, Simms & Associates ("OSA") filed its Motion for Judgment ("CL-01-171") seeking to recover \$50,000 in compensatory damages from Rathe and PGI for their alleged breach of contract with OSA. OSA alleged that Rathe

and PGI contracted with OSA for services and products to support Rathe and PGI in performing the Smithsonian Feasibility Study and that Rathe and PGI failed to pay for such services and products when invoiced after receiving payment from the Smithsonian.

3. On March 20, 2001, Rathe filed its Answer and Grounds of Defense to CL 01-100 and denied receiving any payment from the Smithsonian for the Feasibility Study or converting PGI's funds.

4. On March 26, 2001, PGI filed its Answer and Grounds of Defense to CL-171 denying liability to OSA as PGI has not received any payment from the Smithsonian or Rathe for the Feasibility Study and asserting cross-claims against Rathe that repeat the same conversion and assumpsit claims PGI asserted in CL-100. Rathe has yet to file its Answer and Grounds of Defense in CL 01-171.

5. Trial of CL 01-100 is scheduled for November 14-15, 2001.

6. PGI's claims in CL 01-100, cross-claims in CL 01-171 and OSA's claims in CL 01-171 should be consolidated for trial. This Court enjoys

“the inherent power to order that several causes pending before it be tried together where they are the same nature, arise from the same act or transaction, involve the same or like issues, depend substantially upon the same evidence, even though it may vary in its details in fixing responsibility, and where such trial will not prejudice the substantial rights of any party.”

Clark v. Kimnach, 198 Va. 737, 745 (1957). See also, Tazwell Oil Co., Inc. v. United

Virginia Bank, 243 Va. 94, 109 (1992) (relying on Commonwealth v. Pembroke

Limestone Works, 145 Va. 476, 487 (1926) to affirm the trial court's inherent authority to consolidate cases for trial).

7. In this case, PGI's claims in CL 01-100, cross-claims in CL 01-171 and OSA's claims in CL 01-171 arise from the same core of operative facts. Briefly, the parties respective claims arise out of a May 1997 agreement between the Smithsonian, PGI and Rathe to produce the Smithsonian's "America's Smithsonian Exhibition" (the "Exhibition"). In Section Two of the Notice to Proceed, PGI and Rathe agreed to conduct a study of the Feasibility Study examining potential production of the Exhibition on an international tour. In Section Three, the Smithsonian agreed to pay Rathe and PGI \$250,000 compensation for the Feasibility Study in the event Rathe and PGI recommended against producing the Exhibition on an international tour. PGI and Rathe presented the Feasibility Study to the Smithsonian in March 1998 and recommended against an international Exhibition.

8. Rathe and PGI sought OSA's assistance in completing the Feasibility Study. Under the participation arrangement, OSA was to receive \$50,000 from Rathe and PGI (\$25,000 from each) upon completion of the study and receipt of the Smithsonian's payment. As the Smithsonian paid the \$250,000 Feasibility Study fee to Rathe and not PGI, and Rathe has not paid PGI or OSA amounts properly due under the Notice to Proceed, PGI filed CL 01-100 and OSA filed CL 01-171 to recover amounts owed for services performed in conducting the Feasibility Study.

9. As both CL 01-100 and CL 01-171 arise from the same transaction, involve the same issues and will depend on the same evidence, consolidation of these cases for trial is appropriate.

WHEREFORE, PGI moves this Court for entry of an Order consolidating CL 01-100 and CL 01-171 for trial.

PGI, INC.
By Counsel

McGuireWoods LLP
1750 Tysons Boulevard, Suite 1800
McLean, Virginia 22102
Phone: (703)-712-5000
Fax: (703)-712-5050

By: 

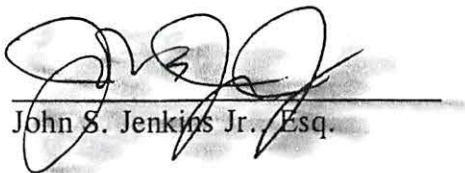
Sean F. Murphy, Esq. (VSB No. 28415)
John S. Jenkins, Jr., Esq. (VSB No. 37426)
Counsel for PGI, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Motion to Consolidate was served, via first class mail, postage prepaid on April 18, 2001:

Robert R. Sparks Jr., Esq.
Herge, Sparks & Christopher, LLP
6862 Elm Street, Suite 360
McLean, VA 22101
Counsel for OS&A

Edward J. Tolchin, Esq.
Fettmann, Tolchin & Majors, PC
10615 Judicial Drive, Suite 502
Fairfax, VA 22030
Counsel for Rathe Productions, Inc.



John S. Jenkins Jr., Esq.

SMITHSONIAN INSTITUTION

Office of Contracting

955 L'Enfant Plaza, S.W., Suite P-114
Washington, D.C. 20560

(202) 287-3343
Fax (202) 287-2008
Writer's Direct Number (202) 287-3580

May 12, 1997

Mr. Richard Rathe
Executive Vice President
Rathe Productions Incorporated
555 West 23rd Street
New York, NY 10011

Mr. Mark N. Sirangelo
Chairman and CEO
Production Group International, Inc.
2200 Wilson Boulevard
Arlington, VA 22201-3324

RE: Notice to Proceed

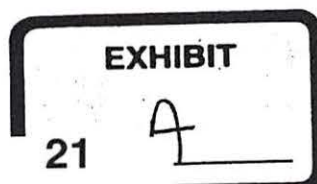
Gentlemen:

The Smithsonian is excited at the prospect of bringing more efficiency, and therefore greater access, to the *America's Smithsonian* Exhibition ("ASE"), both in the United States and potentially internationally. Based upon Rathe/PGI's proposal, dated January 30, 1997, in response to Smithsonian's December 19, 1996 Request for Proposals, and Rathe's best and final offer dated February 21, 1997, the Smithsonian is confident that Rathe/PGI, together with its proposed team, will provide the management and production expertise needed to bring new levels of success to ASE and to launch a similar and even more successful international exhibition.

This letter serves to formally notify Rathe/PGI that it has been chosen as the exclusive contractor of the Smithsonian Institution for management and production of the remainder of ASE, as detailed in Section 1. below, subject to negotiation and execution of a final agreement. This letter also authorizes Rathe/PGI, in anticipation of an executed agreement, as the exclusive producer of a similar international tour, provided that Rathe/PGI recommends taking such an exhibition outside of the U.S. as set forth in Section 3. below. The following outlines the general structure of our new relationship:

1. Management and Production of U.S. Tour:

- a. Portland, Oregon Venue: Beginning with the opening of the Portland, Oregon venue and in preparation for Rathe/PGI's assumption of the management and production of the remainder of the U.S. tour, Rathe/PGI shall assist the Smithsonian in review and



PGI-0083

analysis of all aspects of ASE, with the goals of creating a more efficient exhibition design and identifying potential time and cost saving measures, both for the Portland venue, where possible, and for all future U.S. venues. We accept Rathe/PGI's offer to provide these services to the Smithsonian at no cost, subject to Smithsonian's authorization of Rathe/PGI as the exclusive producer of the international tour, which authorization is set forth in Section 3. below.

- i. Transition: Initial meetings were held in Portland on April 2nd and 3rd with Smithsonian staff and Rathe/PGI to familiarize Rathe/PGI with the details of the exhibition and to discuss how the transition from Smithsonian to Rathe/PGI will be handled at the end of the exhibition's run in Portland. The Smithsonian will provide contract summaries for each contractor currently involved with ASE to Rathe/PGI and shall additionally forward all relevant budget and financial data related to ASE to Rathe/PGI.
 - ii. Agreement: An agreement between Smithsonian and Rathe/PGI, outlining the details for Rathe/PGI to assume the production and management of ASE is being drafted by the Smithsonian's Office of Contracting ("SIOC") and will be forwarded to you for review. In the event that Smithsonian and Rathe/PGI are unable to enter into an agreement for production and management of ASE, Smithsonian shall compensate Rathe/PGI on a time and materials basis for work performed by its staff in conjunction with the Portland venue, including other reasonable direct costs such as travel, including meals, lodging and transportation.
- b. Future U.S. Venues: Provided an agreement has been entered into between Rathe/PGI and Smithsonian, Rathe/PGI shall assume full responsibility as exclusive contractor for ASE beginning with the de-installation of the exhibition in Portland and transport to the Birmingham, Alabama venue (provided full funding is acquired for that venue). If the Birmingham venue is canceled, Smithsonian shall be responsible for de-installation in Portland and transport of the exhibition to storage. Rathe/PGI's responsibility shall then begin with the subsequent move from storage to the next approved venue. Rathe/PGI as contractor shall provide full management and production services for the remainder of the U.S. Tour, which shall include up to five venues after the Portland venue.
- i. Selection of Future Venues: While selection of venues shall be made in consultation with Rathe/PGI, final determination to take ASE to any venue shall be at the sole discretion of the Smithsonian.
 - (1) Funding Statement: In evaluating potential future U.S. venues, Rathe/PGI shall forward to Smithsonian for its approval a schedule setting forth the dates on which Rathe/PGI shall provide a funding statement, comprehensive business plan, and proposed budget to the Smithsonian for its review and approval, including the last date on which Rathe/PGI will have obtained the requisite funding, which date

shall be no later than sixty (60) days prior to the anticipated opening for that venue.

- (2) **Business Plan/Budget:** The comprehensive business plan and proposed budget for the venue will include income projections (including fund-raising, concessions, and so forth), the management fee and reasonable estimate of travel-related out-of-pocket expenses (as set forth in Section 1.b.vi. below), and all costs related to the venue, which do not exceed the stated income requirements. Smithsonian shall have ten (10) business days to review the budget and request clarifications. Should Smithsonian approve the budget, such approval shall be contingent on the receipt of all necessary funding for that venue. The Smithsonian shall move forward with a particular venue, including the Birmingham, Alabama venue, only after confirmed commitments for the requisite funding have been received.
 - (3) **Rejection of Budget:** If Smithsonian does not approve the budget and the parties cannot timely resolve the matter, Rathe/PGI's obligations with respect to that particular venue shall terminate. Rathe/PGI shall be reimbursed for all approved expenses incurred up to the date of termination.
 - (4) **Fundraising:** Rathe/PGI shall raise all funds with respect to each venue and instruct donors that such funds be provided to the Smithsonian. Rathe/PGI will provide Smithsonian with a list of potential funding sources as those sources are identified, for Smithsonian approval. In conjunction with Smithsonian's obligation not to move forward with a venue until the requisite funding is obtained (or confirmed commitments have been received), Rathe/PGI's communications with potential venues and contributors must make that known at the outset. Rathe/PGI shall submit a preliminary report of potential venue and exploratory costs to the Smithsonian for its prior, written approval.
 - (5) **Failure to Raise Required Funds:** If Rathe/PGI does not raise the requisite funds within the specified time frame, the venue shall be canceled, and only those expenses approved shall be reimbursed, including Rathe/PGI's approved expenses. Rathe/PGI shall not be entitled to any portion of the management fee.
- ii. Accounting: ~~Upon Smithsonian approval of the budget,~~ All funds raised by Rathe/PGI's subcontractor shall be placed into a Smithsonian account and shall remain under Smithsonian's control. During the exhibition, Rathe/PGI shall promptly send invoices to the Smithsonian fund manager for review and approval. Smithsonian shall reimburse Rathe/PGI for all invoices within the Smithsonian-approved budget and all invoices which are the result of budget

overruns and which have been approved in advance by the Smithsonian in accordance with Paragraph 1.b.iii. below. Smithsonian shall use best efforts to reimburse Rathe/PGI within ten (10) business days of receipt of such invoices. Rathe/PGI shall provide to Smithsonian written reports of cash usage as necessary.

- iii. Budget Overruns: Rathe/PGI shall notify Smithsonian in writing of any projected budget overruns as soon as such potential overruns become evident, for Smithsonian review and approval.
- iv. Convention Center Agreements: Rathe/PGI shall negotiate the license agreements with the venue convention centers, with consultation and approval of the Smithsonian, by a process to be agreed upon by the parties. Smithsonian shall be the signatory on the license agreement for Birmingham, and shall re-examine with Rathe/PGI the issue of proper signatory for license agreements for future U.S. venues.
- v. Contractors: Rathe/PGI shall contract for all aspects of the Exhibition, including but not limited to transportation (with the exception of DOE), security, installation and de-installation, galas and other special events, and concessions. Smithsonian and Rathe/PGI may agree to have Smithsonian assign certain existing contracts to Rathe/PGI, or, at Rathe/PGI's election and where permissible under existing contracts, Rathe/PGI may enter into a new contract(s), subject to Smithsonian's approval of the contractor(s) and Rathe/PGI's agreement to incorporate certain contractual provisions, including but not limited to the Smithsonian Use of Name clause, and Indemnification clause. With the submission of the proposed budget for each venue, Rathe/PGI shall forward to Smithsonian for its review and approval a listing of all subcontractors for supplies and services. Smithsonian shall communicate its approval or disapproval to Rathe/PGI within three (3) business days of Smithsonian's receipt of the listing. If the Smithsonian does not communicate its approval or disapproval to Rathe/PGI within three (3) business days after Smithsonian has received the listing, then the Smithsonian will be deemed to have given its approval. Rathe/PGI may make reasonable decisions regarding subcontractors for supplies and services, prior to receiving Smithsonian approval, only in exigent circumstances.
- vi. Compensation/Revenues: Smithsonian shall pay to Rathe/PGI a management fee of not-to-exceed one hundred twenty thousand dollars (\$120,000) per venue, plus reasonable out-of-pocket travel-related expenses. This management fee, and a reasonable estimate of the out-of-pocket expenses, shall be included in the approved budget and shall be paid to Rathe/PGI from the funds raised in accordance with each venue as described above, at the conclusion of the venue. All revenues collected for the remainder of the U.S. Tour shall be applied towards the U.S. Tour.

- vii. Reports: Rathe/PGI shall forward monthly reports to the attention of the project manager (to be assigned by Smithsonian), with a copy to SIOC at the address listed in 2.b. below, indicating current status, anticipated and unanticipated costs, and noting any cost savings that have been achieved (as compared to the average cost of the venues prior to Birmingham).
 - viii. Insurance: Upon execution of this Notice to Proceed, Rathe/PGI shall obtain the insurance noted on page eight of the Smithsonian's "Responses to Questions Received From Prospective Offerors," dated January 15, 1997, and shall provide the insurance certificates requested therein within thirty (30) days thereafter.
 - ix. Representation: The Smithsonian represents to Rathe/PGI that Rathe/PGI shall not be held responsible by Smithsonian for outstanding debts or disputes related to the U.S. Tour, up to and including the Portland, Oregon venue, which outstanding debts and disputes are not related to any acts or omissions of Rathe Productions, Inc. or PGI.
 - x. Indemnification: Rathe/PGI agrees to indemnify and hold harmless the Smithsonian and its museums, its Regents, all Smithsonian officers, agents, contractors, and employees, the United States, the corporate partners, and the tour sites from any and all claims, liability (including final judgments or settlements), costs and expenses, or loss to any person or thing, caused by, or arising from, any act or omission of Rathe/PGI, its representatives, agents, contractors, subcontractors, employees or servants, and related directly or indirectly to any aspect of this Notice to Proceed and eventual written agreement or performance of work related thereto, including injury to, or death of, any of Rathe/PGI's contractors, employees or agents, or to a third party unless such claims, liability, costs and expenses are attributable to the sole gross negligence of the Smithsonian, its museums, Regents, officers, agents, contractors, employees, the United States, corporate partners, or the tour sites.
 - xi. Agreement: As stated in Section 1.a.ii. above, a draft agreement outlining the specific details of this arrangement is being drafted by SIOC and will be forwarded to you for review.
2. Feasibility Study: Upon receipt and acceptance of this Notice to Proceed, Rathe/PGI will commence with a study to determine the feasibility of an international tour of an exhibition similar in scope to *America's Smithsonian*.
- a. Results of Study: The feasibility study shall be submitted to Smithsonian no later than 120 days from the date of execution of this Notice, and should result in an assessment of the viability of an international tour, including recommended themes for the exhibition, recommended cities and venues, and a financing plan, and should address specifically how the proposed tour will maintain the cachet and prestige of the U.S. tour. If

Rathe/PGI needs additional time to complete the feasibility study, Rathe/PGI shall submit a written request for prior Smithsonian approval, which approval shall not be unreasonably withheld.

- b. Progress Reports/Briefings: Every thirty (30) days, Rathe/PGI shall forward a written progress report to the Smithsonian, to the attention of **Dan Stevenson, Special Assistant, Office of the Assistant Secretary for Institutional Advancement**, at the address below, describing the progress of the study. At the conclusion of the 120-day period or earlier, Rathe/PGI shall forward to the Smithsonian its final findings and its proposed business plan for the international tour. Additionally, Rathe/PGI will provide several briefings for Smithsonian officials on the progress of the study, during the 120-day period.

Progress Reports will be sent to the following address:

Smithsonian Institution
MRC 027
1000 Jefferson Drive, S.W., SI 105
Washington, D.C. 20560
Attn: Dan Stevenson

With a copy to:

Smithsonian Institution
Office of Contracting
955 L'Enfant Plaza, S.W., Suite P-114
Washington, D.C. 20560
Attn: John Cobert/Susan Marino

- c. Cost: The cost of the feasibility study shall be borne by Rathe/PGI, subject to the provisions of Section 3.a. below.
3. Management and Production of International Tour: The Smithsonian reiterates its desire to provide international access to the proposed exhibition through a "world tour" and wants to make clear its commitment to designate Rathe/PGI as the exclusive manager/producer of such a tour. Rathe/PGI is hereby authorized, in anticipation of an executed agreement, as the exclusive producer of an international tour similar to the *America's Smithsonian* Exhibition in the U.S., provided that Rathe/PGI recommends taking such an exhibition overseas at the conclusion of the feasibility study detailed above. Such recommendation must be reasonable, must document the economic feasibility to both parties, and must document how the international tour will further the vision and strategy of the Smithsonian.
- a. Acceptance of Recommendation: Smithsonian shall accept the recommendation, subject to its right to reasonably disapprove (a) the selection of any specific venue, (b) the inclusion of any specific artifacts, (c) any specific aspect of production of the Exhibition,

(d) any specific aspect of the financing plan, (e) any activity related to licensing or use of the Smithsonian name, and/or (f) any relationship of non-sponsors to the tour. Should Rathe/PGI require additional information regarding potential sponsors or potential sponsorship industries, Rathe/PGI may contact the Smithsonian and arrangements will be made to share such information prior to the commencement of the feasibility study, provided that no written commitments are entered into between Rathe/PGI and such sponsors during the study, and provided all such communications to sponsors are subject to Smithsonian review and approval. The Smithsonian shall provide to Rathe/PGI, in writing, its specific objections regarding these aspects of the recommendation, and the parties agree to work together within an agreed-upon time frame to resolve those issues. If Smithsonian and Rathe/PGI cannot reach agreement on Rathe/PGI's recommendation for a proposed international tour within that time frame, Smithsonian shall pay to Rathe/PGI a not-to-exceed amount of \$250,000 as compensation for the feasibility study. For five (5) years thereafter, prior to Smithsonian seeking an exclusive producer of an international tour similar in size and scope to the U.S. Tour and with more than ten (10) venues, the Smithsonian shall give Rathe/PGI a first right to negotiate such international tour opportunity. If Rathe/PGI does not accept the Smithsonian's proposal within sixty (60) days of receipt thereof, the Smithsonian may negotiate with any other entity for production of such a tour.

- b. Recommendation Not to go Forward: If Rathe/PGI recommends upon the conclusion of the feasibility study that an international tour would not be feasible at this time, Rathe/PGI's obligations for the international tour as stated in this Notice to Proceed and as agreed upon by the parties shall terminate and Smithsonian may contract with another entity for the production of an international tour.
- c. Agreement: Upon Smithsonian's acceptance of Rathe/PGI's recommendation to move forward with an international tour, the parties may commence with negotiation and execution of a final agreement for the international tour, for a term of two years. Upon conclusion of the initial two-year term for the international tour, the parties may agree to extend the tour under a separate agreement.
- d. Compensation:
 - i. License Fee: In exchange for the exclusive license to represent the Smithsonian as the sole manager/producer of the international tour, Rathe/PGI shall pay five million dollars (\$5,000,000) to the Smithsonian. Such payment shall be made within thirty (30) days of execution of a written agreement for production of the international tour by wire transfer to a bank account designated by the Smithsonian.
 - ii. Royalties: As additional license fees, Rathe/PGI shall pay to Smithsonian ten percent (10%) of the aggregate gross collected revenue from Exhibition sponsorships, merchandising, and ticket sales which exceed fifty million dollars (\$50,000,000) up to and including one hundred twenty million dollars

(\$120,000,000). Should the Exhibition bring in revenues of over one hundred twenty million dollars (\$120,000,000), Rathe/PGI shall pay to Smithsonian fifteen percent (15%) of the aggregate gross collected revenue in excess of one hundred twenty million dollars (\$120,000,000) from Exhibition sponsorships, merchandising, and ticket sales during the initial two-year term of the international tour.

- iii. Reimbursement: Rathe/PGI additionally shall reimburse the Smithsonian for the amount of ASE management fees paid to Rathe/PGI for the U.S. Tour which are not offset by revenue increases and cost savings realized by Rathe/PGI's management and operation of ASE, from revenues Rathe/PGI receives as exclusive manager/producer of the international tour.

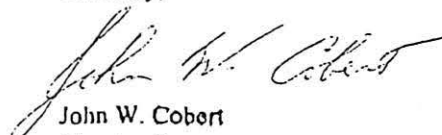
Rathe/PGI may make commitments related to ASE on behalf of the Smithsonian, with prior Smithsonian approval, until a written agreement for management and production of ASE has been executed which shall set forth a formal process for making such commitments. Additionally, all press releases or public communications shall be subject to the approval of both Smithsonian and Rathe/PGI. This Notice to Proceed is intended to reflect the contents of Rathe/PGI's response to Smithsonian's December 19, 1996 Request for Proposal, dated January 30, 1997, and Rathe's best and final letter dated February 21, 1997. If there is any conflict among the terms set forth in these documents and the Notice to Proceed, the terms of the Notice to Proceed shall take precedence.

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Messrs. Rathc & Sirangelo
May 9, 1997
Page 9

Please indicate your acceptance of the Notice to Proceed by signing in the space indicated below and returning one fully-executed copy to the attention of Susan Marino of this office. Please contact Ms. Marino at (202) 287-3580 or Dan Stevenson at (202) 786-2699 with any questions related to this Notice to Proceed. The Smithsonian welcomes your participation in this exciting venture, and looks forward to our successful collaboration over the remainder of the U.S. Tour and the international tour.

Sincerely,


John W. Cobert
Director &
Contracting Officer

ACCEPTED AND AGREED:
RATHE PRODUCTIONS INCORPORATED


Richard Rathc

5/12/97
Date

PRODUCTIONS GROUP, INC.


Mark N. Sirangelo

5/12/97
Date

cc: Constance Berry Newman, OUS
Dan Stevenson, OASIA
Marsha Shaines, OGC
John Huerta, OGC
Susan Marino, SIOC

PGI-0091

Messrs. Rathe & Sirangelo
May 9, 1997
Page 9

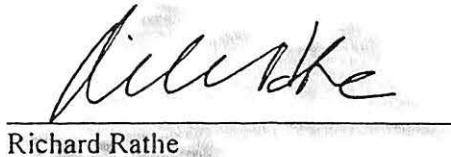
Please indicate your acceptance of the ~~Notice to Proceed~~ by signing in the space indicated below and returning one fully-executed copy to the attention of Susan Marino of this office. Please contact Ms. Marino at (202) 287-3580 or Dan Stevenson at (202) 786-2699 with any questions related to this Notice to Proceed. The Smithsonian welcomes your participation in this exciting venture, and looks forward to our successful collaboration over the remainder of the U.S. Tour and the international tour.

Sincerely,



John W. Cobert
Director &
Contracting Officer

ACCEPTED AND AGREED:
RATHE PRODUCTIONS INCORPORATED


Richard Rathe

5/12/97
Date

PGI, Inc.
~~PRODUCTIONS GROUP, INC.~~


Mark N. Sirangelo

5/12/97
Date

cc: Constance Berry Newman, OUS
Dan Stevenson, OASIA
Marsha Shaines, OGC
John Huerta, OGC
Susan Marino, SIOC

PGI-0092

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

PGI, INC.

Plaintiff,

v.

RATHE PRODUCTIONS, INC.

Defendant.

CL 01-100

CONSENT ORDER


This matter came before the Court this 25th day of May, 2001, on Plaintiff, PGI, Inc.'s Motion to Consolidate Actions for Trial,

It appearing to the Court, after review of the pleadings filed in this case and in CL01-171, and by endorsement of counsel below, that the relief requested is appropriate, it is

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ORDERED that CL 01-100, styled as PGI, Inc. v. Rathe Productions, Inc., is CONSOLIDATED for trial with CL 01-171, styled as Odell, Simms & Associates, Inc. v. PGI, Inc. & Rathe Productions, Inc.


AND THIS CAUSE IS CONTINUED.

Entered this 25th day of May, 2001.


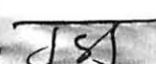

Circuit Court Judge

WE ASK FOR THIS:

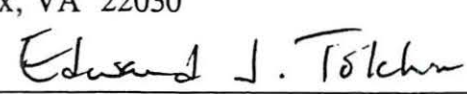
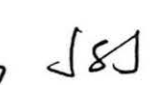
McGuireWoods LLP
1750 Tysons Boulevard, Suite 1800
McLean, Virginia 22102
Phone: (703)-712-5000
Fax: (703)-712-5050

By: 
Sean F. Murphy, Esq. (VSB No. 28415)
John S. Jenkins, Jr., Esq. (VSB No. 37426)
Counsel for PGI, Inc.

Christopher T. Craig, Esq.
Herge, Sparks & Christopher, LLP
6862 Elm Street, Suite 360
McLean, VA 22101

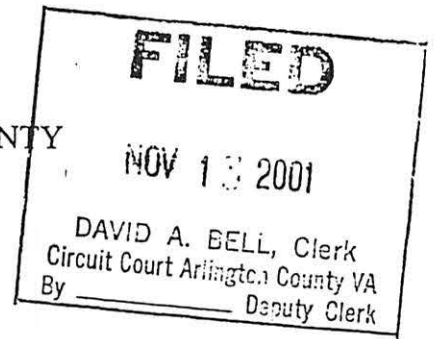
By:  /  (WITH PERMISSION)
Christopher T. Craig, Esq. (VSB No. 36983)
Counsel for OS&A, Inc.

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Edward J. Tolchin, Esq.
Fettmann, Tolchin & Majors, PC
10615 Judicial Drive, Suite 502
Fairfax, VA 22030

By:  /  (WITH PERMISSION)
Edward J. Tolchin (VSB No. 32654)
Counsel for Rathe Productions, Inc.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY



PGI, INC.

Plaintiff,

v.

At Law No. CL01-100

RATHE PRODUCTIONS, INC.

Defendant.

ODELL, SIMMS & ASSOCIATES, INC.

Plaintiff,

v.

At Law No. CL01-171

PRODUCTION GROUP INTERN'L
n/k/a PGI, INC.

and

RATHE PRODUCTIONS, INC.

Defendant.

DEFENDANT RATHE PRODUCTION, INC.'S MOTION IN LIMINE

Defendant Rathe Productions, Inc. moves in limine in this matter to require plaintiff PGI, Inc. to elect between its two pleaded remedies, conversion or assumpsit, and to offer evidence only in support of that remedy which it elects. The grounds for this motion are as follows:

1. Virginia permits pleading in the alternative. However, "a litigant cannot pursue to judgment or decree two different remedies for his demand. Where one has the choice of two remedies, then he must elect." *Michie's Jurisprudence, Election of Remedies*, § 1. See *Morriss*

v. *Scruggs*, 147 Va. 166, 173, 136 S.E. 655 (1927) (“[w]here one has choice of one of two remedies, then he must elect”).

2. PGI here sues for conversion (Count I) and assumpsit (Count II). It brings no other claims. It is well settled that conversion and assumpsit are two different remedies requiring an election. “[W]here a person has illegally seized another’s personal property and converted it to his own use, the owner may bring trespass, trover, detinue or assumpsit. By bringing the action of assumpsit, the owner waives all claim for wrongful taking, detention and conversion.” *Raven Red Ash Coal Co. v. Ball*, 185 Va. 534, 39 S.E.2d 231 (1946). *Accord Schmidt v. Wallinger* 125 Va. 361, 99 S.E. 680, 681 (1919) (“The action is specifically designated in the declaration as assumpsit; and that form of action, if the plaintiff desired to waive the tort, was appropriate for the recovery of the money”).

3. Given the foregoing, PGI cannot prosecute both its conversion and assumpsit claims to judgment. It must elect at this time and pursue only that *one* which it desires. Evidence in support of the other remedy should be eliminated from the trial.

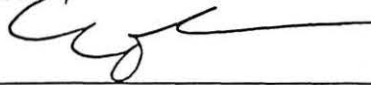


Edward J. Tolchin
VSB 32654
Fettmann, Tolchin, & Majors, P.C.
10615 Judicial Drive
Suite 502
Fairfax, VA 22030
703-385-9500
703-385-9893 (facsimile)

Respectfully submitted,
Rathe Productions, Inc., Defendant
By Counsel

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2001, a true copy of the foregoing Defendant Rathe Production, Inc.'s Motion in Limine was sent via hand delivery to John S. Jenkins, Jr., Esquire, at McGuire Woods LLP, 1750 Tysons Boulevard, Suite 1800, McLean, Virginia 22102, and Christopher Craig, Herge, Sparks and Christopher, 6862 Elm Street, Suite 360, Vienna, VA 22101



Edward J. Tolchin

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

PGI, Inc.,)	
)	
Plaintiff,)	
)	
v.)	At Law No. 01-100
)	
RATHE PRODUCTIONS, INC.,)	
)	
Defendant.)	

ODELL, SIMMS & ASSOCIATES, INC.)	
)	
Plaintiff,)	
)	
v.)	Consolidated With
)	At Law No. 01-171
)	
PGI, INC.)	
)	
and)	
)	
RATHE PRODUCTIONS, INC.)	
)	
Defendants.)	

OPPOSITION TO RATHE PRODUCTIONS INC.'S MOTION IN LIMINE

COMES NOW Plaintiff, PGI, Inc. ("PGI"), by counsel, and opposes Defendant Rathe Productions Inc.'s ("Rathe") Motion in Limine for the following reasons:

Facts

PGI seeks to recover \$125,000 in compensatory damages and \$250,000 in punitive damages for Rathe's conversion of PGI's portion of a settlement payment Rathe received from the Smithsonian Institution ("Smithsonian") Motion for Judgment ("Mot. J.") at ¶¶ 23-26. Also, PGI seeks recovery of the \$125,000 from Rathe in assumpsit for money had and received. Mot. J. at ¶¶ 27-32. Rathe's Motion seeks to limit PGI's

evidence on both counts and requests the Court force PGI to elect a remedy prior to the introduction of any evidence. Rathe's Motion is not well founded as Va. Code Ann. § 8.01-272 expressly allows joinder of claims sounding in tort and contract in once case, provided the claims arise from the same transaction or occurrence.

Argument

Va. Code Ann. § 8.01-272 expressly authorizes PGI to plead claims sounding in both in tort and contract. Prior to October 1, 1977, a party could not join tort and contract claims in a single action. Norfolk Bus Term. v. Sheldon, 188 Va. 288 (1948). However, effective October 1, 1977 "Code § 8.01-272 was adopted, changing the common-law rule applicable to misjoinder and expressly permitting a party to join claims in tort with claims in contract if the claims arose out of the same transaction or occurrence." MacLellan v. Throckmorton, 235 Va. 341, 344 (1988); Accord Fox v. Deese, 234 Va. 412 (1987). As a result, PGI is entitled to plead and prove both its conversion and assumpsit claim.

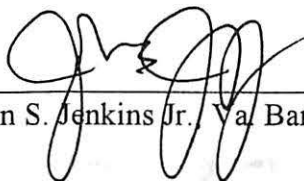
Rathe's Motion is nothing more than a disguised misjoinder objection. In sum, Rathe argues PGI may plead its alternative theories, but may not put on evidence of both. However, Va. Code Ann. § 8.01-272 makes clear that the common-law rules of pleading set down in Norfolk Bus Term. no longer apply. Rather, PGI is entitled to plead its alternative theories and put on its evidence. To exclude relevant and admissible evidence prior to the start of trial is tantamount to a return to the now abrogated misjoinder rule. This is no longer the law in Virginia.

WHEREFORE, PGI respectfully prays for entry of an order denying Rathe's Motion in Limine.

Respectfully submitted,

PGI, Inc.
By Counsel

MCGUIREWOODS LLP
1750 Tysons Boulevard, Suite 1800
Tysons Corner
McLean, Virginia 22102
(703) 712-5015

By: 
John S. Jenkins Jr. Va. Bar No. 37426

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion in Limine by hand delivery on this 14 day of November, 2001 to:

Christopher T. Craig, Esq.
Herge, Sparks & Christopher, LLP
6862 Elm Street, Suite 360
McLean, VA 22101
Counsel for OS&A

Edward J. Tolchin, Esq.
Fettmann, Tolchin & Majors, PC
10615 Judicial Drive, Suite 502
Fairfax, VA 22030
Counsel for Rathe Productions, Inc.



John S. Jenkins Jr. Esq.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

PGI, INC.

Plaintiff,

v.

RATHE PRODUCTIONS, INC.

Defendant.

At Law No. CL01-100

ODELL, SIMMS & ASSOCIATES, INC.

Plaintiff,

v.

PRODUCTION GROUP INTERN'L

n/k/a PGI, INC.

and

RATHE PRODUCTIONS, INC.

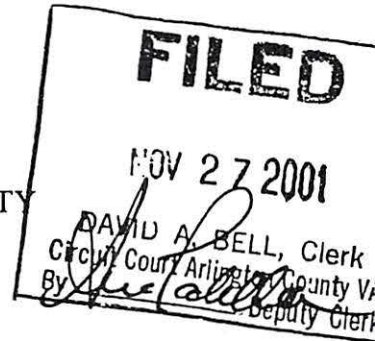
Defendant.

At Law No. CL01-171

**DEFENDANT RATHE PRODUCTION, INC.'S RENEWED MOTION TO STRIKE,
MOTION TO SET ASIDE VERDICT, AND MOTION FOR JUDGMENT IN FAVOR OF
DEFENDANT RATHE PRODUCTIONS, INC. ON CLAIM OF PGI, INC.**

Defendant Rathe Productions, Inc. ("Rathe") asks that the Court grant its motion to strike which the Court took under advisement, set aside the verdict in this matter, and enter judgment in favor of Rathe on the claims of PGI, Inc. ("PGI") (Law No. CL01-100).¹ As we point out below and have pointed out in our arguments to the Court, because PGI's claims are based on a breach

¹ Rathe does not seek relief with respect to the judgment in favor of Odell, Simms & Associates, Inc. in CL01-171.



of an alleged contract, yet it asserts a tort, it cannot prove the elements of the tort as a matter of law.

Argument

A. The Elements of Conversion

PGI tried this case on the issue of conversion. PGI never sought relief for breach of contract.

“Conversion is the wrongful assumption or exercise of the right of ownership over goods or chattels belonging to another in denial of or inconsistent with the owner's rights. An action for conversion can be maintained only by the person having a property interest in and entitled to the immediate possession of the item alleged to have been wrongfully converted.” *Economopoulos v. Kolaitis*, 259 Va. 806, 814, 528 S.E.2d 714 (2000) (citing *Credit Corp. v. Kaplan*, 198 Va. 67, 75-76, 92 S.E.2d 359, 365 (1956), *United Leasing Corp. v. Thrift Ins. Corp.*, 247 Va. 299, 305, 440 S.E.2d 902, 906 (1994)). Thus, in an action for conversion it is essential that the plaintiff establish (1) a wrong committed by a defendant in assuming or exercising ownership over an item, (2) plaintiff's property interest at the time of the conversion, and (3) plaintiff's immediate right to the property at issue. *Id.*

The evidence in this case by PGI failed to establish any of the three elements of conversion.

B. PGI Failed to Establish Element 1 - A Tortiously Wrongful Act by PGI

PGI provided no evidence which could sustain a jury verdict under Virginia law of a “wrongful assumption or exercise of the right of ownership over goods or chattels belonging to another.” The only possible wrong which PGI put at issue was the alleged breach of Rathe of an

agreement between Rathe and PGI to split the \$250,000 in three ways - \$100,000 to Rathe, \$100,000 to PGI, and \$50,000 to Odell. But a tort claim for conversion does not lie if the wrong is a breach of an agreement. See *Oleyar v. Kerr, Trustee*, 217 Va. 88, 90, 225 S.E.2d 398, 399-400 (1976) ("If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract, and not upon tort"). As the Virginia Supreme Court recently has explained in finding that an action in tort will not lie if the basis of the breach of duty is a contractual duty:

In determining whether a cause of action sounds in contract or tort, the source of the duty violated must be ascertained. . . . We have acknowledged that a party can, in certain circumstances, show both a breach of contract and a tortious breach of duty. *Foreign Mission Bd. v. Wade*, 242 Va. 234, 241, 409 S.E.2d 144, 148 (1991). However, "the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract." *Id.* (citing *Spence v. Norfolk & W. R.R. Co.*, 92 Va. 102, 116, 22 S.E. 815, 818 (1895)).

In *Foreign Mission Bd.*, the plaintiffs alleged that the defendant had failed to use ordinary care to protect them from continued sexual abuse. There was an oral contract between the parties; however, the plaintiffs brought suit not only for breach of contract but also for negligence. We affirmed the trial court's dismissal of the negligence count because the plaintiffs sought to "establish a tort action based solely on the negligent breach of a contractual duty with no corresponding common law duty." 242 Va. at 241, 409 S.E.2d at 148.

Richmond Metropolitan Authority v. Mcdevitt Street Bovis, Inc., 256 Va. 553, 507 S.E.2d 344, 347 (1998).

Indeed, relying on *Mcdevitt Street Bovis, Inc.*, the Fourth Circuit recently explained as follows in rejecting the same type of conversion claim which PGI has pursued:

Under Virginia law, "a party can, in certain circumstances, show both a breach of contract and a tortious breach of duty." *Richmond Metropolitan Authority v. McDevitt, Street, Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344, 347 (Va. 1998) (internal quotations omitted). The Virginia Supreme Court further held that "the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract." *Id.* (internal quotations omitted).

A claim for "fraud in the inducement" is not foreclosed by the rule of *McDevitt, Street, Bovis, Inc.*, 507 S.E.2d at 348 (citing *Flip Mortgage Corp. v. McElhone*, 841 F.2d 531 (4th Cir. 1988)). To make out such a claim, the plaintiff must allege facts that demonstrate the defendant's intent (at the time the promises are made) never to abide by the terms of the contract. *Id.* **When, as in the instant case, the allegations of fraud or conversion "are nothing more than allegations of negligent performance of contractual duties," such alleged breaches of duty are not actionable in tort.** 507 S.E.2d at 347.

Out of Chaos, Ltd. v. Aon Corp.; 2001 U.S. App. LEXIS 17407 (4th Cir. 2001) (bold supplied; footnote omitted).

Here, the evidence showed no wrong other than a breach of contract. Thus, there could be no conversion under Virginia law.

C. PGI Failed To Establish Elements 2 and 3 -- Its Property Interest at the Time Of Conversion and Immediate Right to the Money

Because this was a breach of contract case which PGI tried to dress up as a conversion action, it did not, and could not possibly, establish that there was any specific act of conversion. It established only that it had a contractual right to the money at issue. Because it could not establish any specific act of conversion, it could not establish its property rights *at the time of* conversion or *immediate* right to the money. It could only establish that at some point -- a day, a week, a month, whatever -- after Rathe deposited a check made payable to Rathe (*see* PGI Trial Exhibit 14), Rathe had an obligation to pay PGI \$100,000 because of an agreement it asserted to exist between the parties. Even the date of receipt of the check was uncertain (the only evidence

was sometime in August), and there was no evidence of the date of its deposit. Plainly, this lack of evidence of a right of ownership and right to immediate possession of money at the time of conversion doomed this case as a conversion action. See *Economopoulos v. Kolaitis*, *supra*, 259 Va. at 814 (motion to strike upheld because “[i]n the present case, the Plaintiffs were not entitled to the immediate possession of the Treasury bills at the time they allegedly were wrongfully converted”).

D. PGI Has No Law To Support Its Theory that A Breach of Contract Equals A Conversion

At trial, the only case PGI could cite to support its theory that a failure to pay money due because of a breach of contract constituted a conversion was *Fox Seko Construction, Inc. v. Poulin Construction, Inc.*, 28 Va. Cir. 1 (Loudoun Cy. 1991). This Circuit Court case, which predated the Virginia Supreme Court and Fourth Circuit decisions on which Rathe has relied, is inconsistent with the later, controlling decisions and, in any event, does not support PGI in the least.

First, the Virginia Supreme Court’s *Economopoulos* decision rejected the type of analysis done by *Fox Seko*. In *Economopoulos*, the court explained that “[a]n action for conversion can be maintained only by the person having a property interest in and entitled to the immediate possession of the item alleged to have been wrongfully converted.” *Economopoulos v. Kolaitis*, *supra*, 259 Va. at 814. In *Fox Seko*, however, the Circuit Court did not find that the plaintiff had a property interest in and was entitled to the immediate possession of the item alleged to have been wrongfully converted; rather, it reached its conclusion finding only that “[a]s of [the time of the conversion], neither [of the defendants] had a claim of title to or possession of these funds.”

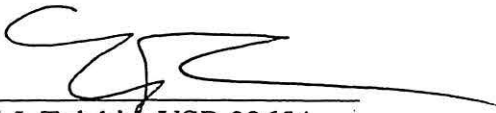
Fox Seko, 28 Va. Cir. at 2.

Second, in *Fox Seko*, where a defendant received two checks when he should have received only one, the circuit held that “when Poulin did not return the funds that were credited to the account of Poulin Construction when he became aware that the original check had been paid and credited to his account and when Fox Seko demanded the funds be returned, the funds were converted.” Thus, there was a specific act and time of conversion, and the basis for the wrongfulness of the act was not a contract. *Fox Seko* therefore has no application to our case, even were it good law.

Conclusion

For the foregoing reasons, this motion should be granted, the verdict in favor of PGI should be set aside, and judgment should be entered in favor of Rathe on PGI’s claims.

Respectfully submitted,
Rathe Productions, Inc., Defendant
By Counsel



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CERTIFICATE OF SERVICE

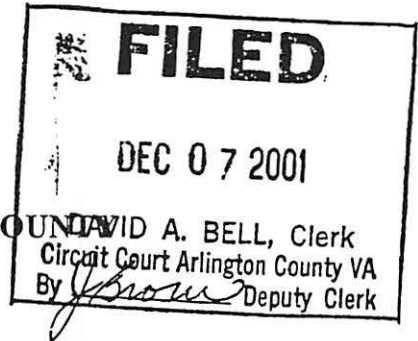
I hereby certify that on November 26, 2001, a true copy of the foregoing Defendant Rathe Production, Inc.'S Renewed Motion to Strike, Motion to Set Aside Verdict, and Motion for Judgment in Favor of Defendant Rathe Productions, Inc. on Claim of PGI, Inc. was sent via facsimile and first class mail, postage prepaid to John S. Jenkins, Jr., Esquire, at McGuire Woods LLP, 1750 Tysons Boulevard, Suite 1800, McLean, Virginia 22102, and Christopher Craig, Herge, Sparks and Christopher, 6862 Elm Street, Suite 360, Vienna, VA 22101.



Edward J. Tolchin

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY



PGI, Inc.,

Plaintiff,

vi.

RATHE PRODUCTIONS, INC.,

Defendant.

✓ At Law No. 01-100

ODELL, SIMMS & ASSOCIATES, INC.

Plaintiff,

v.

PGI, INC.

and

RATHE PRODUCTIONS, INC.

Defendants.

Consolidated With
At Law No. 01-171

**PGI, INC.'S CONDITIONAL MOTION FOR A NEW
TRIAL ON PGI'S CLAIM FOR PUNITIVE DAMAGES**

COMES NOW, the Plaintiff, PGI, Inc., by counsel, and moves the Court to grant PGI a new trial on PGI's punitive damage claim under the conditions and for the reasons stated in the attached Memorandum in Support.

PGI, Inc.
By Counsel

MCGUIREWOODS LLP
1750 Tysons Boulevard, Suite 1800
Tysons Corner
McLean, Virginia 22102
(703) 712-5015

By: _____

John S. Jenkins Jr., Va. Bar No. 37426

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion was served by hand delivery on this 7th day of December, 2001 to:

Christopher T. Craig, Esq.
Herge, Sparks & Christopher, LLP
6862 Elm Street, Suite 360
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Counsel for OS&A

Edward J. Tolchin, Esq.
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John S. Jenkins Jr., Esq.

FILED
DEC 07 2001
DAVID A. BELL, Clerk
Circuit Court Arlington County VA
By *[Signature]* Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

PGI, Inc.,
Plaintiff,
v.
RATHE PRODUCTIONS, INC.,
Defendant.

At Law No. 01-100

ODELL, SIMMS & ASSOCIATES, INC.
Plaintiff,
v.
PGI, INC.
and
RATHE PRODUCTIONS, INC.
Defendants.

Consolidated With
At Law No. 01-171

MEMORANDUM IN OPPOSITION TO DEFENDANT RATHE PRODUCTIONS'
RENEWED MOTION TO STRIKE, MOTION TO SET ASIDE
VERDICT, AND MOTION FOR JUDGMENT IN FAVOR OF
DEFENDANT RATHE PRODUCTIONS ON CLAIM OF PGI

COMES NOW Plaintiff, PGI, Inc. ("PGI"), by counsel, and opposes Defendant Rathe Productions Inc.'s ("Rathe") Renewed Motion to Strike, Motion to Set Aside Verdict and Motion for Judgment in Favor of Defendant Rathe Productions on Claim of PGI for the following reasons:

PROCEDURAL HISTORY

In February 2001, PGI filed its verified Motion for Judgment (“CL 01-100”) seeking to recover \$125,000 in compensatory damages and punitive damages resulting from Rathe’s conversion of funds paid by the Smithsonian Institution (“Smithsonian”) to settle Rathe’s and PGI’s claims relating to the Smithsonian Feasibility Study. PGI further alleged that the Smithsonian paid \$250,000 to Rathe by check made payable to Rathe (the “Smithsonian Settlement”) and Rathe wrongfully converted funds properly belonging to PGI by failing to pay PGI its portion of the \$250,000 settlement .

Similarly, in March 2001, Odell, Simms & Associates (“OSA”) filed its Motion for Judgment (“CL-01-171”) seeking to recover \$50,000 in compensatory damages from Rathe and PGI for their alleged breach of contract with OSA. OSA alleged that Rathe and PGI contracted with OSA for services and products to support Rathe and PGI in performing the Smithsonian Feasibility Study and that Rathe and PGI failed to pay for such services and products.¹

Rathe answered PGI’s claims by denying it received any payment from the Smithsonian for the Feasibility Study or converted PGI’s funds. Rathe also answered OSA’s claim by denying the existence of a contract between Rathe and OSA. PGI responded to OSA’s claim by asserting Rathe assumed the OSA contract obligation and cross-claimed against Rathe for converting PGI’s portion of the Smithsonian Settlement.

The Court consolidated the cases for trial upon PGI’s motion. On November 14th and 15th, 2001, PGI tried its case against Rathe for conversion before an Arlington County jury. Forced to elect its remedy at the outset of trial, PGI elected to proceed on its conversion claim rather than its contract claim. PGI argued that Rathe had converted funds belonging to PGI by

¹ Rathe does not challenge the jury’s verdict in favor of OSA in CL 01-171.

wrongfully retaining that portion of the Smithsonian settlement payment which properly belonged to PGI, despite PGI's demand for its share of this payment.

After PGI concluded its case-in-chief, Rathe moved to strike PGI's case for lack of evidence. The Court took Rathe's motion under advisement and Rathe elected to defend against PGI's claim of conversion by presenting evidence. Rathe's evidence, in short, relied upon an alleged agreement between PGI and Rathe in which PGI allegedly agreed Rathe could retain the Smithsonian settlement as an off-set against amounts PGI allegedly owed to Rathe. After the close of Rathe's case, Rathe again moved the Court to strike PGI's case. The Court denied Rathe's motion.

The Court submitted the case to the jury after instructing the jury on the applicable law. Specifically, the Court instructed the jury to enter judgment in favor of PGI, if the jury found by clear and convincing evidence that Rathe had converted PGI's property. The Court defined conversion as "the wrongful exercise of the right of ownership over the goods or chattels belonging to another in denial of or inconsistent with the owner's rights." The Court further instructed that "an action for conversion can be maintained only by the person having a property interest in and entitled to the immediate possession of the item alleged to have been wrongfully converted."²

Importantly, the Court also instructed the jury regarding PGI's and Rathe's business relationship. In CL No. 01-171, OSA sought to hold PGI and Rathe liable, jointly and severally, for breach of contract in failing to pay OSA for services performed in support of the Smithsonian Feasibility Study. At OSA's request, the Court instructed the jury that a "joint venture exists when two or more persons combine in a joint business enterprise for their mutual benefit, with an

² Rathe Instruction No. 19.

express or implied understanding or agreement that they are to share in the profits or losses of the enterprise, and that each is to have a voice in its control and management.”³

After receiving the Court’s instructions and after deliberating on the evidence, the jury returned a verdict in favor of PGI and assessed damages against Rathe in the amount of \$100,000.00 in CL 01-100. As to OSA’s contract claim against PGI and Rathe, the jury returned a verdict in OSA’s favor and assessed damaged in the amount of \$50,000 against Rathe alone.

In its Motion, Rathe boldly asserts the Court must set aside the verdict as contrary to the law. Rathe argues the verdict is wrong as a matter of law because PGI’s claim is based upon a contract and, therefore, PGI cannot recover on its conversion claim. The Court, however, should deny Rathe’s Motion as PGI’s conversion claim is not only a recognized claim in Virginia, but also plainly supported by the evidence presented at trial.

ARGUMENT

I. Rathe Waived its Right to Object as a Matter of Law

Rathe’s Motion seeks to Set Aside the jury’s verdict and enter judgment in its favor under Virginia Code § 8.01-430 because PGI’s claim sounds in contract. Rathe alleges that “because PGI’s claims are based on a breach of an alleged contract, yet it asserts a tort, it cannot prove the elements of the tort as a matter of law.” (Def. Mot. At 1-2). By failing to object to the Court’s instructions to the jury, however, Rathe waived its opportunity to contend the Court erred as a matter of law on the issue of conversion.

A. Rathe Failed to Object to the Court’s Instructions When Required

Rathe’s failure to preserve its objection to the Court’s instruction to the jury on PGI’s theory of conversion defeats its Motion to Set Aside the Jury Verdict. Under Virginia law,

³ OSA Instruction No. H.

Rathe was required to object to the Court's instructions to the jury on the conversion claim in order to preserve the issue for later review. Spitzli v. Minson, 231 Va. 12, 17-18 (1986); Holles v. Sunrise Terrace, Inc., 257 Va. 131 (1999). Rathe, however, did not object to the Court's definitional or finding instructions regarding conversion. In fact, the Court gave Rathe's proposed instructions on the legal standard to be applied and the requirements for finding a conversion had occurred.⁴

Rathe, having received an adverse jury verdict, seeks to attack the verdict reached in accordance with its own proposed instructions. Rathe invited to Court to commit the error Rathe now complains of in its Motion by tendering its own conversion instruction and by failing to object to instructing the jury on PGI's theory of conversion. Court should deny Rathe's Motion because "the parties cannot invite the court to commit an error, and then complain of it." Hilton v. Faye, 196 Va. 860, 867 (1955).

B. Rathe's Failure to Object Operates as a Waiver

Rathe waived its right to object and contend the Court erred in failing to rule PGI failed to establish conversion as a matter of law. "[W]hen an issue has been submitted to a jury under instructions given without objection, such assent constitutes a waiver of any contention that the trial court erred in failing to rule as a matter of law on the issue." Holles, 257 Va. at 137. Moreover, in Spitzli, the Court found

"[a]lthough the defendant moved to strike the evidence both at the conclusion of the plaintiff's case and at the close of all the evidence, we believe his failure to preserve his objections at the instruction stage constituted a waiver of any contention that the trial court erred in not ruling as a matter of law upon the issues..."

Spitzli, 231 Va. at 17-18.

⁴ Rathe Instruction Nos. 14 and 19.

Further, noting that failure to object operates as a waiver, the Spitzli Court found a defendant “cannot now be heard to say that a verdict arrived at in accordance with [the instruction] must be set aside.” Id. at 16 (quoting from Godsey v. Tucker, 196 Va. 469, 475 (1954)).

The record clearly establishes Rathe not only failed to object to the Court’s instruction on PGI’s theory of conversion, but offered its own instructions on PGI’s theory. The Hilton Court unequivocally stated “[w]here both plaintiff and defendant have asked for and have induced the court to give an instruction upon a given theory of the law, neither will be permitted after the verdict to question that theory.” Hilton, 196 Va. at 867. Both PGI and Rathe asked for and induced the Court to instruct on PGI’s theory of conversion. Having done so, Rathe has waived its right to seek a judgment as a matter of law.

II. PGI’S Conversion Claim is Proper and Enforceable in Virginia

Should the Court conclude Rathe has not waived its right to contend the Court erred as a matter of law and decide to review the evidence introduced at trial, the Court should conclude not only that PGI’s conversion claim is proper and enforceable, but also that the jury’s verdict is supported by the clear and convincing weight of PGI’s evidence.

A. The Court Must Review All of the Evidence

Under Virginia Code § 8.01-430, the trial court may set aside a jury’s verdict only when the verdict is contrary to the evidence or is without evidence to support it. Kim v. Douval Corp., 259 Va. 752, 755-56 (2000); Lane v. Scott, 220 Va. 758, 581-82 (1979), cert. Denied, 446 U.S. 986 (1980). The trial judge is under a duty to review all the evidence and may only set aside a verdict if “there was no evidence to support the verdict, or that the verdict was plainly contrary to the evidence. This conclusion must be drawn from the whole evidence in the case....” T.M. Graves Constr. V. Nat’l Cellulose Corp., 266 Va. 164, 167 (1983) (quoting from

Ricketts v. J.G. McCrory Co., 138 Va. 548, 560 (1924)). “Thus on a motion to set aside a jury verdict the trial court is required to consider all the evidence.” Id.

In addition “when conflicting inferences have been resolved by a jury and those necessarily underlying the conclusion reflected in the verdict are reasonably deducted from the evidence, the trial judge should not set the verdict aside.” Lane v. Scott, 220 Va. 758, 582 (1979). Moreover, it is reversible error for the trial judge to set aside a verdict where the inferences underlying the verdict are reasonably deductible from the evidence. Sampson v. Sampson, 221 Va. 896, 901-02 (1981).

Applying this standard here, the Court should uphold the jury's verdict.

B. Rathe Misunderstands its Relationship with PGI

The bulk of Rathe’s complaint surrounds its fundamental misunderstanding of the nature of PGI’s case. Rathe asserts PGI can not prove conversion as a matter of law because the only breach PGI put at issue was Rathe’s failure to distribute the Smithsonian Settlement in accordance with the parties’ agreement. However, as the evidence plainly established, PGI and Rathe performed services for the Smithsonian as partners. Although PGI and Rathe never finalized a written joint venture agreement, PGI and Rathe functioned as partners in their conduct with the Smithsonian and OSA. Although disputed at trial, the jury resolved the conflict and found PGI and Rathe were a joint venture.⁵

As instructed by the Court, participants in a joint venture share the profits and losses. That both PGI and Rathe understood this principle is clear from the record as PGI and Rathe confirmed the funds from the Smithsonian Settlement would be divided evenly after

⁵ Rathe defended OSA’s claim on the theory the subcontract existed between PGI and OSA and no contact between Rathe and OSA existed. The jury found Rathe, and not PGI, liable to OSA. Such a finding necessarily includes a finding PGI and Rathe operated as a joint venture.

paying OSA. This confirmation reflects the “well established rule in Virginia that in the absence of an agreement, express or implied, between partners in respect to their shares in the profits and losses of the business, they are to share equally, although they may not have contributed equally to the partnership capital.” Legum Furniture Corp. v. Levine, 217 Va. 782, 787 (1977). As PGI and Rathe did not execute a joint venture contract, these general partnership principles operate to establish the duties and responsibilities between joint venturers. Id.

Moreover, Rathe accepted PGI’s appointment as its agent for collecting the amounts owed both PGI and Rathe from the Smithsonian. The evidence established that on August 19, 1999, C.B. Wismar, PGI’s Executive Vice President, authorized Rathe to represent PGI in collecting amounts owed PGI for both the Feasibility Study and America’s Smithsonian Exhibition. As PGI’s agent, Rathe owed PGI a duty of loyalty. That duty includes a prohibition on taking a secret profit. Covey v. Kimbrough, 1 Va. Cir. 82 (Richmond 1969). As stated in Covey, “[t]he well settled and salutary principle that a person who undertakes to act for another shall not, in the same matter act for himself, results also in the rule, that all profits made and advantage gained by the agent in the execution of the agency belong to the principal.” Id. at 84.

After Rathe received the Smithsonian Settlement, PGI’s entitlement to its portion of the payment arose. PGI’s right is grounded not only in contract principles; that is the right to be paid for work performed, but also in agency and partnership principles. An agent owes his principal the duty of loyalty and to refrain from taking a secret profit. Covey, 1 Va. Cir. At 82. Joint venturers, like partners, share equally in the profits and loss resulting from their joint endeavors. Legum Furniture Corp., 217 Va. at 787. While PGI’s and Rathe’s right to the Smithsonian Settlement flows from the contract both entered into with the Smithsonian, PGI’s right to its portion of the Smithsonian Settlement is also based on contract, agency and

partnership rights. As a result, PGI's right to the funds converted by Rathe results from Rathe's breach of a "common law duty, not one existing between the parties solely by virtue of the contract." Richmond Metro. Auth. v. McDevitt Street Bovis, Inc., 256 Va. 553, 558 (1998) (emphasis added).

C. Contract Rights in Property are Subject to Conversion

Rathe's brief suggests a party can not convert another's property if the property rights are grounded in contract. However, the Virginia Supreme Court's decision in Universal C.I.T. Credit Corp. v. Kaplan, 198 Va. 67 (1956), cited by Rathe, illustrates the weakness of this argument. In Universal C.I.T. Credit, Bailey, a U.S. Navy sailor, entered into a conditional sales contract with Natrona Motor Company for the purchase of a car. Natrona, in turn, assigned the conditional sales contract to Universal C.I.T.. Under the contract's terms, the vendor retained title to the car pending Bailey's full payment of the purchase price. Also, the contract prohibited Bailey from selling, encumbering or abandoning the car and upon his default in paying any installment, the entire balance would become due and entitle the vendor to repossess the car.

After making one payment, Bailey defaulted on the contract and sold the car to Martin Kaplan, trading as L&M Motors. Kaplan subsequently sold the car to Howett Motor Company. Universal C.I.T. sued Bailey and Kaplan alleging breach of the conditional sales contract and conversion and sought return of the car or its value at the time of the conversion. The trial court examined the enforceability of Universal C.I.T.'s lien under the conditional sales contract as Universal C.I.T. never recorded its lien in Virginia. The trial court concluded Universal C.I.T. enjoyed a valid lien on the car Bailey sold to Kaplan at the time of the sale. As a result, the trial court found Bailey guilty of conversion and that "appellee [Kaplan] was guilty of

conversion upon buying and exercising control over the vehicle inconsistent with the rights of the appellant.” Id. at 76.

Universal C.I.T.’s rights in the car existed solely by virtue of the conditional sales contract. Absent the contract assigned by the Natrona Motor Company, Universal C.I.T. had no other right to the car or to sue for its conversion. Universal C.I.T., by its own terms, stands for the proposition that one can convert property of another whose rights in the property are based upon exclusively upon a contract.

III. PGI Proved Rathe’s Conversion by Clear and Convincing Evidence⁶

As discussed above, the Court must review all of the evidence to determine whether the jury’s verdict is contrary to the evidence or without evidence to support it. Lane v. Scott, 220 Va. 758, 581-82 (1979), cert. denied, 446 U.S. 986 (1980). After accomplishing its review, the Court should easily conclude the evidence supported the jury’s verdict.

A. Rathe’s Secret Retention of PGI’s Settlement Payment is Wrongful

The evidence established at trial, by clear and convincing evidence, that Rathe’s wrongful retention of the Smithsonian settlement funds deprived PGI of its right to the immediate possession of its portion of the settlement proceeds. Conversion is defined as “any wrongful exercise or assumption of authority, personally or by procurement, over another’s goods, depriving him of their possession.” Universal C.I.T. Credit Corp v. Kaplan, 198 Va. 67, 75 (1956). In maintaining an action for conversion, the claimant must have “a property interest in and [be] entitled to the immediate possession of the item alleged to have been wrongfully converted.” United Leasing Corp. v. Thrift Ins. Corp., 247 Va. 299, 305 (1994).

⁶ While PGI objected to the Court’s instruction on standard of proof, and maintains the appropriate standard in preponderance of the evidence, the jury nonetheless found PGI proved its case by the higher standard of proof.

The testimony and evidence established Rathe did not enjoy the right to retain the entire Settlement Payment received from the Smithsonian.

PGI and Rathe contracted with the Smithsonian to perform services in support of the America's Smithsonian Exhibition and conduct a Feasibility Study. Having failed to receive payment for the Feasibility Study and the remaining America's Smithsonian Exhibition expenses, PGI and Rathe attempted to collect amounts owed PGI and Rathe. In furtherance of this effort, PGI appointed Rathe as PGI's agent to "represent our company in connection with the payment of the \$250,000 for the Smithsonian International Feasibility Study." (PGI Tr. Ex. 15). In July, 2000, Rathe negotiated and executed the Smithsonian Settlement (PGI. Tr. Ex. 16) and then received a Smithsonian check for \$250,000 made payable to both Rathe and PGI. At trial, the testimony of Cynthia Engel, PGI's President, established that Rathe never disclosed the existence of the Smithsonian Settlement to PGI until PGI discovered from OSA that Rathe, in fact, received the \$250,000 payment. As a result, by receiving the Rathe/PGI payment from the Smithsonian and retaining PGI's portion of the Smithsonian Settlement even after a PGI demand for this money, Rathe wrongfully exercised authority over PGI's money, thereby depriving PGI of its possession. As pled and as shown by the evidence, PGI proved a prima facie case of conversion.⁷

Further, Rathe affirmatively recognized its obligation to pay OSA \$50,000 for services it performed in supporting Rathe and PGI in the Feasibility Study.⁸ After receiving the

⁷ Interestingly, Rathe, while citing *Economopoulos v. Kolatis*, 259 Va. 806, 814 (2000), ignores the Court's finding that a motion to strike must be denied "unless it is conclusively apparent that the plaintiff has proved no cause of action." In this case, the Court denied Rathe's Motion to Strike, leading to the only logical conclusion that PGI's evidence was sufficient to maintain its conversion claim.

⁸ Importantly, PGI's authorization to pay OSA was not conditioned upon receiving the entire \$250,000 Smithsonian Settlement. Rather, OSA's entitlement is based on its contract with the Joint Venture and that OSA would be paid from whatever amount Rathe ultimately recovered.

Smithsonian Settlement, however, Rathe retained the entire amount and tried to negotiate a lower payment with OSA. Moreover, Rathe did not disclose to PGI that it had reached a settlement with the Smithsonian or report receiving the Smithsonian Settlement to PGI. The jury correctly inferred from this evidence that Rathe attempted to conceal its receipt of the Smithsonian Settlement from PGI. From this, the jury could further conclude Rathe's concealment was an acknowledgement of its wrongful acts.

In addition, the jury heard Rathe's testimony claiming that PGI had authorized Rathe to retain the Smithsonian Settlement as an offset against amounts Rathe alleged Rathe owed PGI. Cynthia Engel, C.B. Wismar and Darryl Hartley-Leonard all testified no such understanding existed. Having heard all the evidence, the jury rejected Rathe's contention and found Rathe was not entitled to retain the entire Smithsonian Settlement. Having rejected that Rathe's retention of the Smithsonian Settlement with no recognized claim of right to the funds, the jury correctly concluded Rathe's conduct was wrongful. Fox Seko v. Poulin Constr. Inc., 28 Va. Cir. 1, 3 (Loudoun 1991) (finding retention of money without claim of title to or possession of funds is wrongful). As a result, the jury's conclusions are supported by the direct evidence and all reasonable inferences.

B. PGI Proved Rathe's Conversion

The evidence and testimony demonstrated PGI's right to its portion of the Smithsonian Settlement. Richard Rathe testified he negotiated and executed the Smithsonian Settlement and received the \$250,000 payment by check dated July 25, 2000. At that point, PGI's entitlement to its portion of the Smithsonian Settlement vested. PGI, as a partner in the joint venture, is entitled to share in its revenue. Legum Furniture Corp. v. Levine, 217 Va. 782, 877 (1977). PGI's right to the \$100,000 awarded by the jury is supported by the jury's

interpretation of the evidence presented at trial. The jury heard evidence that PGI and Rathe performed services for the Smithsonian as partners. Rathe's letter to the Smithsonian of April 14, 2000, introduced into evidence, reflects Rathe's understanding that **any** amount recovered from the Smithsonian would be divided evenly between PGI and Rathe, after paying OSA \$50,000. (PGI Tr. Ex. 19). (emphasis added). Rathe's admission that the Smithsonian Settlement would be divided evenly with PGI is alone sufficient to establish not only PGI's property interest, but also the measure of PGI's damages.

Further, Rathe's admission forecloses its argument that PGI's conversion claim is based solely upon the contract.⁹ Both PGI and Rathe testified concerning their dispute with the Smithsonian over amounts owed for the Feasibility Study and America's Smithsonian Exhibition. Rathe testified that the object of his negotiation with the Smithsonian was to recover as much money as possible. If the contract, or Rathe's "agreement" with PGI, were the only contract at issue, why then negotiate for more than the \$250,000 owed under the contract? Having heard this evidence, the jury correctly concluded that PGI enjoyed a right to receive half the amount recovered and PGI's right vested upon Rathe's receipt of the Smithsonian Settlement. Again, the jury's verdict is supported by an abundance of evidence.

CONCLUSION

The Court should deny Rathe's Motion to Set Aside. PGI's claim against Rathe for its secret receipt of the Smithsonian Settlement and retention of amounts properly belonging to PGI presents a valid claim under Virginia law. As PGI's partner in a de facto joint venture, Rathe's

⁹ Of note, PGI did not sue on the contract between the Smithsonian, Rathe and PGI. (PGI Tr. Ex. 1). Rather PGI sued for Rathe's wrongful retention of the corpus of the Smithsonian Settlement after its authorized receipt.

retention of the entire Smithsonian Settlement amounted to a wrongful conversion of PGI's money. When Rathe received the Smithsonian Settlement and thereafter failed to pay PGI its half of the amount received, Rathe's conversion was complete. Having heard the evidence, the jury's verdict is not only supported by evidence, but also correct in law and fact. As a result, the Court should deny Rathe's motion and enter judgement in favor of PGI.

Respectfully submitted,

PGI, Inc.
By Counsel

MCGUIREWOODS LLP
1750 Tysons Boulevard, Suite 1800
Tysons Corner
McLean, Virginia 22102
(703) 712-5015

By: 

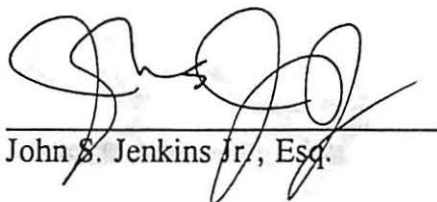
John S. Jenkins Jr., Va. Bar No. 37426

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion in Limine by hand delivery on this 7th day of December, 2001 to:

Christopher T. Craig, Esq.
Herge, Sparks & Christopher, LLP
6862 Elm Street, Suite 360
McLean, VA 22101
Counsel for OS&A

Edward J. Tolchin, Esq.
Fettmann, Tolchin & Majors, PC
10615 Judicial Drive, Suite 502
Fairfax, VA 22030
Counsel for Rathe Productions, Inc.



John S. Jenkins Jr., Esq.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

PGI, INC.

Plaintiff,

v.

RATHE PRODUCTIONS, INC.

Defendant.

At Law No. CL01-100

FILED

DEC 13 2001

ODELL, SIMMS & ASSOCIATES, INC.

Plaintiff,

v.

PRODUCTION GROUP INTERN'L

n/k/a PGI, INC. *et al.*

Defendant.

At Law No. CL01-171 ✓

DAVID A. BELL, CLERK
Arlington County Circuit Court
By _____ Deputy Clerk

**DEFENDANT RATHE PRODUCTION, INC.'S REPLY IN SUPPORT OF RENEWED
MOTION TO STRIKE, MOTION TO SET ASIDE VERDICT, AND MOTION FOR
JUDGMENT IN FAVOR OF DEFENDANT RATHE PRODUCTIONS, INC.**

We write briefly to point out that plaintiff PGI's opposition memorandum fails to cite controlling law to the Court and misstates the holding of its primary case law support.

PGI's primary argument is that defendant Rathe waived its motion by not objecting to the form of the jury instructions, despite its repeated motions to strike both before and after the fact. PGI cites 3 cases for this proposition – *Spitzli*, *Godsey* and *Hilton*. PGI also cites *Holles*, but that case is not even close to the facts here. In *Holles*, the only issue on appeal was the giving of a jury instruction to which no objection was made.

Spitzli, *Godsey* and *Hilton* are not on point. Each deals with a failure of a party to notify

the court of an objection to putting an issue to the jury. That is not the situation here, where Rathe raised the issue repeatedly at trial in our motions. But this Court need not believe Rathe on the question of the meaning of these three cases. The Virginia Supreme Court already has expressly rejected PGI's contentions as to the meaning of these cases in *Wright v. Norfolk & Western Ry.*, 245 Va. 160, 427 S.E.2d 724 (1993).¹ There, the Court quoted at length from *Spitzli, Godsey and Hilton* and stated that they can not be interpreted as PGI interprets them. Rather, as the Court explained, the issue of waiver is whether the party fooled the judge into thinking that there was no objection on a legal question so as to invite him to commit error, and so long as the trial judge wasn't fooled, there is no waiver:

The consistent thread that runs through *Spitzli, Godsey and Hilton* is that a litigant will not be permitted to invite a trial court to commit error, either through agreeing or failing to object, and then be permitted to successfully complain of such error on appeal. But that is not what happened here. The record affirmatively establishes, unlike the three cases just discussed, that the defendant did not invite the court to commit error. Indeed, after the discussion of the instruction and before the trial court charged the jury, the defendant renewed its motion to strike the plaintiffs' evidence on the ground that Wright was guilty of contributory negligence as a matter of law. And, in none of the three cases reviewed, as here, was there a positive expression from the very person for whose benefit the rule is established, the trial judge, that the defendant had not invited error.

Rathe did not fool the Court here, given Rathe's repeated arguments that this case is not a jury issue and should be decided on a motion to strike, a motion which the Court indeed took under advisement and then explained that the Court expected a renewal of the motion after the verdict.

PGI's secondary arguments fair no better. PGI is attempting to rewrite its motion for

¹ PGI's failure to call to the Court's attention the Supreme Court's decision in *Wright* is troubling.

judgment at this late stage. PGI's motion stated that Rathe and PGI agreed to divide the \$250,000, and that Rathe's failure to do so constituted a conversion. PGI's Motion for Judgment at ¶s 16-17. PGI's new claim that Rathe violated "agency and partnership" principles and that Rathe violated a "duty of loyalty" was never at issue in this case, no evidence was submitted with respect to these matters, and no instructions were requested or given on these issues.

PGI's final assertion that "contract rights" are subject to conversion is yet another attempt to twist Virginia law out of context. PGI cites a single case for this proposition – *Universal CIT Credit v. Kaplan*, 198 Va. 67 (1956), claiming that the Supreme Court found in that case that a contract breach could constitute a conversion. In that case, however, *the appellee had no contract with the appellant*. There, appellant Universal had entered into a conditional sales contract selling an automobile to a Mr. Baily, and Baily resold the auto to appellee Kaplan. Universal and Kaplan had no contract whatsoever between them. Universal sued both Baily and Kaplan because (1) Baily erased the title document showing Universal's security interest in the car, (2) Baily then resold the car to Kaplan who claimed that he did not see the erasure, though it was "readily observed" in court, and (3) Kaplan resold the car to a dealer in North Carolina without allowing for Universal's security interest. Baily defaulted in the court below, but Kaplan defended. The Court explained that Baily could be sued for conversion, not based on his breach of contract, but because he took the car which belonged to Universal and resold the car without any right to do so. Kaplan was guilty of conversion when he resold the car without any rightful ownership of the vehicle. This was not a breach of contract case. This was a

conversion.²

PGI's other arguments are simply contentions that Rathe's breach of contract was somehow in bad faith -- that is, Rathe "secretly" kept the money. These contentions, however, cannot "convert" a breach of contract action into a tort. Simply stated, absent the agreement alleged and apparently proven by PGI, PGI had no right to the \$100,000. But, a tort claim for conversion does not lie if the wrong is a breach of an agreement. *See Oleyar v. Kerr, Trustee*, 217 Va. 88, 90, 225 S.E.2d 398, 399-400 (1976) ("If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract, and not upon tort"); *Richmond Metropolitan Authority v. Mcdevitt Street Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344, 347 (1998) (tort claim dismissed if plaintiffs seek to "establish a tort action based solely on the negligent breach of a contractual duty")

Indeed, relying on *Mcdevitt Street Bovis, Inc.*, the Fourth Circuit recently explained as follows in rejecting the same type of conversion claim which PGI has pursued:

Under Virginia law, "a party can, in certain circumstances, show both a breach of contract and a tortious breach of duty." *Richmond Metropolitan Authority v. McDevitt, Street, Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344, 347 (Va. 1998) (internal quotations omitted). The Virginia Supreme Court further held that "the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract." *Id.* (internal

² We also note that in *Kaplan*, the second and third elements of conversion (plaintiff's property interest at the time of the conversion, and plaintiff's immediate right to the property at issue) were clearly proven. *See Economopoulos v. Kolaitis*, 259 Va. 806, 814, 528 S.E.2d 714 (2000) (citing *inter alia Kaplan* for the proposition that these elements must be shown). That is not the situation in our case, where neither was proven.

quotations omitted).

A claim for "fraud in the inducement" is not foreclosed by the rule of *McDevitt, Street, Bovis, Inc.*, 507 S.E.2d at 348 (citing *Flip Mortgage Corp. v. McElhone*, 841 F.2d 531 (4th Cir. 1988)). To make out such a claim, the plaintiff must allege facts that demonstrate the defendant's intent (at the time the promises are made) never to abide by the terms of the contract. *Id.* **When, as in the instant case, the allegations of fraud or conversion "are nothing more than allegations of negligent performance of contractual duties," such alleged breaches of duty are not actionable in tort.** 507 S.E.2d at 347.

Out of Chaos, Ltd. v. Aon Corp., 2001 U.S. App. LEXIS 17407 (4th Cir. 2001) (bold supplied; footnote omitted).

Here, the evidence showed no wrong other than a breach of contract. Thus, there could be no conversion under Virginia law.

We also note that nowhere does PGI contend in its opposition that it offered evidence of the second and third elements of conversion – its property interest at the time of conversion and immediate right to the money. Because this was a breach of contract case which PGI tried to dress up as a conversion action, it did not, and could not possibly, establish that there was any specific act of conversion. It established only that it had a contractual right to the money at issue. Because it could not establish any specific act of conversion, it could not establish its property rights *at the time* of conversion or *immediate* right to the money. It could only establish that at some point -- a day, a week, a month, whatever -- after Rathe deposited a check made payable to Rathe (*see* PGI Trial Exhibit 14), Rathe had an obligation to pay PGI \$100,000 because of an agreement it asserted to exist between the parties. Even the date of receipt of the check was uncertain (the only evidence was sometime in August), and there was no evidence of the date of its deposit. Plainly, this lack of evidence of a right of ownership and right to immediate

possession of money at the time of conversion doomed this case as a conversion action. *See Economopoulos v. Kolaitis*, 259 Va. 806, 814, 528 S.E.2d 714 (2000) (motion to strike upheld because “[i]n the present case, the Plaintiffs were not entitled to the immediate possession of the Treasury bills at the time they allegedly were wrongfully converted”). PGI’s failure to address *Economopoulos v. Kolaitis* is most telling.³

Conclusion

For the foregoing reasons, Rathe’s motion should be granted, the verdict in favor of PGI should be set aside, and judgment should be entered in favor of Rathe on PGI’s claims.

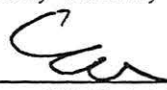


Respectfully submitted,
Rathe Productions, Inc., by Counsel

Edward J. Tolchin, VSB 32654
Fettmann, Tolchin, & Majors, P.C.
10615 Judicial Drive, Suite 502
Fairfax, VA 22030
703-385-9500
703-385-9893 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2001, a true copy of the foregoing Defendant Rathe Production, Inc.’S Renewed Motion to Strike, Motion to Set Aside Verdict, and Motion for Judgment in Favor of Defendant Rathe Productions, Inc. on Claim of PGI, Inc. was sent via facsimile and first class mail, postage prepaid to John S. Jenkins, Jr., Esquire, at McGuire Woods LLP, 1750 Tysons Boulevard, Suite 1800, McLean, Virginia 22102, and Christopher Craig, Herge, Sparks and Christopher, 6862 Elm Street, Suite 360, Vienna, VA 22101.



Edward J. Tolchin

³ Rathe also opposes PGI’s “conditional” motion regarding punitive damages. There are no punitive damages for a breach of contract, and PGI provided no evidence of malice, certainly not clear and convincing evidence.

FILE



Circuit Court of Arlington County

1425 North Court House Road

Arlington, Virginia 22201

BENJAMIN N. A. KENDRICK
JUDGE

PAUL F. SHERIDAN
JUDGE

WILLIAM T. NEWMAN, JR.
JUDGE

JOANNE F. ALPER
JUDGE

WILLIAM L. WINSTON
JUDGE RETIRED

PAUL D. BROWN
JUDGE RETIRED

CHARLES S. RUSSELL
JUSTICE RETIRED

CHARLES H. DUFFY
JUDGE RETIRED

THOMAS R. MONROE
JUDGE RETIRED

January 25, 2002

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Fettmann, Tolchin, & Majors, P.C.
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Fairfax, VA 22030

John S. Jenkins, Jr., Esq.
McGuire Woods L.L.P.
1750 Tysons Boulevard, Suite 1800
McLean, VA 22102

Christopher T. Craig, Esq.
Herge, Sparks & Christopher, L.L.P.
6862 Elm Street, Suite 360
McLean, VA 22101

Re: PGI, Inc. v. Rathe Productions, Inc.
Law No. 01-100

Dear Counsel:

This matter came before the Court on Defendant Rathe Productions Renewed Motion to Strike, argued December 14, 2001. The Court has carefully reviewed Defendant's Motion to Strike, Plaintiff's Opposition, and Defendant's Reply in Support of the Motion. After reviewing the relevant case law, the Court grants the Defendant's Motion to Strike, sets aside the verdict, and enters judgment in favor of Defendant Rathe Productions.

Under Va. Code § 8.01-430, the trial court may set aside a jury verdict and enter judgment only when the verdict is plainly wrong or without credible evidence to support it. Lane v. Scott, 220 Va. 578, 260 S.E.2d 238 (1979). The Court is of the opinion that the verdict in this case was plainly wrong, and that PGI did not present credible evidence to support its claim for conversion.

The Court is persuaded by Defendant Rathe Productions' arguments that PGI's claims are solely based on a breach of contract theory, therefore, an action in tort is not appropriate. The Supreme Court has held that in determining whether an action lies in contract or tort, one must first establish the source of the duty violated. Richmond Metropolitan Authority v. Mcdevitt Street Bovis, Inc., 256 Va. 553, 558 S.E.2d 344, 347 (1998). The Supreme Court stated in Oleyar v. Kerr, Trustee, 217 Va. 88, 90, 225 S.E.2d 398 399-400 (1976):

If the cause of complaint be for an act of omission or nonfeasance which without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from the contract to do what is complained of exists) then the action is founded upon contract and not upon tort.

It is clear that a cause of action may arise out of both contract law and tort law if it is shown that there is a breach of contract and a breach of a common law duty. However, the duty cannot exist solely by virtue of the contract. Richmond Metropolitan Authority v. Mcdevitt Street Bovis, Inc. 256 Va. 553, 507 S.E.2d 344, 347 (1998). Plaintiff argues that PGI and Rathe were acting as partners in a joint venture, however, PGI did not present evidence at trial to establish that a partnership existed between the parties or that the parties had common law duties to each other. The Court holds that PGI's conversion claim is based solely on an allegation that Rathe Productions breached the contract between the parties, and therefore, these allegations are not actionable in tort law. Wherefore, PGI cannot prevail on the basis of conversion, and the jury verdict should be stricken as a matter of law.

The Court also finds that Rathe Productions did not waive its motion to strike by not objecting to the form of the jury instructions. The Court understands Wright v. Norfolk & Western Ry. to be the controlling caselaw. 245 Va. 160, 427 S.E.2d 724 (1993). In Wright, the defendant argues that the plaintiff's case failed as a matter of law because the plaintiff was contributorily negligent. The trial court denied defendant's motion to strike at the end of the plaintiff's case in chief and again at the conclusion of all evidence and allowed the case to be decided by the jury. The trial judge stated that while he felt the defendant's position was correct, he wanted the issue submitted to the jury subject to further review, if necessary, after the verdict. The jury decided the case in favor of the plaintiff. The defendant brought a motion to set aside the verdict. The plaintiff argued that the defendant had waived its right to assert contributory negligence as a defense because it had failed to object to an instruction given to the jury concerning contributory negligence. The Virginia Supreme Court held that throughout the trial the

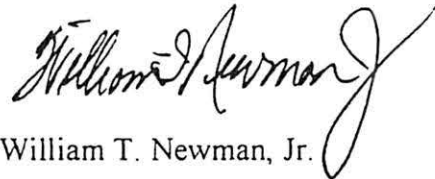
defendant had consistently maintained that the issue of contributory negligence was of great importance. The defendant maintained its position throughout the trial, including at the second motion to strike which occurred after counsel discussed jury instructions. Contrary to the holdings in Spitzli v. Minson, 231 Va. 12, Godsey v. Tucker, 196 Va. 469 (1954), and Hilton v. Fayen, 196 Va. 860 (1955), the defendant in Wright did not cause the court to commit an error by agreeing or failing to object, and then turn-around and complain about the error in a later proceeding. Wright at 170.

This case is analogous to the Wright case. Rathe Productions has consistently maintained that Plaintiff's complaint arises solely out of the contract between the parties, and that an action in conversion should fail as a matter of law. Rathe made this argument during its first motion to strike after the conclusion of PGI's case and again at the close of all of the evidence. The Court was fully aware of Rathe's position regarding the conversion claim, and does not find that Rathe was inviting the Court to commit an error. Therefore, Rathe's failure to object to the jury instruction regarding conversion does not constitute a waiver of the issue.

Conclusion

Based on the foregoing, the Court grants Defendant Rathe Production's Motion to Strike. The jury verdict is set aside and the Court finds for Defendant Rathe Productions as a matter of law.

Very Truly Yours,



William T. Newman, Jr.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

PGI, Inc.,

Plaintiff,

v.

RATHE PRODUCTIONS, INC.,

Defendant.

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At Law No. 01-100

FINAL JUDGMENT

THIS CAUSE came on for trial before a jury on November 14th and 15th, 2001 upon the pleadings filed by the parties herein and

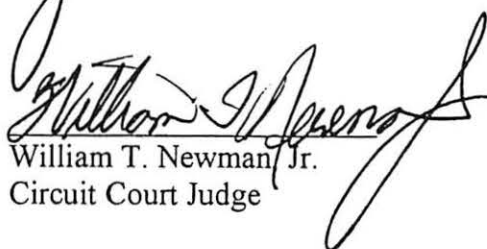
UPON CONSIDERATION of the evidence presented, the argument of counsel, the rulings of the Court and the verdict of the jury, it is,

ADJUDGED, and ORDERED that the verdict of the jury in At Law No. 01-100 in favor of the Plaintiff, PGI, Inc. and against the Defendant Rathe Productions, Inc. in the sum of \$100,000 is set aside for the reasons stated in the Court's letter opinion of January 25, 2002,

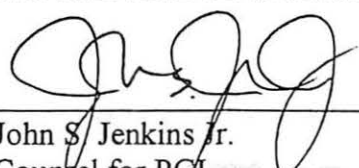
FURTHER ADJUDGED and ORDERED that for the reasons stated in the Court's letter opinion of January 25, 2002, that judgment be and is hereby entered in favor of the Defendant, Rathe Productions, Inc.

AND THIS CAUSE IS ENDED.

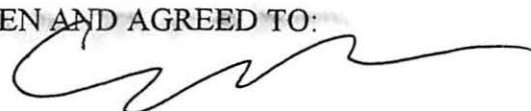
Entered this 15th day of February 2002.


William T. Newman Jr.
Circuit Court Judge

✓ SEEN AND OBJECTED TO FOR ALL THE
REASONS STATED AT TRIAL AND IN THE
MEMORANDA SUBMITTED TO THE COURT
BEFORE AND AFTER TRIAL


John S. Jenkins Jr.
Counsel for PGI

MCGUIREWOODS LLP
1750 Tysons Boulevard, Suite 1800
Tysons Corner
McLean, Virginia 22102
(703) 712-5015

✓ SEEN AND AGREED TO:


Edward J. Tolchin, Esq.
Counsel for Rathe Productions, Inc.

Fettmann, Tolchin & Majors, PC
10615 Judicial Drive, Suite 502
Fairfax, VA 22030

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

FILED

MAR 01 2001

DAVID A. BELL, Clerk
Circuit Court Arlington County VA
By L Deputy Clerk

ODELL, SIMMS & ASSOCIATES, INC.
7704 Leesburg Pike
Falls Church, Virginia 22043

Plaintiff

v.

PRODUCTION GROUP INTERNATIONAL
n/k/a PGI, INC.

Serve: Beverly L. Crump, Registered Agent
11 South Street
Richmond, Virginia 23219

and

RATHE PRODUCTIONS, INCORPORATED

Serve: Secretary of the Commonwealth
Post Office Box 2452
Richmond, Virginia 23218

Defendants

Law No.: 01-171

MOTION FOR JUDGMENT

Plaintiff, Odell, Simms & Associates, Inc. (previously known as Odell, Roper & Simms, Inc.), by Counsel, asks for judgment against Defendants Production Group International and Rathe Productions, Incorporated, and in support hereof, alleges that:

The Parties

1. ODELL, SIMMS & ASSOCIATES, Inc. (OS&A) is a Maryland stock

corporation whose principle place of business is in the Commonwealth of Virginia, and which is in the business of fund raising consulting, among other things.

2. Rathe Productions, Inc. (Rathe) is New York stock corporation located at 555 West 23rd Street, New York, New York 10011. Richard and Robert Rathe are principals in the firm.

3. On information and belief, Rathe is in the business of, among other things, designing and fabricating displays, exhibits and booths, for presentation at exhibitions, conferences and trade shows.

4. Production Group International (PGI) is a Virginia stock corporation, located at 2200 Wilson Boulevard, Arlington, Virginia 22201. Cynthia R. Engel is PGI's President.

5. On information and belief, PGI is in the business of the management and production of, among other things, global events, entertainment, exhibitions, conferences and trade shows.

Jurisdiction and Venue

6. Jurisdiction in the Commonwealth of Virginia is proper pursuant to §8.01-328, *et seq.* Virginia (1950), as amended.

7. Venue in the Commonwealth of Virginia is proper pursuant to §8.01-257, *et seq.* Code of Virginia (1950), as amended.

The Facts

8. On information and belief, on or about May 9, 1997, Rathe and PGI (Rathe/PGI) entered into an arrangement, alternatively described as a strategic alliance, joint

venture, partnership and teaming agreement, to be the exclusive provider of management and production services for the Smithsonian Institution and the "*America's Smithsonian Exhibition*" (ASE)

9. As part of their agreement, Rathe/PGI agreed to perform an in-depth study of the feasibility ("Feasibility Study") of a global tour and exhibition of Smithsonian Institution artifacts ("International Tour").

10. On information and belief, under the agreement Rathe/PGI would be paid to perform the Feasibility Study as follows: (1) if the Smithsonian Institution decided *not to* proceed with the International Tour, the Smithsonian Institution would pay Rathe/PGI a fee of \$250,000.00; (2) if the Smithsonian Institution decided *it would* proceed with the International Tour, Rathe/PGI would absorb the cost of the Feasibility Study, but be entitled to fees and commissions for managing and producing the International Tour.

11. On or about August, 1997, Rathe/PGI agreed to subcontract a portion of the Feasibility Study to OS&A, whereby OS&A would research and report on the feasibility of raising corporate money to support the International Tour. Rathe/PGI agreed to pay OS&A as follows: (1) if the Smithsonian Institution decided *not to* proceed with the International Tour, Rathe/PGI would pay OS&A a fee of \$50,000.00 upon receipt of its fee in the amount of \$250,000.00, plus expenses; (2) if the Smithsonian Institution decided *it would* proceed with the International Tour, OS&A would absorb their fees for producing the Feasibility Study, but be entitled to fees and commissions for fund raising in connection with the International Tour, plus expenses for conducting the Feasibility Study.

12. OS&A rendered the services and produced the product which was agreed

upon on or before January 23, 1998.

13. On information and belief, the first draft of the Feasibility Study, including the analysis produced by OS&A, was completed and presented to the Smithsonian on January 23, 1998.

14. On information and belief, a final draft Feasibility Study was presented to the Smithsonian Institution on or before March 5, 1998.

15. OS&A presented Rathe/PGI six invoices totaling \$7,933.78 for expenses related to the Feasibility Study, from August 26, 1997 through November 14, 1997. OS&A was paid on February 6, 1998 on those invoices.

16. OS&A presented Rathe/PGI invoices for their fees in the amount of \$50,000.00 on August 29, 1997.

17. In a letter dated May 5, 1998 from Darryl Hartley-Leonard, Chairman and Chief Executive Officer of PGI, to John Simms and Robert Odell of OS&A, PGI confirmed the agreement of the parties stating that, "a participation of \$50,000.00 (fifty thousand dollars) will be provided to Odell & Simms by Rathe and PGI upon receipt from the Smithsonian Institution of fees for the feasibility study for an international Smithsonian tour."

18. In a letter dated September 9, 1998 from Cynthia Engel, President of PGI to John Cobert, Director of the Office of Contracting of the Smithsonian Institution, Ms. Engel confirmed the Feasibility Study conclusion that the International Tour was not feasible and presented its invoice for services rendered, including an acknowledgment of OS&A's services.

19. In a letter dated August 16, 1999 from CB Wismar, Executive Vice President of PGI, to Susan Marino, Office of Public Affairs for the Smithsonian Institution, PGI

again requested payment and acknowledged that OS&A was entitled to \$50,000.00 for its services.

20. On information and belief, Rathe/PGI was paid by the Smithsonian Institution on or after August 1, 2000, in the amount of \$250,000.00.

21. In a memorandum dated December 7, 2000, from Richard Rathe of Rathe to John Simms of OS&A, Mr. Rathe acknowledged that Rathe/PGI was paid by the Smithsonian Institution in the amount of \$250,000.00.

22. Because Rathe/PGI received payment in the amount of \$250,000.00 from the Smithsonian Institution for the Feasibility Study, Rathe/PGI is obligated under its agreement with OS&A, to pay OS&A \$50,000.00.

23. OS&A has demanded payment from Rathe/PGI several times, by invoice, verbally, and in writing by letter dated December 14, 2000.

24. Rathe/PGI has not paid OS&A.

25. The agreement between OS&A and Rathe/PGI constituted a contract between those parties.

26. OS&A performed their obligations under the agreement by providing its services and products in support of the Feasibility Study.

27. Rathe/PGI accepted and approved the services and products provided by OS&A on the Feasibility Study without objection or complaint, and included OS&A's analysis in the Feasibility Study.

28. Rathe/PGI breached their obligation when they failed to pay OS&A \$50,000.00 upon Rathe/PGI's receipt of payment from the Smithsonian Institution.

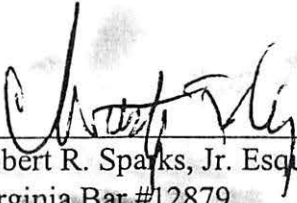
29. Rathe/PGI continues to refuse to make payment for such services.

30. OS&A has been damaged in the amount of \$50,000.00.

WHEREFORE, OS&A asks for judgment against PGI, Inc. and Rathe Productions, Incorporated, jointly and severally, for breach of contract in the amount of Fifty Thousand and 00/100 Dollars (\$50,000.00), together with pre-judgment interest thereon from August 1, 2000 until the date of judgment, and for other relief as this Court considers appropriate.

Respectfully Submitted,
ODELL SIMMS & ASSOCIATES, INC.

By Counsel



Robert R. Sparks, Jr. Esquire
Virginia Bar #12879
Christopher T. Craig, Esq.
Virginia Bar #36983
Herge Sparks & Christopher, LLP
6862 Elm Street, Suite 360
McLean, Virginia 22101
703/848-4700 - telephone
703/893-7371 - facsimile
Counsel for Odell, Simms & Associates

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

ODELL, SIMMS & ASSOCIATES, INC.

Plaintiff

v.

PRODUCTION GROUP INTERNATIONAL
n/k/a PGI, INC.

and


RATHE PRODUCTIONS, INCORPORATED

Defendants

Law No.: _____

AFFIDAVIT

Personally appeared before me, John Simms, President of Odell Simms & Associates, Inc., who being first duly sworn, says: to the best of his knowledge, information and belief, PGI, Inc. and Rathe Productions, Inc. are jointly and severally justly indebted to Odell Simms & Associates, Inc. in the sum of Fifty Thousand and 00/100 Dollars (\$50,000.00) and that the account and invoices which are made a part of the complaint are a true and correct statement of said indebtedness. Moreover, the affiant has reviewed the attached lawsuit and, to the best of his knowledge, information and belief, all of the allegations therein are true and the statements contained therein are incorporated herein by reference.


JOHN SIMMS, President
Odell Simms & Associates, Inc.

Sworn and Subscribed to before me on this 27 day of February, 2001.


NOTARY PUBLIC

My Commission Expires: July 31, 2001

Commonwealth of Virginia,
County of Fairfax

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

ODELL, SIMMS & ASSOCIATES, INC.

Plaintiff,

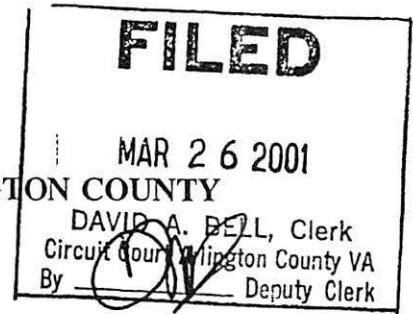
v.

PGI, INC.

and

RATHE PRODUCTIONS, INC.

Defendants.



At Law No. 01-171

GROUND OF DEFENSE AND CROSS-CLAIM

Defendant PGI, Inc. ("PGI"), by counsel, states as follows in support of its

Grounds of Defense and Cross-Claim:

PARTIES

1. Admitted.

2. Admitted.

3. Admitted.

4. PGI admits its is located at 2200 Wilson Boulevard in Arlington, Virginia and that Cynthia Engel is President, but denies it is a Virginia stock corporation.

5. Admitted.

JURISDICTION AND VENUE

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted, except that Rathe Productions, Inc. ("Rathe"), PGI and the Smithsonian Institution ("Smithsonian") agreed that if the Smithsonian decided not to proceed with the International Tour, the Smithsonian would pay Rathe and PGI a fee of \$250,000 to be divided evenly between Rathe and PGI in the amount of \$125,000 each.

11. Admitted, except that Rathe and PGI agreed that if the Smithsonian decided not to proceed with the International Tour, Rathe and PGI would each pay Odell, Simms & Associates, Inc. ("OS&A") \$25,000 upon the receipt and distribution of the \$250,000 Smithsonian's payment to Rathe in the amount of \$125,000 and PGI in the amount of \$125,000.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. PGI admits Darryl Hartley-Leonard wrote a letter dated May 5, 1998 to John Simms. Further, PGI states that the letter speaks for itself and not as Plaintiff may characterize it.

18. PGI admits Cynthia Engel wrote a letter dated September 9, 1998 to John Cobert. Further, PGI states that the letter speaks for itself and not as Plaintiff may characterize it.

19. PGI admits C.B. Wismar wrote a letter dated August 16, 1999 to Susan Marino. Further, PGI states that the letter speaks for itself and not as Plaintiff may characterize it.

20. Admitted as to Rathe and denied as to PGI.

21. PGI does not possess sufficient information to form a belief as to the allegations of Paragraph 21 on that basis, denied the allegation. Further, PGI denies it has received any payment from either Rathe or the Smithsonian Institution for the Feasibility Study.

22. PGI denies it has received any payment from either Rathe or the Smithsonian for the feasibility study. Further PGI states its obligation to pay OS&A \$25,000 arises only upon PGI's receipt of its \$125,000 portion of the \$250,000 Smithsonian payment.

23. Admitted.

24. PGI admits it has not paid OS&A as PGI's obligation to pay OS&A arises only upon PGI's receipt of its \$125,000 portion of the \$250,000 Smithsonian Payment. PGI has not received any payment from either Rathe or the Smithsonian for the Feasibility Study.

25. The allegations of Paragraph 25 call for a legal conclusion to which no response is required. To the extent a response is required, PGI denies the allegations of Paragraph 25.

26. The allegations of Paragraph 26 call for a legal conclusion to which no response is required. To the extent a response is required, PGI denies the allegations of Paragraph 26.

27. PGI admits that OS&A performed services in connection with the Smithsonian's Feasibility Study conducted by Rathe and PGI.

28. The allegations of Paragraph 28 call for a legal conclusion to which no response is required. To the extent a response is required, PGI states its obligation to pay OS&A arises only upon PGI's receipt of its \$125,000 portion of the \$250,000 Smithsonian payment. PGI has not received any payment from either Rathe or the Smithsonian for the Feasibility Study.

29. PGI admits it has not paid OS&A as PGI's obligation to pay OS&A arises only upon PGI's receipt of its \$125,000 portion of the \$250,000 Smithsonian payment. PGI has not received any payment from either Rathe or the Smithsonian for the Feasibility Study.

30. Denied.

All allegations not specifically admitted in Paragraphs 1 through 30 are denied.

AFFIRMATIVE DEFENSES

31. The Plaintiff fails to state a claim upon which relief can be granted.

32. All conditions precedent to PGI's obligations to OS&A, if any, have not been satisfied.

33. Plaintiff has waived its claim.

34. Plaintiff's claim is barred by laches.

35. Defendant reserves the right to assert any additional affirmative defenses which the evidence may suggest.

WHEREFORE, PGI request this Court dismiss OS&A's Motion for Judgment with prejudice and award PGI any other relief the Court deems appropriate.

CROSS-CLAIM

PGI, Inc., by counsel, states as follows in support of its Cross-Claim against Co-Defendant Rathe Productions, Inc.

1. Beginning in the Spring of 1997, Rathe and PGI provided exposition management, logistics, display and financial services to the Smithsonian Institution ("Smithsonian") for "America's Smithsonian Exposition", a traveling museum show which displayed a variety of historic and cultural exhibits in selected cities in the United States ("the Exposition").

2. The Smithsonian had raised an initial capital contribution of forty million dollars from corporate sponsors to support the Exhibition's planned tour of ten cities. After touring five cities, the initial capital contribution was exhausted and the Smithsonian solicited bids for private operation and management of the Exposition.

3. PGI and Rathe submitted a proposal to manage and operate the Exposition and the Smithsonian selected the PGI/Rathe proposal. PGI and Rathe then engaged OS&A to function as the corporate fundraiser to solicit additional corporate sponsorships to continue the Exposition.

4. Existing corporate sponsors were unwilling to continue financial support for the Exposition and additional corporate sponsors were unable to contribute sufficient funding to sustain the Exhibition. As a result, in the Fall of 1997, the Exposition ended after visiting eight of the ten planned locations.

5. PGI invoiced the Smithsonian for services performed managing the Exhibition in Portland, Oregon, Birmingham, Alabama and San Jose, California. However, as the Exposition's finances were exhausted, PGI, Rathe and OS&A were not

reimbursed for direct expenses incurred in producing, managing and executing the Exposition.

6. Although the Exhibition concluded prematurely, the Smithsonian was encouraged by the attendance figures experienced at Exposition locations. As a result, the Smithsonian asked PGI and Rathe to conduct a market study (the "Market Study") examining the feasibility of producing a self-funded and self-sustaining international "America's Smithsonian Exposition" at a cost of \$250,000. OS&A was retained to provide fundraising advice to PGI and Rathe for the Market Study.

7. During the Spring of 1998, PGI, with minimal assistance from Rathe, conducted the Market Study which concluded the risks of an international exposition or festival did not justify the potential rewards to the Smithsonian.

8. PGI Executive C.B. Wismar presented the Market Study findings and recommendation to the Smithsonian's leadership and the results were accepted. After completion and submission of the Market Study, PGI, on behalf of Rathe and OS&A, invoiced the Smithsonian for the study's agreed cost of \$250,000 and also submitted PGI's invoices for the Exposition's management by PGI and Rathe.

9. Despite PGI's demand, the Smithsonian did not pay either the Exhibition's direct expenses or the Market Study invoices.

10. Given the Smithsonian's refusal to pay PGI and Rathe for the Market Study, in the Summer of 1998, PGI's and Rathe's executive leadership met at PGI offices in Arlington, Virginia. At that meeting, Rathe's President, Robert Rathe, and PGI's Chief Executive Officer, Darryl Hartley-Leonard, agreed that Rathe should continue

efforts to collect amounts owed for the Market Study as Rathe had a continuing business relationship with the Smithsonian to produce museum display cases.

11. Robert Rathe also agreed to divide evenly between PGI and Rathe any amount Rathe obtained from the Smithsonian. PGI and Rathe would then pay OS&A from these proceeds for its contribution to the Market Study.

12. Despite receiving payment for the Market Study, Rathe willfully concealed the Smithsonian's payment for the Market Study and deliberately converted PGI's portion of the payment by keeping those funds for Rathe.

13. It was not until December 2000 that Cynthia Engel, PGI's President, learned from John Simms, President of OS&A that the Smithsonian paid Rathe in July 2000 the \$250,000 owed for the Market Study.

14. Upon information and belief, the Smithsonian check for the \$250,000 was made payable to the order of both PGI and Rathe.

15. After learning the Smithsonian paid Rathe the \$250,000, Cynthia Engel called Rathe's Comptroller and demanded Rathe release PGI's funds. Rathe's Comptroller refused to release PGI's portion of the Smithsonian's payment.

16. In addition, Cynthia Engel made a written demand on Rathe to release to PGI \$125,000 representing PGI's portion of the Market Study payment.

17. Despite PGI's demand, Rathe has intentionally and consciously disregarded PGI's right to payment and has repeatedly refused to release PGI's funds.

18. Rathe presently owes PGI a total amount of \$125,000.

COUNT ONE
CONVERSION

19. PGI incorporates the allegations of Paragraph 1 through 28 as if set forth fully herein.

20. By receiving the \$250,000 Market Study payment from the Smithsonian, Rathe exercised control over \$125,000 of funds that belong to PGI's.

21. After failing to tender to PGI the funds the Smithsonian had entrusted to Rathe for PGI, Rathe's continued exercise of control over PGI's \$125,000 was wrongful.

22. Rathe has improperly converted to its own use \$125,000 of PGI's funds and has denied PGI its rightful possession and use of these funds.

WHEREFORE, PGI requests this Court award compensatory damages in the amount of \$125,000, punitive damages in the amount of at least \$250,000, plus interest, attorney's fees, costs and any other relief the Court deems appropriate.

COUNT TWO
ASSUMPSIT

23. PGI incorporates the allegations of Paragraph 1 through 22 as if set forth fully herein.

24. By performing the Market Study, PGI conferred a business benefit on Rathe.

25. Rathe knowingly accepted the benefit by receiving and retaining the Smithsonian's \$250,000 payment for the Market Study performed by PGI and Rathe.

26. PGI had a reasonable expectation of payment for services performed.

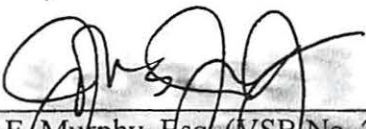
27. Rathe should have reasonably expected to pay PGI for the services performed.

28. Under the circumstances, Rathe's retention of the benefit conferred without paying for its value is inequitable and has damaged PGI in the amount of at least \$125,000.

WHEREFORE, PGI requests this Court award compensatory damages in the amount of \$125,000, plus interest, attorney's fees, costs and any other relief the Court deems appropriate.

PGI, INC.
By Counsel

McGuireWoods LLP
1750 Tysons Boulevard, Suite 1800
McLean, Virginia 22102
Phone: (703)-712-5000
Fax: (703)-712-5050

By: 
Sean F. Murphy, Esq. (VSB No. 28415)
John S. Jenkins, Jr., Esq. (VSB No. 37426)
Counsel for PGI, Inc.

AFFIDAVIT

This day Cynthia Engel appeared before me and stated under oath as follows:

1. I am an adult citizen of the Commonwealth of Virginia over the age of eighteen.
2. I am the President and Chief Operating Officer of PGI, Inc. and I am authorized to make this affidavit.
3. I have read the foregoing Grounds of Defense and Cross-Claim and state the allegations therein are true and accurate.
4. Based on information and belief, co-defendant Rathe Productions, Inc. is a New York corporation with its principal place of business located at 555 West 23rd Street, New York, New York 10011.

PGI, Inc.

By: Cynthia Engel
Cynthia Engel
President and Chief Operating Officer

Subscribed and sworn to before me this 23rd day of March, 2001

[Signature]
Notary Public


Commission Expires: 1-21-2005

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Answer and Cross-Claim was served, via first class mail, postage prepaid on March 26, 2001:

Robert R. Sparks Jr., Esq.
Herge, Sparks & Christopher, LLP
6862 Elm Street, Suite 360
McLean, VA 22101
Counsel for OS&A

Edward J. Tolchin, Esq.
Fettmann, Tolchin & Majors, PC
10615 Judicial Drive, Suite 502
Fairfax, VA 22030
Counsel for Rathe Productions, Inc.



John S. Jenkins Jr., Esq.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

ODELL, SIMMS & ASSOCIATES, INC.)

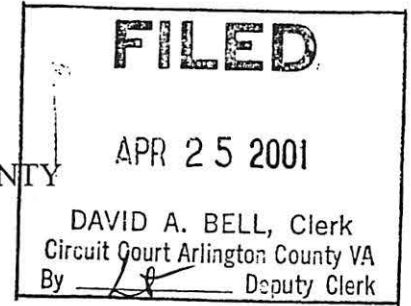
Plaintiff,)

v.)

PRODUCTION GROUP INT'L INC. et al.)

Defendant.)

At Law No. CL01-171



**DEFENDANT RATHE PRODUCTIONS, INC.'S ANSWER AND
GROUNDS OF DEFENSE & CROSSCLAIM AGAINST PGI, INC.**

ANSWER/GROUNDS OF DEFENSE

Defendant Rathe Productions, Inc., answers the Motion For Judgment as follows:

1. Defendant has insufficient information to admit or deny this allegation, but to the extent an answer is required, deny.
2. Admitted, except deny that the address is current.
3. Admitted.
4. Defendant has insufficient information to admit or deny this allegation, but to the extent an answer is required, admit.
5. Admitted.
6. This is a legal conclusion to which no answer is required, but to the extent an answer is required, deny.
7. This is a legal conclusion to which no answer is required, but to the extent an answer

is required, deny.

8. Admitted.

9. Admitted.

10. Denied as pleaded.

11. Denied as pleaded.

12. Denied.

13. Admitted.

14. Admitted.

15. Admitted.

16. Denied.

17. Defendant has insufficient information to admit or deny this allegation, but to the extent an answer is required, deny.

18. Defendant has insufficient information to admit or deny this allegation, but to the extent an answer is required, deny.

19. Defendant has insufficient information to admit or deny this allegation, but to the extent an answer is required, deny.

20. Denied as pleaded.

21. Denied as pleaded.

22. Denied.

23. Admit that payments have been demanded, but deny that the payment demanded is due.

24. Admitted.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Admit that the sought after payment was not made, but deny it was due.

30. Denied.

Defendant denies that Plaintiff is entitled to the relief requested or any relief whatsoever.

All allegations not admitted or denied above to which a response is required are denied.

AFFIRMATIVE DEFENSES

Defendant, in addition to denying that Plaintiff is entitled to the relief requested in Plaintiff's Motion For Judgment or to any relief whatsoever, asserts Plaintiff is precluded from its claim against defendant based on the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by waiver.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by estoppel.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because they fail to state claims upon which relief may be granted.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by laches.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by Plaintiff's own actions in performing additional work and incurring additional costs and charges without first obtaining Defendant's written approval and consent.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the Statute of Frauds.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by a statute of limitations.

EIGHTH AFFIRMATIVE DEFENSE

Defendant reserves the right to assert any additional or further affirmative defenses which may arise in the course of this proceeding.

WHEREFORE Defendant pray that Plaintiff's Motion For Judgment be dismissed with prejudice, that the Defendant be awarded its costs in this matter, and such further relief as the Court deems just and proper.

CROSSCLAIM AGAINST DEFENDANT PGI, INC.

Defendant Rathe Productions, Inc. crossclaims against co-defendant PGI, Inc. as follows:

1. To the extent that defendant Rathe Productions, Inc. is found indebted to plaintiff, co-defendant PGI, Inc. is indebted to Rathe Productions, Inc. for a pro-rata share of the debt as a joint obligor.

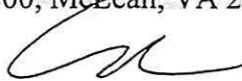
RATHE PRODUCTIONS, INC.
Defendant, By Counsel



Edward J. Tolchin, Esquire VSB#32654
Fettmann, Tolchin & Majors, P.C.
10615 Judicial Drive, Suite 502
Fairfax, Virginia 22030
703-385-9500
703-385-9893 (Facsimile)
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2001, a true copy of Defendant's Answer and Grounds of Defense was sent by first class mail, postage pre-paid, to Robert Sparks, Herge Sparks & Christopher, LLP, 6862 Elm Street, Suite 360, McLean, VA 22101, and John S. Jenkins, McGuireWoods, LLP, 1750 Tysons Blvd., Suite 1800, McLean, VA 22102.



Edward J. Tolchin

V I R G I N I A :

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

PGI, INC.

Plaintiff

v.

RATHE PRODUCTIONS, INC.

Defendant.

At Law No. CL01-100

ODELL, SIMMS & ASSOCIATES, INC.

Plaintiff,

v.

PRODUCTION GROUP INTERNATIONAL
n/k/a PGI, INC.

and

RATHE PRODUCTIONS, INC.

Defendants.

At Law No. CL01-171

FINAL JUDGMENT

THIS CAUSE came on for trial upon the pleadings filed by the parties herein and

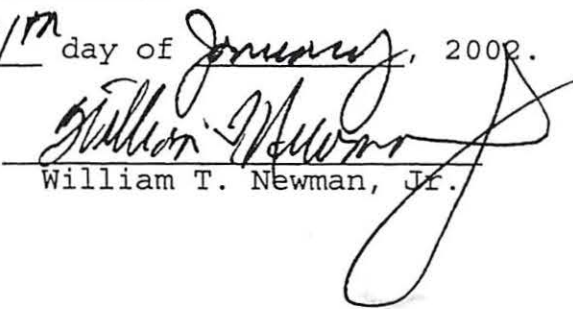
UPON CONSIDERATION of the evidence present, the argument of counsel, the rulings of the Court and the verdict of the jury, it is,

FURTHER ADJUDGED and ORDERED that judgment be and is hereby entered in favor of the Plaintiff, Odell, Simms & Associates, Inc. in the case CL-01-171, and against the Defendant Rathe Productions, Inc. in the sum of \$50,000, plus interest at the judgment rate from January 11, 2002 until paid.

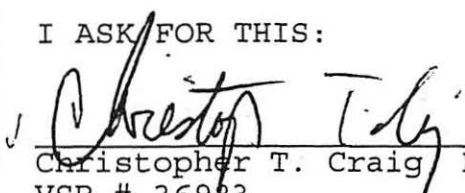
FURTHER ADJUDGED and ORDERED that judgment be and is hereby entered in favor of the Plaintiff, Odell Simms & Associates, Inc. in the case CL-01-171, against the Defendant, PGI, Inc., in the sum of \$0.

AND THIS CAUSE IS ENDED.

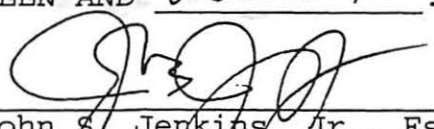
Entered this 11th day of January, 2002.


William T. Newman, Jr.

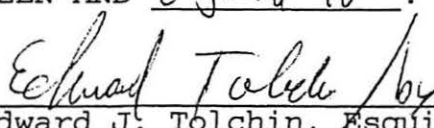
I ASK FOR THIS:


Christopher T. Craig Esquire
VSB # 36983
Herge, Sparks & Christopher, LLP
6862 Elm Street, Suite 360
McLean, Virginia 22101
(703) 848-4700; (703) 893-7371
Counsel for Odell, Simms & Associates, Inc.

SEEN AND OBJECTED TO :


John S. Jenkins, Jr., Esquire
McGuire Woods, LLP
1750 Tysons Boulevard, Suite 1800
McLean, Virginia 2210
Fax No. (703)-712-5292
Counsel for PGI, Inc.

SEEN AND objected to :

 by Christopher T. Craig by agreement
Edward J. Tolchin, Esquire
Fettmann, Tolchin & Majors, P.C.
10615 Judicial Drive, Suite 502
Fairfax, Virginia 22030
Fax No. (703) 385-9893
Counsel for Rathe Productions, Inc.

FILED

1

1 FEB 28 2002

DAVID A. BELL, Clerk
Circuit Court Arlington County VA
Deputy Clerk

V I R G I N I A

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

- - - - - X

PGI, INC.,

Plaintiff,

-vs-

AT LAW NO. 01-100

RATHE PRODUCTIONS, INC.,

Defendant.

- - - - - X

ODELL, SIMMS & ASSOCIATES, INC.,

Plaintiff,

-vs-

AT LAW NO. 01-171

PGI, INC.,

and

RATHE PRODUCTIONS, INC.,

Defendants.

- - - - - X

CLERK
SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

Arlington County Courthouse
Circuit Courtroom No. 10-A
Arlington, Virginia

Wednesday, November 14, 2001

The above-entitled matter came on to be
heard, with a Jury, before the HONORABLE WILLIAM T.
NEWMAN, JR., Judge, in and for the Circuit Court of

Arlington County, in the Courthouse, Arlington, Virginia,
beginning at 10:13 o'clock a.m.

APPEARANCES:

On Behalf of the Plaintiff PGI:

John S. Jenkins, Jr., Esquire
McGUIRE WOODS, LLP
1750 Tysons Boulevard
Suite 1800
McLean, Virginia 22102

On Behalf of the Defendant OS&A:

Christopher T. Craig, Esquire
HERGE, SPARKS & CHRISTOPHER, LLP
6862 Elm Street
Suite 360
McLean, Virginia 22101

On Behalf of the Defendant Rathe:

Edward J. Tolchin, Esquire
FETTMANN, TOLCHIN & MAJORS, PC
10615 Judicial Drive
Suite 502
Fairfax, Virginia 22030

* * * * *

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* * * * *

EVIDENCE ON BEHALF OF PLAINTIFF PGI

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* * *

1 I think this is one that we are going to have
2 to let it fall out where it may and see where the proof
3 falls out and I think that you may -- so, I'm limiting, in
4 the opening statements and the arguments, arguing anything
5 about recoupment.

6 However -- and I understand that you don't
7 intend to. I understand that, but as I said, I am going
8 to have to wait and see how the -- what the proof is, so
9 you may have to make your objections at the appropriate
10 time to see if, in fact, he is offering something that is
11 in the nature of a recoupment.

12 We'll see. We'll see.

13 MR. JENKINS: Thank you, Your Honor.

14 MR. TOLCHIN: Your Honor, we have two issues
15 to raise preliminarily. One is a plea and bar to a
16 cross-claim and this I think is just a housekeeping
17 matter.

18 The way this case arises is that PGI sued
19 Rathe. Then Odell-Simms sued Rathe and PGI. In the
20 Odell-Simms matter, where Odell-Simms sued Rathe and PGI,
21 PGI raised as a cross-claim the -- their Motion for
22 Judgment.

23 Basically they just raised the Motion for

1 Judgment and said this is a cross-claim back against
2 Rathe. And I want to make sure that what goes to the jury
3 is just one thing.

4 I don't think -- I think it would be improper
5 for the jury to hear that there's also a cross-claim in
6 addition to the Motion for Judgment.

7 I think that they are one and the same and the
8 jury shouldn't be misled by thinking there are two claims
9 against Rathe. That there is really only one claim.

10 That's it. That's the issue there and I think
11 it's just a housekeeping matter.

12 MR. JENKINS: Your Honor, our position is
13 there are two separate cases that are consolidated for
14 trial and to that extent, it is a proper cross-claim.

15 MR. CRAIG: Your Honor, they are absolutely
16 two separate claims. You'll find that throughout the day.
17 I don't think that that's a correct reading.

18 MR. TOLCHIN: Well, the pleading is identical.
19 They're verbatim, so -- I'm not saying that Odell-Simms
20 can't place their -- their claim at issue.

21 They ought to be placing their claim at issue,
22 but the jury doesn't -- shouldn't be instructed that they
23 can decide twice on the same issue with respect to --

1 THE COURT: Oh, no, but --

2 MR. TOLCHIN: -- conversion and assumpsit.

3 THE COURT: Sure. Sure. I think that that's
4 clear, but we will deal with that, you know, when it gets
5 time to instructions of the jury.

6 MR. TOLCHIN: Okay.

7 THE COURT: We'll take care of that.

8 MR. TOLCHIN: Okay.

9 The second issue is our Motion in Limine and
10 it deals with the question of an election of remedies.

11 And again, going back to the Motion for
12 Judgment that was filed by PGI; if you look at the Motion
13 for Judgment that was filed by PGI which started this
14 case, you'll see it's a verified motion and there were
15 only two claims raised.

16 No contract claims. Just a claim for
17 conversion and assumpsit. And the assumpsit claim is
18 not -- is simply that Rathe received the benefit and
19 therefore has to pay the value of the services that PGI
20 supposedly provided.

21 Those are the two claims. Now, it is true
22 that in Virginia that you can and you should be pleading
23 in the alternative. You can plead both conversion and

1 assumpsit in the alternative.

2 But, when it comes time for trial, you need to
3 elect and the reason for that is because the law is one
4 hundred percent absolute clear that assumpsit and
5 conversion are inconsistent remedies.

6 We've cited two cases that say precisely that.
7 One is Raven Red Ash Coal Company versus Ball which is 185
8 VA 5-34 and the second one is Schmidt versus Wallinger
9 which is 125 VA 3-61.

10 And those cases and I'll read you the quote
11 from the cases. "Where a person has illegally seized
12 another's personal property and converted it to his own
13 use, the owner may be (inaudible) -- or assumpsit.'

14 "By bringing the action of assumpsit, the
15 owner waives all claim to wrongful taking contention and
16 conversion."

17 That's Raven.

18 Schmidt says, "The action is specifically
19 designating the declaration as assumpsit and that point of
20 action where the plaintiff desired to waive the tort, was
21 appropriate for the recovery of the money.

22 So, if you are pleading assumpsit, you have to
23 waive conversion. If you are pleading conversion, you

1 have to waive assumpsit.

2 You have to elect the remedy and the question
3 is, is when does this election occur? The election has to
4 occur before a case gets tried to a jury.

5 The election has to occur now because the rule
6 in Virginia and I'm reading to you from Michie's
7 Jurisprudence which is a quote actually from Morris versus
8 Scruggs, 147 VA 1-66.

9 It states as follows: "A litigant cannot
10 pursue to judgment or decree two different remedies for
11 his demand. Where one has the choice of two remedies,
12 then he must elect."

13 It's clear in Virginia that conversion and
14 assumpsit are two different, conflicting remedies. He
15 must elect right now.

16 You can't go to the jury on both of them
17 because if you do, then you are allowing (A), a double
18 recovery; and (B), confusion of the jury; and (C), an
19 inconsistency not in the pleading stage where you are
20 allowed to have alternative theories, but at trial.

21 And at trial you cannot have alternative
22 theories. You have to go to the jury on one or the other.
23 So, the election has to be made between conversion and

1 assumpsit.

2 And, therefore, anything dealing with the one
3 that is not elected should be eliminated from the trial
4 and the evidence going to conversion.

5 If assumpsit is elected, then evidence of
6 conversion has to be eliminated from the trial and if
7 conversion is elected as what goes to the jury, then
8 anything dealing with assumpsit has to be eliminated from
9 the trial.

10 MR. JENKINS: May I approach, Your Honor?

11 THE COURT: Yes, sir.

12 MR. JENKINS: Having received the Motion in
13 Limine yesterday afternoon at about 3:00 o'clock, I didn't
14 have an opportunity to get a response filed with the
15 court, but I can certainly briefly just respond.

16 If this case were being tried in 1976, I would
17 agree with Mr. Tolchin. However, it is bring tried in
18 2001 and as of October 1, 1977, the General Assembly in
19 Richmond, passed 8.01-272 which allows us to join contract
20 and non-contract claims for trial.

21 What Mr. Tolchin's Motion in Limine is is a
22 disguised misjoinder motion and 8.01-272 should settle the
23 matter, Your Honor, that we have the express right to join

1 tort claims with contract claims if they have arose from
2 the same transaction or occurrence.

3 In this case, we are alleging that they have
4 arisen from the same transaction or occurrence. That
5 fact, Your Honor, is confirmed by a couple of recent
6 Supreme Court decisions.

7 One is Fox versus Deese and another one,
8 MacLellan versus Throckmorton. But both of those cases
9 stand for the proposition that I'm entitled to plea and
10 I'm entitled to put on evidence on both of PGI's claims.

11 And for that reason the motion should be
12 denied.

13 MR. TOLCHIN: Your Honor, 8.01-272 allows
14 claims both contract and tort, but not inconsistent
15 claims.

16 You can't have an assumpsit and a conversion
17 both presented to the jury because they are inconsistent.
18 One says we have no right to the money and we've stolen
19 the money, in essence.

20 And the other one says, you owe us the money
21 because we've done all this work for you and got the value
22 of the services.

23 The law in Virginia has been absolutely clear

1 for two centuries; that those two are simply inconsistent
2 and the law in Virginia is that there is an election of
3 remedies that has to be made.

4 If this were -- initially -- and before
5 8.01-272, you couldn't sue under contract and tort, that's
6 true. You couldn't sue under contract and tort.

7 And now, -- but you can't sue inconsistently.
8 The Virginia law is clear these are inconsistent remedies.
9 It's not that the causes of action are wrong. That's what
10 8.01-272 -- it's not that the causes of action are --
11 can't be joined.

12 It's that the remedies are inconsistent and
13 because the remedies are inconsistent, you have to have an
14 election.

15 If Mr. Jenkins' reading of 8.01-272 is
16 correct, then there is no election of remedies applicable
17 in Virginia any more and that clearly is not the law.

18 THE COURT: Why don't you address that point?
19 The question of the fact that these are inconsistent
20 remedies.

21 MR. JENKINS: Well, he's talking -- he's
22 speaking to Your Honor about election of remedies, but his
23 motion seeks election of evidence. The two are internally

1 inconsistent.

2 If, at the time the case is in, the Court
3 feels that it is appropriate for PGI to elect, then we
4 want the Court instructed -- or the jury instructed on
5 conversion or on assumpsit.

6 That's one thing. His motion, Your Honor,
7 seeks to force the election of evidence by the election of
8 remedies.

9 MR. TOLCHIN: Well, Your Honor, the reason why
10 I -- no, we're -- we're saying that the evidence has to --
11 that the remedy has to be selected now, because if not,
12 you are going to have evidence presented to the jury which
13 should not be presented to the jury.

14 That's the issue. And that's how we framed
15 our motion. That's exactly how we framed our motion.

16 If Mr. Jenkins is right, he can put on -- he
17 could put on all kinds of evidence saying Rathe
18 Productions, Inc. stole this money.

19 Rathe Productions is horrible, horrible,
20 horrible people and then go to the jury on assumpsit and
21 therefore, -- and therefore have colored their thinking
22 about Rathe Productions on things that are totally
23 irrelevant and never should have come in before the jury

1 because of the election.

2 He has to elect before it goes to the jury.
3 Otherwise, you have an unfair advantage --

4 THE COURT: So, you think the Court should
5 do what? Should the Court, at this point, separate these
6 suits?

7 MR. TOLCHIN: Well, either you need to
8 separate the suits or -- and if it goes to the judgment
9 on one, -- you need to separate them; that's exactly
10 right.

11 And if it goes to judgment on -- he selects
12 conversion, then goes to judgment on a conversion and then
13 res judicata would prevent the assumpsit action.

14 But that's -- that's -- that exactly what
15 happens. You have to elect now. It's the same thing as
16 separating now.

17 It's the same result, but he has to elect now.
18 Otherwise, the jury hears evidence which is immaterial,
19 irrelevant and could be prejudicial.

20 THE COURT: Let's see the case that you have
21 about the inconsistent.

22 MR. TOLCHIN: Sir, I ran out of quarters. I
23 have parts of the case that I've copied.

1 Your Honor, I'm sorry. I gave you the wrong
2 cases.

3 THE COURT: The Court is going to separate at
4 this point the claims and order that an election be made.

5 MR. JENKINS: PGI would like to proceed on its
6 conversion claim.

7 THE COURT: Okay.

8 MR. TOLCHIN: Thank you, Your Honor.

9 THE COURT: All right. Are there any other
10 matters before we have the jury?

11 MR. TOLCHIN: Not from Rathe, Your Honor.

12 MR. JENKINS: Nothing from PGI, Your Honor.

13 MR. CRAIG: Nothing here, Your Honor.

14 (Whereupon, at approximately, 11:05 o'clock
15 a.m., the Jury entered the courtroom and assumed their
16 place in the jury box.)

17 THE COURT: Call the style of the case.

18 CLERK OF THE COURT: PGI versus Rathe
19 Productions, Law 01-100 and Odell-Simms versus PGI, Law
20 01-171.

21 Ladies and gentlemen, as I call your name, if
22 you'd please take a seat in the jury box as the deputy
23 directs you.



* * *

Whereupon

CYNTHIA ENGEL,

a Witness, was called for examination by counsel on behalf of the Plaintiff PGI, and, after having been duly sworn, was examined and testified, as follows:

EXAMINATION ON BEHALF OF PGI

BY MR. JENKINS:

Q Good afternoon, would you please state your full name for the record.

A Cynthia Engel.

Q Miss Engel, where do you work?

A At PGI.

Q What is your job at PGI?

A I am the President and Chief Operating Officer.

Q How long have you been the President and Chief Operating Officer of PGI?

A Four years in January.

Q Prior to coming to PGI and assuming the duties as president, what did you do for employment?

A I -- how do I explain it? I'm a CPA from background and what I did is I would go into companies and I usually work for either investment bankers or large

1 banking institutions or law firms, -- where I would go in
2 and try to, in essence, straighten out the financial
3 situations of the companies.

4 So, I was actually hired by the investment
5 bankers.

6 Q And you mentioned that you have a CPA degree?

7 A Yes.

8 Q When did you obtain your certification as a
9 certified accountant?

10 A I have to think. It will be twenty-five years
11 in January.

12 Q Now, Miss Engel, I am going to get right to
13 the heart of the matter.

14 Did there come a time when PGI became involved
15 with Rathe Productions in the management and production of
16 the American Smithsonian Exhibition?

17 A Yes.

18 Q Do you recall approximately when that was?

19 A It was prior to my coming to the company. In
20 my situation, I came in and reviewed everything.

21 Q Okay; when did you come to the company?

22 A I came in 1990 -- gosh -- January, 1998.

23 Q After you got to PGI and reviewed the business

1 operations of PGI ongoing at that time, was PGI involved
2 with Rathe Productions?

3 A Yes.

4 Q And what was the nature and scope of their
5 involvement; just briefly?

6 A Okay. It was exactly as you all disclosed.
7 That they were -- the two companies were doing work for
8 the Smithsonian for a large event that they were trying to
9 do -- or several, actually, in several cities.

10 Q And what was that event known as?

11 A It was known as the -- gosh -- it had
12 international and national -- tell me the names. I mean,
13 I'm -- I just call it the Smithsonian event.

14 Q Okay; were there two different aspects of the
15 Smithsonian event?

16 A Yes.

17 Q And what were the two different aspects?

18 A One was in the United States and one was
19 international overseas.

20 Q And what was your understanding of the extent
21 of PGI's involvement with respect to the overseas portion?

22 A The overseas portion -- the Smithsonian wanted
23 a feasibility study to determine first if they should go

1 forward, okay?

2 So, PGI pretty much did the bulk of the work
3 and did the presentation for the feasibility study.

4 Q And what was the Smithsonian looking for from
5 that feasibility study?

6 A Well, there were lots of things. There was a
7 book this thick (indicating). I mean, there was a lot
8 involved.

9 It was, where should we go; what should the
10 sites be; what did they think the attendance would be;
11 what would the costs be; and massive insurance matters
12 with taking various and sundry treasures to other cities.

13 And some of them -- do you ship them by sea;
14 ship them by air. I mean, it's long and involved. I
15 mean --

16 Q So, it was a global study which looked at the
17 issues involved in taking the American Smithsonian
18 Exhibition overseas?

19 A Exactly.

20 Q You mentioned that the study was presented to
21 the Smithsonian?

22 A Yes.

23 Q Do you know who did the presentation to the

1 Smithsonian?

2 A It was my understanding that C.B. Wismar did
3 the bulk of the presentation, yes.

4 Q Did the Smithsonian arrive at any conclusions
5 that you are aware of?

6 A I'm -- the only thing I'm aware of is that
7 they decided not to go forward with the event.

8 Q After the conclusion of the presentation of
9 the feasibility study, did PGI ever take efforts to
10 collect the amounts of money that PGI was owed for that
11 work?

12 A Yes, we did.

13 Q Describe briefly some of the things that PGI
14 did in an effort to get paid.

15 A We were supposed to be paid \$250,000 for the
16 feasibility study. So, we sent several bills. We called
17 them. Our CEO called them.

18 I called them. Our CFO called them. I can't
19 recall -- you know --

20 Q Did you communicate to them in writing?

21 A Yes.

22 MR. JENKINS: May I approach the witness, Your
23 Honor?

1 THE COURT: All right.

2 BY MR. JENKINS:

3 Q Drawing your attention to PGI's Exhibit 2,
4 Miss Engel --

5 A Oh, yes.

6 Q -- would you identify that document?

7 A It is a letter that I wrote to Connie -- no.
8 I wrote it to Mr. Cobert with a copy to Connie Newman.

9 Q How do you recognize the letter?

10 A I signed it.

11 Q Is it on PGI letterhead?

12 A Yes.

13 Q And in this letter, what are you asking the
14 Smithsonian for?

15 A To please pay us for the \$250,000 that was
16 owed to us on the feasibility study.

17 Q When did you write this letter to the
18 Smithsonian?

19 A September 9th, 1998.

20 MR. JENKINS: Your Honor, I would move PGI
21 Exhibit 2 into evidence.

22 MR. TOLCHIN: No objection.
23

1 THE COURT: All right, it will be received
2 without objection.

3 (The document heretofore marked
4 PGI Exhibit No. 2, for
5 identification, was received
6 in evidence.)

7 MR. JENKINS: Your Honor, I would like to
8 publish PGI No. 2 to the members at this time.

9 THE COURT: Yes, sir.

10 (Whereupon, PGI Exhibit 2 was published to the
11 jury.)

12 MR. TOLCHIN: For the record, counsel, you
13 used the copy that you have given to the Judge as the
14 official for the record document.

15 MR. JENKINS: Then I believe His Honor and
16 Miss Engel ought to switch books because this one has
17 the -- oh, that one has the original exhibit sticker on it
18 too.

19 MR. TOLCHIN: Thank you.

20 BY MR. JENKINS:

21 Q Now, Miss Engel, let me ask you, after sending
22 the letter to the Smithsonian in September of 1998 asking
23 for payment, did you get paid?

1 A No.

2 Q I would like to then turn your attention to
3 PGI Exhibit 3.

4 A Yes.

5 Q And I'd ask you to identify that document.

6 A Yes.

7 Q What is it?

8 A It is from our CFO at that time, a Nancy
9 Owens.

10 Q To whom?

11 A Mr. Cobert again.

12 Q And how do you recognize that document?

13 A I know Nancy's signature and it's a PGI --
14 it's on PGI letterhead.

15 Q Let me ask you one more preliminary question,
16 what is the date of the document?

17 A October 9th.

18 Q Of what year?

19 A 1998.

20 Q After sending PGI Exhibit 3 to the
21 Smithsonian, did you receive any payment from the
22 Smithsonian?

23 A Not that I'm aware of.

1 MR. JENKINS: Your Honor, I'd move PGI Exhibit
2 3 into evidence.

3 THE WITNESS: No. The answer is no. You are
4 talking about did I get the 323,924?

5 BY MR. JENKINS:

6 Q That's correct.

7 A No.

8 THE COURT: Any objection?

9 MR. TOLCHIN: None.

10 THE COURT: 3 will be received without
11 objection.

(The document heretofore
12 marked PGI Exhibit No. 3,
13 for identification, was
14 received in evidence.)
15

16 MR. JENKINS: Your Honor, may I publish PGI
17 Exhibit No. 3 to the jurors at this time?

18 THE COURT: Yes, sir.

19 (Whereupon, PGI Exhibit No. 3 was published to
20 the jury.)

21 BY MR. JENKINS:

22 Q Now, Miss Engel, during this time period, late
23 summer and early fall of 1998, were you in communications

1 with Rathe Productions concerning collection of the
2 amounts that were owed for the feasibility study?

3 A We were. Are you talking about our company?

4 Q Yes.

5 A Yes.

6 Q And --

7 A Well, one is the feasibility study. The other
8 is the American Tour; two different --

9 Q But my question is, were you talking to Rathe,
10 generally, about the amounts that were owed PGI?

11 A Yes.

12 Q Did there come a time when you had a meeting
13 with Rathe on this subject?

14 A Yes.

15 Q Could you describe for me, briefly, -- when,
16 to the best of your recollection, did your meeting with
17 Rathe occur?

18 A I don't recall the exact date.

19 Q Do you recall the approximate time of year?

20 A In the fall.

21 Q Of what year?

22 A 1998.

23 Q Where did this meeting take place?

1 A In our office.

2 Q And your office is located where?

3 A Across the street.

4 Q What's the address?

5 A Oh, sorry, 2200 Wilson Boulevard, Arlington,
6 Virginia.

7 Q Which is just caddy-corner to the courthouse?

8 A Yes. We have two floors in that building.

9 Q Okay; at this meeting which occurred in the
10 fall of 1998; who attended this meeting at PGI's offices?

11 A Darryl Hartley-Leonard, our CEO. I was there.
12 Mr. Rathe was there. I think his brother was there.
13 Someone was with Mr. Rathe and I think it is his brother.

14 Q Okay.

15 A C.B. Wismar. I can't recall if Nancy Owens
16 walked in and out, but she -- her office is right next
17 door to the conference room and I remember -- I remember
18 Nancy being around.

19 Those are the main people that I recall in the
20 room.

21 Q Okay; so, you mentioned Daryl Hartley-Leonard,
22 the Chief Executive Officer for PGI.

23 A Right.

1 Q Yourself.

2 A Right.

3 Q Mr. Wismar.

4 A Right.

5 Q And Mr. Wismar works for whom?

6 A PGI.

7 Q And what is his title?

8 A He is a Senior Vice-President of the company
9 -- or Executive Vice-President of the company and he is
10 head of business development.

11 Q Okay; and Mr. Richard Rathe --

12 A Yes.

13 Q -- was there?

14 A Yes.

15 Q And there was another individual with
16 Mr. Rathe?

17 A Yes.

18 Q What was the purpose of this meeting?

19 A We were trying to figure out how do we get the
20 Smithsonian to pay us, because if you add these bills up,
21 it's pretty substantial.

22 And the main purpose of that meeting was to
23 discuss, how do we get paid? And if we do get paid, how

1 do we divvy up the funds.

2 Q So what strategy was discussed as an approach
3 to obtain payment from the Smithsonian?

4 A We all felt like that we could get the
5 feasibility study paid for and we knew that we'd both lost
6 a substantial amount of money on the old -- what we called
7 the old bill, so to speak.

8 It cost us a lot more money than anybody
9 anticipated, okay? But, you know, that's the way life is.
10 You tell a client it's a certain price, that's the way it
11 is. And if you spend more than that you lose money.

12 And we felt like if we went to the Smithsonian
13 and said, "Look, this is how much money we've lost --
14 these two companies have lost," and show them, you know,
15 how we spent all this money and that how we didn't make
16 any money then, at least, they would be kind enough -- a
17 nice way to say it -- to pay us for the feasibility study
18 which is the \$250,000.

19 Q Was there any discussion at that time about
20 how the \$250,000 payment would be divided?

21 A Yes.

22 Q What was the -- describe the discussion on
23 that subject.

1 A Well, the feasibility study was really PGI's,
2 but we thought it was very fair that -- because everybody
3 lost money on the first deal, that we would split it like
4 we had always been splitting except for Odell-Simms.

5 And we agreed to pay -- and Odell-Simms was
6 not at the meeting, so -- we agreed to pay Mr. Simms --
7 Mr. Odell Simms -- his company, \$50,000.

8 We would take a hundred and Rathe would take a
9 hundred.

10 Q You mentioned Odell-Simms was not present at
11 that meeting.

12 A Right.

13 Q Did you, after that meeting, have any
14 discussions with somebody at Odell-Simms?

15 A Yes, I did.

16 Q Who did you speak to at Odell-Simms?

17 A I immediately called Odell-Simms after the
18 meeting, because I felt like he should know what was going
19 on, and I said, "We've had a meeting and we have agreed
20 that if we get paid for this feasibility study, we will
21 immediately give you \$50,000."

22 Q And what was Mr. Simms reaction, if any, to
23 that statement?

1 A "Thank you." You know, pretty much and that
2 he wanted to -- we talked about his accounting issues,
3 okay?

4 Did he keep this on his books, because he
5 didn't want to take a huge write-off. So, I said, you
6 know, "We may never get paid, but until they absolutely
7 say no. . ."

8 Because he asked me, is this is an active
9 account and I said, "Until the Smithsonian absolutely says
10 no, I would keep it on your books."

11 So, he said, "Well. . . " We talked about how
12 -- could he send the bills over to my -- to my office,
13 because, you see, we have a corporate accounting
14 department, so bills do not come to me.

15 And I said, "You may send your monthly
16 statement to me. Just send it to me personally every
17 month."

18 And that's what he did and he made his
19 statement \$50,000 and I received a bill almost every month
20 from Mr. Simms.

21 Q Now, was there discussion about division of
22 monies owed for the American Smithsonian Exhibition, if
23 any?

1 A No.

2 Q Okay.

3 A Not that I'm aware of.

4 Q At that time, how much was PGI owed for open
5 invoices on the American Smithsonian Exhibition?

6 A Well, we did a full audit just recently.

7 Q Well, let me just ask you this, as of that
8 time, how much did PGI --

9 A Well, on the books we wrote off around
10 \$224,000 and then we had an entire box of receipts this
11 high (indicating); of expenses this high (indicating) that
12 we did not post to the account, because it would just be
13 ridiculous, so --

14 Q Now, at that time your invoice --

15 A It was about three quarters of a million
16 dollars total.

17 Q And I'll get to that point --

18 A Okay.

19 Q As of that time, how much were you seeking to
20 recover from the Smithsonian in invoices for the American
21 Smithsonian Exhibition?

22 A (No response.)

23 Q I believe it is reflected on PGI Exhibit 2.

1 A You're talking about for the feasibility
2 study; it's \$250,000.

3 Q And were there any other invoices that were
4 open?

5 A Well, we had the \$323,000.

6 Q Okay; now, you mentioned that recently you had
7 an audit done to examine the company's books and records
8 and that based on that audit, you have new information as
9 to the amount of money that PGI lost, if you will --

10 A Right.

11 Q -- in this work for the Smithsonian.

12 A Right.

13 Q After that audit, what did you determine the
14 amount of the loss was?

15 A About three quarters of a million dollars.

16 MR. TOLCHIN: Your Honor, I would object.
17 This information was never disclosed in discovery.
18 Apparently, this is just after the fact.

19 This is after the fact that until recently
20 we've never seen any documentation. This is an
21 out-of-court statement. It's hearsay. She doesn't have
22 any of the documents here.

23 There's a thousand reasons why this can't be

1 allowed.

2 MR. JENKINS: Well, first of all, Your Honor,
3 there were no documents that were prepared that are
4 discoverable.

5 Miss Engel, I believe, if you let me to
6 continue, will lay a foundation as to the source of her
7 testimony today. The numbers she is going to testify to.

8 THE COURT: All right. I'll sustain the
9 objection at this point, but I will let you -- at this
10 point and tell the jury to disregard the last statement,
11 but you can see if you can lay a foundation.

12 MR. JENKINS: Certainly.

13 BY MR. JENKINS:

14 Q Miss Engel, in preparing to testify for court,
15 did you review PGI's financial records to make a
16 determination as to the amount of money PGI lost, if you
17 will, on the Smithsonian work?

18 A Yes.

19 Q What type of documents did you review?

20 A Financial statements, invoices. We went
21 back -- what happened was -- is a lot of stuff was put in
22 storage, because this was such an old bill.

23 And it was really just never pulled out and

1 so, basically, that type of thing which you would normally
2 do.

3 Q Who performed the actual work?

4 A Ellen Mosher.

5 Q Who mashed the buttons on the calculator to
6 arrive at the figure?

7 A You mean pulled all the stuff together?

8 Q Yes.

9 A Ellen Mosher.

10 Q Who did the computations?

11 A You mean added them all up?

12 Q Yes.

13 A I added them up.

14 Q Okay; now, based on your addition of those
15 figures, did you reach any opinion as to how much money
16 PGI lost on the deal?

17 A Yes.

18 Q And how much did you determine the amount of
19 the company's loss was?

20 A Over \$700,000.

21 MR. TOLCHIN: Same objection, Your Honor.

22 THE COURT: Hold on.

23 MR. TOLCHIN: We don't have an expert witness

1 testifying. No expert was identified. In fact, we were
2 told there were no expert witnesses.

3 This is clearly hearsay. We haven't seen any
4 of these bills or anything added up. We can't test it.
5 It's clearly not admissible evidence.

6 MR. JENKINS: I tend to disagree, Your Honor.

7 THE COURT: I'm going to overrule. I think
8 that a witness, with her background, could answer that
9 question.

10 MR. TOLCHIN: Please note my exception, Your
11 Honor.

12 THE COURT: Yes, sir.

13 MR. TOLCHIN: I would like to note that there
14 were practically no witnesses -- or experts were
15 identified in this case.

16 THE COURT: I don't think this is -- well, I'm
17 not going to view her as an expert in the way you did, but
18 I think she -- a woman with her background could answer
19 that question.

20 All right.

21 MR. TOLCHIN: Your Honor, might we ask that
22 all the documents be produced to us?

23 MR. JENKINS: The documents were produced.

1 The documents that Miss Engel relied upon have been
2 produced to Mr. Tolchin.

3 MR. TOLCHIN: Your Honor, I will show you what
4 we have and --

5 THE COURT: Well, I made a ruling that she is
6 entitled to make the statement as to what the amount was.

7 MR. JENKINS: Thank you.

8 BY MR. JENKINS:

9 Q Miss Engel, with the Court's permission, what
10 amount did you determine was owed -- or at least the
11 amount of PGI's loss?

12 A It was over \$700,000. Frankly, I didn't
13 memorize the number. I mean, it was huge.

14 Q But it was in excess of \$700,000?

15 A Yes.

16 Q Now, at the meeting with the individuals from
17 Rathe; that being Mr. Rathe, who is in court today, and
18 another member or employee of his company; was there any
19 discussion that Rathe was owed money?

20 A The \$100,000.

21 Q Were there any additional amounts discussed?

22 A You are talking about when we were in the deal
23 -- when we were in the meeting?

1 Q I'm saying, when you had your meeting with
2 Rathe --

3 A Right.

4 Q -- at the PGI offices, --

5 A Right.

6 Q -- were there discussion, at that time, that
7 any amount of money, other than \$100,000 that you agreed
8 upon, would be due and owing to Rathe?

9 A No.

10 Q Now, after that meeting in -- I believe you
11 testified -- the fall of 1998.

12 When was the next time that you spoke with
13 anybody at Rathe Productions?

14 A Prior to filing this lawsuit?

15 Q Yes.

16 A So, that was about the week before.

17 Q And who did you speak to over at Rathe
18 Productions?

19 A A guy who said he was the CFO and I think it
20 was someone else on the phone. I can't recall.

21 Q What was the purpose of your telephone call to
22 Rathe Productions?

23 A I found out that they received the \$250,000.

1 Q How did you find out that they had received
2 the \$250,000?

3 A Mr. Simms called me and told me.

4 Q Do you recall when Mr. Simms told you that
5 Rathe had been paid the \$250,000?

6 A The same -- the same day that I called the --
7 Rathe's office.

8 Q Do you recall about what month and year that
9 was?

10 A Tell me when we filed the lawsuit? I have a
11 hundred phone calls a day. So, for me to get the dates --

12 THE COURT: All right, that's okay. That's
13 enough.

14 BY MR. JENKINS:

15 Q And if you don't recall, that's fine.

16 A Yeah, right. It was the week before we filed
17 the lawsuit, so it was, you know, very recently.

18 Q Well, let me ask you this, what year did you
19 file -- or did I file on your behalf, the lawsuit against
20 Rathe?

21 A This year.

22 Q So, this was 2001?

23 A Yes.

1 Q And your meeting with the Rathes at the PGI
2 offices, you testified was in August of 19 --

3 A The fall.

4 Q Excuse me.

5 A Right.

6 Q The fall of 1999?

7 A Right.

8 Q So, at any time between the fall of 1999 and
9 the calendar year 2001, did you speak with Mr. Rathe
10 concerning the efforts to recover the money from the
11 Smithsonian?

12 MR. TOLCHIN: I have to object, just to move
13 it a lot faster --

14 THE WITNESS: No.

15 MR. TOLCHIN: -- now we have the statements of
16 the leading questions. It was the fall of '98 is what she
17 testified, not the fall of '99.

18 MR. JENKINS: Excuse me, if I misspoke, Your
19 Honor. I will rephrase the question.

20 THE COURT: All right.

21 BY MR. JENKINS:

22 Q At any time between the fall of 1998, when you
23 had your meeting with the Rathes in the PGI offices here

1 on Wilson Boulevard, and the calendar year 2001, when you
2 filed the lawsuit, did you speak with Mr. Rathe or anyone
3 from his company concerning the amounts owed from the
4 Smithsonian?

5 A I personally did not, no.

6 Q Now, when you spoke to the CFO at Rathe
7 Productions, what did you say to him?

8 A I asked him did they get the check.

9 Q And what was his response?

10 MR. TOLCHIN: Objection, unless he can
11 identify who this person is, it's clearly hearsay.

12 THE COURT: Sustained.

13 BY MR. JENKINS:

14 Q Did you make a demand -- well, let me rephrase
15 the question.

16 Did you make any demands on Rathe Productions?

17 A Yes. I said that I thought they should send
18 us our hundred and send Odell-Simms his fifty.

19 Q Did you receive your hundred?

20 A No.

21 MR. JENKINS: That's all I have for this
22 witness, Your Honor.

23 I tender the witness.

1 THE COURT: All right. At this time it is
2 really right at the 1:00 o'clock hour that I told you I
3 needed to go ahead and take the break.

4 So, ladies and gentlemen of the jury, at this
5 time, we'll go ahead and take the luncheon break.

6 I will direct -- obviously the case has just
7 started, so you haven't heard anything yet, so don't try
8 to talk about it or make any decisions.

9 If you happen to go to lunch with somebody and
10 if you hear anybody talking about the case someplace that
11 you have lunch, I advise you not to listen and that you
12 move away.

13 I'm directing that you be back here at 2:15
14 and at that time, just come on back to the courtroom and
15 as soon as everybody is assembled, we'll get started.

16 With that, go ahead and have a good lunch.

17 * * * * *

18 (Whereupon, at approximately 12:57 o'clock
19 p.m., the hearing in the above-entitled matter was
20 recessed, to reconvene at 2:00 o'clock p.m., that same
21 day.)
22
23

A F T E R N O O N S E S S I O N

(The Court reconvened at approximately 2:35 o'clock p.m.)

THE COURT: Okay, we are ready for the jury.

(Whereupon, at approximately 2:36 o'clock p.m., the jury returned to the courtroom and resumed their place in the jury box.)

THE COURT: Are you ready to resume, Mr. Craig?

MR. CRAIG: Yes, Your Honor.

* * * * *

Whereupon

CYNTHIA ENGEL,
a witness, was recalled for further examination by counsel on behalf of the Plaintiff Odell-Simms, and, after having been duly sworn, was examined and testified further, as follows:

EXAMINATION ON BEHALF OF ODELL-SIMMS

BY MR. CRAIG:

Q Miss Engel, it is your testimony that you came on board around January of 1998?

A Yes.

Q Do you recall, if, in January 1998, when you

1 came on board, -- the International Tour Feasibility Study
2 had been completed by the time you came on board?

3 A No, it was not -- the feasibility study; the
4 foreign?

5 Q Yes.

6 A No.

7 Q When was that study completed to your
8 recollection?

9 A You'd have to ask C.B. Wismar. I'm not
10 certain.

11 Q Do you remember when the International Tour
12 Feasibility Study was presented to the Smithsonian
13 Institution?

14 A It was after I came, as I recall.

15 Q Have you seen a copy of the report?

16 A Yes.

17 MR. CRAIG: Your Honor, I'd like to hand up my
18 document of books on my exhibits.

19 THE COURT: All right.

20 MR. CRAIG: And by stipulation we will allow
21 that several documents will be let in.

22 THE COURT: All right.

23 MR. CRAIG: In fact, I believe all of the

1 Odell-Simms documents but one, have been stipulated to.

2 MR. TOLCHIN: Mr. Jenkins and I still have to
3 talk the other, Your Honor.

4 MR. JENKINS: That's correct.

5 THE COURT: All right.

6 BY MR. CRAIG:

7 Q I'll ask you to turn to Tab No. 23, if I
8 might.

9 A Okay.

10 Q Is that the International Tour Feasibility
11 Study that was presented to the Smithsonian?

12 A It appears to be; in color, bound. You're
13 saying is it a copy of it?

14 Q It's a copy?

15 A Yes.

16 Q And reading from the front cover, what was the
17 date of that report?

18 A March, 1998.

19 Q March 5th, 1998?

20 A March 5th, 1998.

21 Q And who presented this document to the
22 Smithsonian?

23 A It is under my impression that C.B. did.

1 Q Okay; and on the document cover in the
2 lower-right hand corner, what does that read?

3 A "A Joint Venture Report by Rathe-PGI."

4 Q Thank you.

5 At the time that you came on board, what was
6 your understanding of the relationship between Rathe and
7 PGI?

8 A My understanding was they were -- you want to
9 know my personal opinion of what I expected?

10 Q What was your understanding of their
11 relationship?

12 A My understanding was that it was a joint
13 venture and that all expenses would be paid and if there
14 was a profit, it would be split.

15 Q And how about the management of the joint
16 venture; how did you understand the management of the
17 joint venture to be?

18 A PGI had the ability to do all the accounting,
19 so we, in essence, did the majority of the accounting;
20 paid the bills, got the invoices.

21 Frankly, and again, I came as a third person,
22 PGI did the bulk of the work.

23 Q What was your understanding of Rathe's

1 responsibility in the joint venture?

2 A To build the sets.

3 Q To build -- which sets were those?

4 A Whatever sets that needed to be built for the
5 exhibition.

6 Q I see.

7 And what was Rathe's role in the International
8 Tour Feasibility Study?

9 A I don't know what they did in the feasibility
10 study.

11 Q Okay; they were just part of the larger joint
12 venture?

13 A (Nodding head.)

14 THE COURT: Is that yes?

15 THE WITNESS: Yes; I'm sorry. Yes.

16 THE COURT: The court reporter can't take down
17 your nods --

18 THE WITNESS: You're right. I'm sorry.

19 BY MR. CRAIG:

20 Q I want to turn now to the meeting of the fall
21 of 1998. That was your testimony when this meeting
22 occurred.

23 A Right.

1 Q Can you tell us once again, in your words,
2 because I might not have been paying attention entirely,
3 the -- who were the attendees at that meeting?

4 A As I recall Darryl Hartley-Leonard which was
5 our CEO. I was there. Mr. Rathe was there and his
6 brother. C.B. was there and I think Nancy Owens came in
7 and out.

8 But, I could be totally wrong about that, but
9 it is under my impression that I think Nancy was involved
10 in it. It could be because we were discussing numbers.

11 Q Who is Nancy Owens?

12 A She was our CFO at the time.

13 Q Were there any representatives of Odell-Simms
14 there at that meeting?

15 A No.

16 Q What was the purpose of meeting in the fall of
17 1998 with this group?

18 A We were trying to figure out a strategy,
19 because I had sent this bill with "Final Bill before Legal
20 Notice."

21 But -- and that you have to not understand my
22 position -- the company that I came in to go through and
23 fix everything.

1 And on the top of the document I had written
2 "Final Bill before Legal Action," because we couldn't get
3 responses.

4 And a meeting was called with everybody to
5 figure out, how do we get paid? Because we had lost a
6 substantial amount of money.

7 And that's what you do in business. You try
8 to figure out what do you do? So, we had a meeting in our
9 office to discuss, how do we get them to pay us?

10 They had owed us money on the first event, but
11 they still had not paid us on the feasibility study and so
12 we felt like that if they pay us for the feasibility
13 study, but how can we get any more money than just the
14 250.

15 And so, at that meeting, we discussed the
16 strategy of how to do that, because, in essence, they were
17 angry because I had written "Final Notice before Legal
18 Action" on the bill.

19 So, that was the main purpose -- that was the
20 main purpose of the meeting, is how do we get paid? And
21 then, if we did get paid, how we would split the monies
22 up?

23 Q Is it fair to say that there was a consensus

1 agreement that you would get the \$250,000 for the
2 feasibility study?

3 A Oh, yes.

4 Q And was it fair to say that -- you've
5 testified earlier that the split was going to be a hundred
6 thousand for PGI, a hundred thousand for Rathe and fifty
7 thousand for Odell-Simms.

8 Is it fair to say that all the folks in the
9 room agreed that Odell-Simms was due \$50,000?

10 A Yes. If we got paid and when we got paid.

11 Q If you got paid and when you got paid?

12 A Right.

13 Q By whom?

14 A By the Smithsonian.

15 Q And in that room, did it matter whether PGI or
16 Rathe or both were paid at any one time?

17 A No.

18 Q And so, it makes perfect sense that
19 Odell-Simms wasn't involved in that meeting. They
20 weren't part of the joint venture?

21 A That's right.

22 Q Is this -- was this agreement a modification
23 of any kind of any previous agreements between PGI and

1 Rathe?

2 A No.

3 Q Would you characterize this as an attempt to
4 collect the \$250,000 due to you on the feasibility study
5 -- and I'll leave it at that.

6 A No.

7 Q Okay.

8 A I think that the Rathes probably, at the time,
9 were afraid that the 250 would all go to PGI, because we
10 did the work on the feasibility study.

11 So, I think from the Rathe's perspective, they
12 wanted to make sure that everybody was going to be fair --
13 be paid fairly.

14 And I think we were very, very fair. So, I
15 think there was more to it than just that. Now, if -- I
16 do believe that they went to try to get more money, okay?

17 But I believe they wanted to make absolutely
18 sure how that 250 was going to be split up. And I thought
19 we were very honest and fair about it.

20 Q Did you ever meet with this same group or
21 one similar to it to discuss additional collection
22 attempts?

23 A No.

1 Q Not after that day?

2 A No.

3 Q Is it fair to say the next time you had any
4 dealings with anybody from that group was in that late
5 last year telephone calling you described earlier?

6 A That's -- that's correct.

7 Q And that telephone call was with John Simms;
8 is that correct?

9 A Yes.

10 Q Did PGI authorize Rathe to take the lead on
11 collecting the \$250,000?

12 A Yes.

13 Q Do you recall when that was?

14 A No, I don't recall exactly when it was.

15 Q Do you know why you did that?

16 A Yes, sir.

17 Q Why did you do that?

18 A The Smithsonian was mad at us. I wrote "Legal
19 Action" on their bills.

20 Q So, strategically, it was --

21 A And you know what? I'm -- I'm not from
22 Washington. I didn't know that it would make them mad,
23 so --

1 Q Fair enough.

2 Then is it fair to say politically it was
3 better for Rathe to take the lead on collections at that
4 point?

5 A Exactly.

6 Q And that was the consensus of the folks in
7 that room; is that correct?

8 A Yes.

9 Q And at that time, which was sometime in the
10 fall of 1998, there was a consensus in the room that
11 Odell-Simms was due \$50,000 for their work on the
12 International Tour Feasibility Study?

13 A Yes.

14 Q Have you ever been asked, prior to this
15 lawsuit, to take less than your share of the feasibility
16 -- the International Tour Feasibility Study monies?

17 A Never.

18 Q Do you know if Odell-Simms was ever asked
19 that?

20 A No, never.

21 MR. CRAIG: That's all I have, Your Honor.

22 THE COURT: All right, Mr. Tolchin.



* * *

1 the production and management of the U.S. Tour of the
2 American Smithsonian Institution.

3 Q Is it -- on the last page of the exhibit, is
4 it signed?

5 A Yes, it is.

6 Q Who is it executed by from PGI?

7 A It was executed by Mark Sirangelo in May of
8 1997.

9 Q Do you recognize that as Mr. Sirangelo's
10 signature?

11 A Yes, I do.

12 MR. JENKINS: Your Honor, at this time I'd
13 move the admission of PGI Exhibit 1.

14 MR. TOLCHIN: No objection.

15 THE COURT: It will be received without
16 objection.

17 (The document heretofore marked
18 PGI Exhibit No. 1, for
19 identification, was received
20 in evidence.)

21 BY MR. JENKINS:

22 Q Now, Mr. Wismar, what were PGI's and Rathe's
23 responsibilities, in general, with respect to the American

1 Smithsonian Exhibition?

2 A Together Rathe and PGI were charged through
3 this notice with the management of the presentation of
4 American Smithsonian Exhibition as it was presented in
5 various cities throughout the United States.

6 Those management responsibilities included the
7 oversight of the movement of the artifacts that were part
8 of that program into the various venues.

9 Also, the coordination of fund-raising
10 activities because at the time, the Smithsonian had
11 stepped away from financing -- fully financing the
12 traveling exhibition and required that local cities and
13 supporters sponsor it.

14 Q Are those duties and responsibilities spelled
15 out in the Notice to Proceed?

16 A Yes, they are.

17 Q What paragraph would that be found in?

18 MR. TOLCHIN: Your Honor, the document is in
19 evidence. They jury can read it if they really want to.

20 THE COURT: Well, they can, but I'll allow it.

21 MR. JENKINS: The question is to help the jury
22 draw their attention to it.

23 THE COURT: I'll allow it.

1 THE WITNESS: Well, certainly Section One,
2 Management and Production covers that.

3 BY MR. JENKINS:

4 Q Now, did PGI also have responsibilities with
5 respect to the feasibility study that we had talked about?

6 A There is a requirement -- or there is a
7 mention in the Notice to Proceed of a feasibility study
8 that is Section Two.

9 Q Section Two?

10 A Uh-huh.

11 MR. JENKINS: With that, Your Honor, I'd like
12 to publish Exhibit 1 to the members.

13 THE COURT: Yes, sir.

14 (Whereupon, PGI Exhibit No. 1 was published to
15 the jury.)

16 BY MR. JENKINS:

17 Q Now, Mr. Wismar, drawing your attention
18 specifically to the feasibility study, that being Section
19 Two of the Contract.

20 What duties and responsibilities did PGI have
21 with respect to that endeavor?

22 A We were charged to determine, through a
23 feasibility study, the possibility of extending American

1 Smithsonian to an international tour.

2 To take it outside the borders of the United
3 States.

4 Q Did PGI accomplish that?

5 A Yes, we accomplished this study.

6 Q Did PGI have the assistance of Odell-Simms in
7 that regard?

8 A Yes, we did.

9 Q Did PGI also have the assistance of Rathe in
10 that regard?

11 A Rathe Productions were involved, but the bulk
12 of it was done by PGI.

13 Q If you had to estimate a percentage of work
14 done by PGI of the study, what percent would you estimate
15 was accomplished by PGI?

16 A I would say eighty to ninety percent.

17 Q And what would be the percentage contribution
18 of Odell-Simms?

19 A I would imagine ten percent.

20 Q And the percentage contribution from Rathe?

21 A About ten percent would make a hundred.

22 Q Were the conclusions of the study presented to
23 the Smithsonian?

1 A Yes, they were.

2 Q Do you recall about when they were presented?

3 A It would be in March of 1998.

4 Q Who presented the conclusions?

5 A There were representatives of Rathe as well
6 as PGI and I believe that I made the presentation to the
7 Smithsonian, but there were others involved from our team.

8 Q Did there come a time where the Smithsonian
9 shifted the focus of the feasibility study in any regard?

10 A The Smithsonian shifted the focus in terms of
11 their willingness to participate in an extension of the
12 tour.

13 After several meetings and presentations,
14 they determined that the presentation of artifacts would
15 not be well received by the curators in the Smithsonian;
16 having had them on the road for almost two years at that
17 point.

18 And that the Smithsonian suggested that any
19 extension of the tour would be very similar to the
20 American Folk Life Festival which is held every year on
21 the mall.

22 That it would be much more participatory and
23 performance oriented as opposed to archival and utilizing

1 the artifacts from the museum.

2 Q Did you incorporate that into the feasibility
3 study?

4 A We -- we reflected at that point on the
5 viability of that particular idea vis-a-vis the fund
6 raising capability.

7 The -- the cost of supporting a tour like that
8 around the world was going to be serious and without the
9 guarantees of an audience we had to determine whether or
10 not we could raise the money, not only from the venues and
11 from the various cities that would be visited, but also
12 from corporate underwriting.

13 We determined that that was likely not to be
14 the case.

15 Q Now, after the presentation of the feasibility
16 study to the Smithsonian, what conclusions, if any, did
17 they reach?

18 A The Smithsonian, at the point of -- of
19 decision said that they were not interested in presenting
20 artifacts, but only in a folk life and at that point we
21 stepped away from the project not believing that that was
22 going to be a viable product.

23 Q Did you ever make an effort to collect amounts

1 owed PGI for the work performed?

2 A Yes.

3 Q When did that effort begin?

4 MR. TOLCHIN: Your Honor, this is
5 cumulative at this point. We have already heard
6 this from Miss Engel.

7 THE COURT: Try to limit it to things that
8 we've not been through.

9 MR. JENKINS: I will, Your Honor.

10 BY MR. JENKINS:

11 Q Mr. Wismar, when did that begin?

12 A The efforts -- the effort to collect would
13 have begun shortly after the presentations in March-April
14 and in the beginning of May.

15 Q Did you -- well, describe your personal
16 efforts to collect the monies owed.

17 A My involvement -- I am not a financial officer
18 of PGI, nor am I involved in the accounting or banking
19 functions.

20 My involvement was to -- to create some
21 letters to the Smithsonian requesting payment based on
22 contacts that we had had.

23 Q Now, did you ever participate in any meetings

1 to discuss collection efforts with the Smithsonian?

2 A Meetings with the Smithsonian?

3 Q Well, meetings wherein the subject of
4 collection was discussed.

5 A Yes. Yes, I did participate in those
6 meetings.

7 Q Did you participate in the meetings at the
8 headquarters of PGI?

9 A Yes, I did, sir.

10 Q The one in which the Rathes attended?

11 A Yes.

12 Q What was the strategy that was discussed at
13 that meeting, to your recollection?

14 MR. TOLCHIN: Now, Your Honor, this is
15 cumulative. We've heard this before.

16 THE COURT: I'll sustain the objection and
17 say, counsel, just limit it to things that have not been
18 raised before unless you have something particular you
19 want to talk about.

20 MR. JENKINS: Well, Your Honor, if I may, I
21 believe that there will be evidence later in the case that
22 will suggest a different interpretation of what occurred
23 at that meeting, so I believe it's important for the jury

1 to know what each member heard and understood and took
2 away from that meeting.

3 THE COURT: All right.

4 MR. JENKINS: It's a question of
5 interpretation.

6 THE COURT: All right; I'll allow the
7 question.

8 BY MR. JENKINS:

9 Q Mr. Wismar, what was the strategy that was
10 discussed?

11 A The strategy that the -- to the best of my
12 recollection what was discussed at that meeting was the
13 continuing effort to secure the payment of \$250,000 due
14 per the Notice to Proceed.

15 And the corresponding agreement at that
16 meeting on the way in which those funds would be shared
17 once they were received; keeping in mind the fact that
18 there was an agreement that Odell-Simms was owed a certain
19 percentage of the money for their work.

20 Q What was the split of money to be to the best
21 of your recollection?

22 A Fifty thousand dollars was going to be given
23 to Odell-Simms. One hundred thousand dollars each to

1 Rathe Productions and to PGI.

2 Q Do you recall any discussion or commitment at
3 that time that Rathe Productions could retain amounts that
4 it was claiming that it was either owed or --

5 MR. TOLCHIN: Objection; leading and
6 cumulative.

7 THE COURT: To the extent that it is -- well,
8 leading, I'll --

9 MR. JENKINS: I'll rephrase the question, Your
10 Honor.

11 THE COURT: Right.

12 BY MR. JENKINS:

13 Q Did Rathe claim it was owed any additional
14 money at that time?

15 A Not to my recollection.

16 Q Now, did you, at any time, prepare a letter on
17 the subject of the collection efforts?

18 A I'm not --

19 Q And I can rephrase the question to make it
20 more direct.

21 A Thank you.

22 Q Was there a time that you authorized Rathe to
23 do anything on behalf of PGI?

1 A Yes.

2 Q I am going to turn your attention now to PGI
3 Exhibit 15; that being the fourth page.

4 A Okay.

5 Q And I'd ask you, Mr. Wismar, to identify this
6 letter.

7 A This is a letter that was directed by Mr. Rick
8 Rathe and then faxed to me. And I recorded it on PGI
9 letterhead and faxed it to Miss Susan Moreno at the
10 Smithsonian Institution informing Ms. Moreno, who is
11 Counsel at the Office of Public Affairs, that Mr. Rathe
12 and Mr. Richard Mavadie of Rathe Productions were
13 authorized to represent the PGI interests in connection
14 with the payment of the \$250,000 from the Smithsonian.

15 And also, they could represent us in
16 collecting the balance due which we held at that point in
17 excess of \$73,000 from the Smithsonian.

18 Q Now, you indicated that you had communication
19 with Mr. Rathe concerning the language to use.

20 Describe for me what happened in that regard.

21 A I had had a meeting in New York with
22 Mr. Rathe and Mr. Mavadie some weeks before this in
23 which, as a result of the continued frustration that

1 we all felt with the non-payment of the invoices from the
2 Smithsonian, we met in Mr. Rathe's office to discuss how
3 best to approach the Smithsonian in getting that matter
4 resolved.

5 During the course of that discussion,
6 Mr. Rathe suggested that, because of the fact that Rathe
7 Productions had, at that time, ongoing relationships with
8 the Smithsonian in terms of other programs, that he might
9 best be the one who could continue that discussion.

10 I agreed with that and we stepped aside in
11 behalf of one voice as opposed to multiple voices
12 appealing to the Smithsonian.

13 Part of the motivation for that had been
14 the fact that we were in regular contact with the
15 representatives from Odell-Simms, who, of course, were
16 requesting payment for their \$50,000 which was not
17 forthcoming.

18 As a result of that meeting in New York,
19 it is my belief that Mr. Rathe then made contact with
20 the Smithsonian because he then sent me a note, a fax
21 with the text of the letter that you see as part of this
22 exhibit.

23 And which I then recast on PGI letterhead and

1 sent to him in addition to which I sent him some backup
2 information on the individuals from PGI that had worked
3 on the feasibility study, their titles, their job
4 descriptions and the amounts of money that had been
5 paid to them.

6 Q Now, Mr. Wismar, I want to break this up a
7 little; what was the purpose of your letter to Ms. Moreno?

8 A The purpose of the letter was to signify that
9 Mr. Rathe was, in fact, authorized by us to negotiate the
10 payment.

11 Q In your view, did that authorization extend
12 beyond just negotiation?

13 A No. It says, "Authorized to represent the
14 company in connection with the payment." It did not
15 authorize anything beyond that.

16 Q Did it authorize Rathe Productions, in your
17 view, to settle any claims?

18 MR. TOLCHIN: Objection. The letter speaks
19 for itself. Now he is asking Mr. Wismar for legal
20 interpretations.

21 THE COURT: You can ask what, if anything, did
22 it mean, but beyond that, I sustain the objection.
23

1 BY MR. JENKINS:

2 Q Well, does the letter say you are authorized
3 to settle claims?

4 MR. TOLCHIN: Objection.

5 THE COURT: Sustained.

6 What, if anything, does the letter say
7 regarding the settlement of claims?

8 BY MR. JENKINS:

9 Q Mr. Wismar?

10 A Nothing, sir.

11 Q What, if anything, does the letter say
12 regarding retention of monies recovered from the
13 Smithsonian?

14 A Nothing.

15 Q What, if anything, does the letter say about
16 amounts that Rathe Productions may be owed for open
17 invoices?

18 A It says nothing.

19 Q And again, this letter -- the text of this
20 letter cam from whom?

21 A From Mr. Rathe, sir.

22 Q You also mentioned that you provided Mr. Rathe
23 some costing information in a fax transmission.

1 Describe for me why you needed to provide that
2 information to Mr. Rathe?

3 A It was my understanding that the Smithsonian
4 had requested backup information for the amount of time
5 and effort that had been put into the feasibility study
6 and we were supplying that information; as we were told
7 Rathe Productions would, as well.

8 Q And what was the purpose of this information?

9 A It was to support the reason for requesting
10 the \$250,000.

11 Q Do you recall when the last time you spoke to
12 Mr. Rathe or anybody from Rathe Productions was concerning
13 the collections of amounts owed?

14 A I had one conversation with Mr. Rathe after we
15 had been notified by Mr. Simms that Odell-Simms was about
16 to bring suit in the matter.

17 We had received -- Miss Engle had received a
18 letter at PGI from Mr. Simms and she had passed that
19 letter on to me.

20 At that point, I made phone contact with
21 Mr. Rathe. That was the last time that we discussed the
22 matter at all.

23 Q Do you recall when that was?

1 A I would not specifically recall it. It was,
2 I believe, in the fall of last year.

3 Q So, the fall of 2000?

4 A Yes.

5 Q Mr. Wismar, do you have an understanding
6 of how much money PGI is owed for the work performed in
7 connection with the feasibility study?

8 A Yeah, I believe I do, yes.

9 Q What is that amount?

10 A In connection with the feasibility study we
11 are owed \$100,000 of the \$250,000.

12 Q Has PGI been paid?

13 A No, they have not.

14 Q Now, Mr. Wismar, I'd like to turn your
15 attention to -- I believe it's Odell-Simms -- excuse me;
16 Rathe Exhibit 14.

17 MR. JENKINS: May I approach the witness, Your
18 Honor?

19 THE COURT: Yes, sir.

20 BY MR. JENKINS:

21 Q And let me ask you, Mr. Wismar, when was the
22 first time that you saw that document?

23 A The first time I saw this document was last

1 week in my office when you showed it to me.

2 MR. JENKINS: That's all I have, Your Honor.

3 THE COURT: Mr. Craig.

4 EXAMINATION ON BEHALF OF PLAINTIFF ODELL-SIMMS

5 BY MR. CRAIG:

6 Q I'll go backwards in time a little bit to just
7 after the Notice to Proceed.

8 A Uh-huh.

9 Q And you've testified already that Odell-Simms
10 was involved in the project on the International
11 Feasibility Tour -- I should say the International Tour
12 Feasibility Study.

13 How did it come about that Odell-Simms would
14 be involved in this project?

15 A We were -- we, as PGI, were introduced to
16 Odell-Simms at the inception of our involvement in the
17 America's Smithsonian Tour.

18 They were -- my recollection is that they were
19 already in place as fund raisers for the tour itself.

20 And through the good offices of a number of
21 people in Washington, as we became acquainted with the
22 Rathes, we were also acquainted with Odell-Simms and met
23 with them on various occasions as they went about the

1 business of trying to raise money in various cities to
2 bring the tour to those cities.

3 Q So, now is a tour different from the one we're
4 talking about, than the National Feasibility Tour?

5 A Well, the -- the -- we met them in conjunction
6 with the American Tour. They were in charge of fund
7 raising and also in terms of creating the potential for
8 extending the tour domestically.

9 As a result of our involvement with them on
10 the domestic tour, I believe that there was a uniform
11 feeling that they should be involved in also the
12 possibility of research for the international tour.

13 Q And when do you -- do you recall approaching
14 Odell-Simms about being a part of the feasibility study?

15 A I would not have been the one that would have
16 approached them. But it was my understanding that they
17 were part -- I was not the individual who would have done
18 that approach.

19 They were always there. There was never a
20 question.

21 Q Was there a time -- did there come a time when
22 they were actually asked to do the work, the analysis work
23 for the feasibility study?

1 A Could very well be. That would have been by
2 someone else at PGI. Not by me.

3 Q I turn your attention to -- there's a big
4 thick book back of the one you've got --

5 A Uh-huh.

6 Q -- and I'd like you to turn your attention to
7 Tab No. 27 -- 19, I'm sorry, 19.

8 A Nineteen?

9 Q Yes.

10 Does that document look familiar to you?

11 A It is not familiar to me. It's not something
12 that I've seen.

13 Q Okay; do you recall when Odell-Simms -- let me
14 rephrase that.

15 Is it fair to say that Odell-Simms was brought
16 on to do the International Feasibility Tour Study -- their
17 portion of it, sometime after the Notice to Proceed?

18 A Yes. Yes. Certainly, because there was --
19 there was no activity on the International Feasibility
20 Tour until it was noticed in the Notice to Proceed.

21 Q Okay; and what is your recollection of the
22 agreement reached for Odell to do that work -- Odell-Simms
23 to do that work?

1 A I was not privy to any of the negotiations
2 or the commitments that anyone would have made to
3 Odell-Simms.

4 That would have been done by other people
5 within PGI and within Rathe. I became aware of the
6 situation after the fact when the issue of the \$250,000
7 payment became -- brought to my notice.

8 Q You became aware of Odell-Simms's role in the
9 feasibility study?

10 A No. I became involved -- your question, I
11 believe, reflected on their -- their participation and
12 their payment and I was not aware of --

13 Q No. I've misled you then.

14 My question is, when they became -- when you
15 signed them on to do the work; do you recall when that
16 was?

17 A As I say, I would not have been the person
18 that signed them on.

19 Q Okay; did Odell-Simms do the work?

20 A Odell-Simms was part of the research that we
21 took into the -- took into consideration as we looked to
22 the international scene, yes.

23 Q Did they do what they were asked by Rathe and

1 PGI in support of the feasibility study?

2 A As far as I know, the answer is yes.

3 Q And did you include their work in the final
4 product that was given to the Smithsonian?

5 A Yes, I did.

6 Q Was there ever any question as to the quality
7 of their work?

8 A No.

9 Q And just so I'm clear, because I think I mixed
10 myself up there -- your testimony is that you had no
11 understanding of what Odell-Simms payments -- how they
12 were to be paid and when and in what amount?

13 A My -- my response was that I was not the one
14 who would have negotiated the payment schedule or the
15 basis of the payment.

16 I became aware, after the fact, as we looked
17 at the recoupment of the \$250,000 that there was a \$50,000
18 commitment made to Odell-Simms for their participation.

19 Q Do you remember, roughly, when that was?

20 A It would have been late in the year of 1997.

21 Q Do you know who told you?

22 A I was in -- I was in the meeting that we had
23 referred to earlier that -- with the Rathes and with PGI

1 in which it was determined that the \$250,000 should be
2 divided 50-100-100.

3 Q Do you think that meeting was the first time
4 you were aware that Odell-Simms was due 50,000?

5 A I am reasonably convinced that there had been
6 discussions about payments to Odell-Simms. I was not
7 aware of any dollar figure and I believed that that was
8 simply an arbitrary number.

9 Q Okay; what was your understanding of the
10 relationship between Rathe and PGI upon accepting and
11 signing off on the Notice to Proceed?

12 A The Notice to Proceed was predicated or was
13 offered by the Smithsonian on the basis that a joint
14 venture would be created between Rathe and PGI.

15 Q From that point forward, was a joint venture
16 then contemplated through the period that you produced the
17 feasibility study?

18 A To my knowledge, the joint venture was never
19 finalized or memorialized. I am unclear as to how long
20 the negotiations would have gone on to create that joint
21 venture.

22 Q But, essentially, after the Notice to Proceed
23 was signed off on and you went into the project itself, it

1 was still, at that time, contemplated to be a joint
2 venture?

3 A Yes.

4 Q And to the best of your knowledge, Odell-Simms
5 performed under the agreement that they had with Rathe and
6 PGI?

7 A To the best of my knowledge, yes.

8 Q Now, in this meeting that you came to
9 the conclusion as a consensus group that it would be
10 100,000-100,000; 50,000 to Odell Simms; did you see that
11 as a modification of the original agreement with the
12 Smithsonian?

13 A I'm sorry to plead --

14 Q That's all right.

15 A -- I don't quite understand the question.

16 Q Okay; when it was decided as a group that you
17 would endeavor to get the \$250,000 due under the
18 feasibility study and it was also decided, as you've
19 testified that \$100,000 would go to Rathe, \$100,000 would
20 go to PGI and \$50,000 would go to Odell-Simms; did you see
21 that -- view that as a change?

22 A It would be difficult to answer that. I -- I
23 don't know that anyone had ever set out a formula for the

1 proceeds of that \$250,000, so since there was no
2 predecessor decision there couldn't be a change.

3 Q Okay; so all along, in your view, PGI would
4 have been due \$100,000?

5 A No, as I said there was no formula set up
6 prior to that. There was -- there had, to my knowledge,
7 not been an agreement that the money would be divided
8 along any specific line.

9 So, it was always referred to as the \$250,000
10 due for the feasibility study.

11 Q There would be \$250,000 due to the joint
12 venture of PGI and Rathe?

13 A Yes.

14 Q Okay; and any monies due Odell-Simms would
15 just have been in their role as a subcontractor?

16 A That would have been out of my purview to
17 decide. I'm not the person who would have made those
18 decisions.

19 Q Do you know whether PGI has paid Odell-Simms
20 the \$50,000?

21 A To my knowledge, they have not paid
22 Odell-Simms \$50,000.

23 Q Do you know whether Rathe has paid Odell-Simms

1 \$50,000?

2 A To my knowledge, they have not.

3 Q And you said nobody from the joint venture --
4 either side of the joint venture has paid Odell-Simms
5 \$50,000?

6 A To my knowledge, that would be the case.

7 Q I want to turn your attention to -- I want to
8 turn your attention now to Exhibit No. 23, if you will.

9 This is my, Odell-Simms, in the big thick
10 book.

11 A Yes.

12 Q Exhibit No. 23.

13 A Uh-huh.

14 Q And does that document look familiar to you?

15 A Yes, it does.

16 Q What is that document?

17 A That is the printed report that we delivered
18 to the Smithsonian Institution on the proposed
19 international feasibility -- or the proposed international
20 tour.

21 Q And in the upper right-hand corner there's
22 handwriting?

23 A Yes, there is.

1 Q And can you read what that handwriting says?

2 A Yes, I can.

3 Q Would you --

4 A It says Wismar. It's the way I sign my name.

5 Q What does that indicate to you?

6 A That's my copy.

7 MR. CRAIG: I'd like to move this document in,
8 Your Honor.

9 MR. JENKINS: Without objection, Your Honor.

10 THE COURT: Exhibit 19 (sic) will be received
11 without objection. I mean, not 19 --

12 MR. CRAIG: It's 23, Your Honor.

13 THE COURT: -- 23.

14 (The document heretofore marked
15 Odell-Simms Exhibit No. 23, for
16 identification, was received in
17 evidence.)

18 MR. CRAIG: Your Honor, that's all I have.

19 THE COURT: All right; Mr. Tolchin.

20 EXAMINATION ON BEHALF OF DEFENDANT

21 BY MR. TOLCHIN:

22 Q I have just a very few questions.

23 Mr. Wismar, Jessica Peristere worked for you;

*

*

*

1 (Whereupon, at approximately 4:27 o'clock
2 p.m., the jury returned to the courtroom and assumed their
3 place in the jury box.)

4 THE COURT: Your next witness.

5 MR. JENKINS: Miss Susan Engelhardt.

6 * * * * *

7 Whereupon

8 SUSAN FITCH ENGELHARDT,
9 a Witness, was called for examination by counsel on behalf
10 of the Plaintiff PGI, and, after having been duly
11 previously sworn, was examined and testified, as follows:

12 EXAMINATION ON BEHALF OF PLAINTIFF PGI

13 BY MR. JENKINS:

14 Q Would you please state your full name for the
15 record.

16 A Susan Fitch Engelhardt.

17 Q And Miss Engelhardt, where do you work?

18 A I work at the Smithsonian Institution in the
19 Office of Contracting.

20 Q How long have you worked there?

21 A About five and a half years.

22 Q What is your job description at the
23 Smithsonian?

1 A I'm a contract negotiator. I work with the
2 Smithsonian's Museums and Offices to draft, negotiate,
3 execute and administer contracts.

4 Q Do you have any specialized training that
5 helps you in that job?

6 A I do.

7 Q And what is that?

8 A I'm an attorney.

9 Q And when did you become an attorney?

10 A In 1995.

11 Q Have you been a practitioner continuously
12 since then?

13 A Yes, I have.

14 Q Now, do you -- did you have any involvement
15 with PGI and Rathe in connection with the American
16 Smithsonian Exhibition?

17 A Yes, I did.

18 Q What was the basic description of your
19 responsibility in that area?

20 A My responsibility was to draft and negotiate a
21 Notice to Proceed with Rathe and PGI. The Notice to
22 Proceed was to allow Rathe and PGI to begin some immediate
23 work on the next venue of America's Smithsonian.

1 Q And was there an additional area of
2 responsibility for PGI and Rathe in connection with the
3 Notice to Proceed?

4 A There was. It also outlined the general
5 responsibilities of the parties with respect to performing
6 a feasibility study to look into the possibility of
7 bringing a tour similar in size to America's Smithsonian
8 abroad.

9 Q Do you recall approximately when that study
10 was tendered to the Smithsonian?

11 A I believe it was the spring of 1998.

12 Q And after the completion of that study, did
13 there come a time when PGI began an effort to collect the
14 amounts it believed it was owed for that feasibility
15 study?

16 A Yes.

17 Q Did the Smithsonian receive written
18 communications from PGI to that effect?

19 A Yes, we did.

20 Q Did the Smithsonian respond to those written
21 communications?

22 A We did.

23 Q I am going to turn your attention to PGI

1 Exhibit 4. It should be in the binder in front of you and
2 if I may, I could assist you.

3 MR. JENKINS: May I approach, Your Honor?

4 THE COURT: Yes.

5 BY MR. JENKINS:

6 Q Let me just ask you this, what is this
7 (indicating) document; that being PGI Exhibit 4?

8 A This is a letter from John Cobert, the
9 Smithsonian's Contracting Officer to Nancy Owens of PGI.

10 It's a letter that requests written
11 confirmation from Rathe and PGI as to who was authorized
12 to represent the parties for purposes of making a
13 payment.

14 Q When was this letter written?

15 A October 22nd of 1998.

16 Q Does this letter respond to correspondence
17 previously received by PGI on the subject of collecting
18 the amounts owed?

19 A Yes, it does.

20 Q Why did the Smithsonian request confirmation
21 of who would be authorized to represent the companies in
22 connection with the negotiations for amounts owed?

23 A When the Smithsonian initially executed the

1 Notice to Proceed with Rathe and PGI, it was with Rathe
2 and PGI as a joint venture.

3 Subsequent to that, Rathe and PGI informed us
4 that they were not going to be able to form the joint
5 venture.

6 So, in order to make a final payment for any
7 work performed, we wanted to make sure that we had an
8 authorized representative from each party so that we could
9 properly make a final payment.

10 MR. JENKINS: Your Honor, I'd move PGI
11 Exhibit 4 into evidence.

12 MR. TOLCHIN: No objection.

13 THE COURT: All right, Exhibit 4 will be
14 received without objection.

15 (The document heretofore marked
16 PGI Exhibit No. 4, for
17 identification, was received
18 in evidence.)

19 MR. JENKINS: Your Honor, I would publish
20 Exhibit 4 to the members at this time.

21 THE COURT: All right.

22 (Whereupon, PGI Exhibit No. 4 was published to
23 the jury.)

1 BY MR. JENKINS:

2 Q After writing PGI Exhibit 4, that being the
3 letter from Mr. Cobert dated October 22, 1998, did the
4 Smithsonian engage -- or begin to engage in a dialogue
5 with PGI and Rathe concerning the collection of the
6 amounts owed?

7 A I believe with Rathe, yes.

8 Q And what dialogue began with Rathe
9 Productions?

10 A The Smithsonian asked for additional
11 documentation of the expenses -- the amounts claimed for
12 the work performed.

13 Q Now, to the best of your recollection,
14 initially, how much money was Rathe claiming it was owed?

15 A I believe it was around -- around \$330,000.

16 Q And did the Smithsonian believe that all of
17 those charges were proper?

18 A Upon reviewing the documentation, no.

19 Q Now, you indicated that the Smithsonian
20 requested Rathe provide certain information to the
21 Smithsonian?

22 A Yes, we did.

23 Q I'd like to turn your attention to PGI

1 Exhibit 5 in the binder.

2 A Okay.

3 Q Let me ask you this, Mrs. Engelhardt, what is
4 that document?

5 A This is a letter from Richard Rathe to me,
6 dated March 9th of 1999, providing some additional detail
7 to back up the amount claimed.

8 Q And turning your attention to Page 2 of PGI
9 Exhibit 5, what does that table present?

10 A The table shows a breakdown of invoices from
11 PGI, Odell and Simms and then Rathe Productions costs and
12 fees.

13 MR. JENKINS: Your Honor, I'd move Exhibit 5
14 into evidence at this time.

15 MR. TOLCHIN: No objection.

16 THE COURT: Exhibit 5 will be received without
17 objection.

18 (The document heretofore marked
19 PGI Exhibit No. 5, for
20 identification, was received
21 in evidence.)

22 MR. JENKINS: Permission to publish Exhibit 5
23 to the members, Your Honor.

1 THE COURT: Yes, sir.

2 (Whereupon, PGI Exhibit No. 5 was published to
3 the jury.)

4 BY MR. JENKINS:

5 Q I'd like to just -- first of all I'll just ask
6 you, can you see this (indicating)?

7 A I can.

8 Q I'd just like to ask you a few questions about
9 this blowup.

10 THE COURT: Members of the jury, can you see
11 it okay?

12 THE JURY: (A yes response.)

13 BY MR. JENKINS:

14 Q I'd just like to ask you a few questions about
15 Page 2 of this exhibit.

16 What analysis is presented to you from Rathe
17 at the very top of Page 2 of PGI Exhibit 5?

18 A It reads, "An Analysis of the Smithsonian
19 International Tour."

20 Q And who presented this to you?

21 A Rathe.

22 Q Now, the first entry in the top of the chart,
23 what does that represent?

1 A It's a PGI invoice for \$174,522. That appears
2 to be an invoice for PGI work performed on the feasibility
3 study for the international tour.

4 Q And the second entry, what does that reflect?

5 A That's an amount of \$50,000 for Odell and
6 Simms. Again, work performed by Odell and Simms for the
7 international tour.

8 Q And lastly, the third entry for Rathe
9 Productions costs; what does that reflect?

10 A That's \$334,691.10 work performed by Rathe
11 Productions. Again for the international tour.

12 Q Now, the second set of -- the second chart, I
13 would say, it's just below the international tour costs;
14 what do those invoices represent?

15 A Those invoices represent work performed
16 related to the America Smithsonian Exhibition.

17 Q Did Rathe provide any invoices with respect
18 to any work that it performed for the American Smithsonian
19 Exhibition?

20 A No, I don't believe they did.

21 Q Now, after -- after you received Exhibit 5,
22 that being the letter form March 9th, 1999, did you
23 respond to Rathe Productions concerning the claim for

1 amounts owed?

2 A Yes, I did.

3 Q Turning your attention to PGI Exhibit 6, can
4 you identify that document?

5 A This is a letter dated March 18th of 1999,
6 from me to Richard Rathe. In this letter I am requesting
7 additional backup documentation to explain the amount
8 claimed for work performed for the international tour.

9 And, I believe I am also again, requesting
10 written confirmation of who is authorized to represent the
11 parties.

12 Q And turning to -- I guess that would be Page
13 -- the second page of the letter, who are the "cc's" on
14 that letter?

15 A John Cobert, the Smithsonian's Contracting
16 Officer; Constance B. Newman, who was the Smithsonian's
17 Under-Secretary at the time; and Nancy Owens of PGI.

18 Q I notice in the third paragraph that you had
19 discussed the amounts that PGI was claiming for the
20 American Smithsonian Exhibition.

21 What information are you conveying to PGI in
22 that paragraph?

23 A In that paragraph I am stating that the

1 Smithsonian already had copies of PGI invoices related to
2 the America Smithsonian work and the backup documentation
3 for that.

4 Q So, did you require any further additional
5 information as to those expenses?

6 A No, I didn't.

7 MR. JENKINS: Your Honor, I move PGI No. 6
8 into evidence.

9 MR. TOLCHIN: No objection.

10 THE COURT: It will be received without
11 objection, Exhibit No. 6.

12 (The document heretofore marked
13 PGI Exhibit No. 6, for
14 identification, was received
15 in evidence.)

16 MR. JENKINS: I'd like to publish Exhibit 6 to
17 the members of the jury.

18 THE COURT: All right.

19 (Whereupon, PGI Exhibit No. 6 was published to
20 the jury.)

21 BY MR. JENKINS:

22 Q Did there come a time when you received a
23 response from Rathe to your letter of March 18th of 1999?

1 A I did.

2 Q And turning your attention to PGI Exhibit 8 --

3 A Okay.

4 Q -- I'd ask you, what is that document?

5 A This is a letter from Richard Rathe to me in
6 which he is conveying all of the backup documentation that
7 I had requested.

8 Q Turning to Page 6 --

9 A Yes.

10 Q -- of Exhibit 8, does that letter look
11 familiar to you?

12 A Dated August 16th, 1999?

13 Q Yes.

14 A Yes, it does.

15 Q Who sent you that letter?

16 A C.B. Wismar.

17 Q And what does this letter accomplish?

18 A In this letter, C.B. is stating that Rathe
19 Productions is authorized to negotiate on PGI's behalf in
20 order to come to a final payment for work performed.

21 Q What, if anything, does it say about the
22 disposition of the \$250,000 for the feasibility study?

23 MR. TOLCHIN: Objection; the document does

1 speak for itself. He's just asking the witness to read
2 it.

3 MR. JENKINS: I'll withdraw the question, Your
4 Honor.

5 THE COURT: All right.

6 BY MR. JENKINS:

7 Q Based on this letter, did you have an
8 understanding as to who would pay Odell-Simms the \$50,000
9 that Odell-Simms was owed?

10 A Yes.

11 Q What was your understanding as to who would
12 pay Odell-Simms?

13 A Rathe --

14 MR. TOLCHIN: Objection as to relevance.
15 She's not a contractual party here to the dispute and the
16 document does speak for itself.

17 THE COURT: I'll sustain the objection unless
18 you can lay a foundation.

19 MR. JENKINS: I'll withdraw the question, Your
20 Honor.

21 THE COURT: All right.

22 BY MR. JENKINS:

23 Q Now, did you receive any additional staff

1 costing information from Rathe prior to making a
2 determination whether amounts would be allowed or
3 disallowed for the \$250,000 claimed?

4 A Not as to cost. I think I did receive some
5 additional information about meeting dates and attendees.

6 Q And turning your attention to PGI Exhibit
7 No. 9.

8 A Yes.

9 MR. TOLCHIN: Is Exhibit 8 being offered into
10 evidence?

11 MR. JENKINS: Not yet it's not.

12 THE COURT: It has not been.

13 BY MR. JENKINS:

14 Q Do you recognize that document?

15 A I do.

16 Q And how do you recognize it?

17 A This is a letter from Richard Rathe to me.

18 Q And what is contained within Exhibit 9?

19 A Mr. Rathe is providing some additional
20 information that I had requested about specific meeting
21 dates and meeting attendees.

22 MR. JENKINS: I'd move Exhibit 9 into
23 evidence, Your Honor.

1 MR. TOLCHIN: No objection.

2 MR. JENKINS: And 8 as well.

3 MR. TOLCHIN: No objection.

4 THE COURT: All right. Exhibits 8 and 9 will
5 now be received without objection.

6 (The documents heretofore marked
7 PGI Exhibit Nos. 8 & 9, for
8 identification, were received
9 in evidence.)

10 MR. JENKINS: And I'd like to publish 8 and 9
11 to the members of the jury.

12 THE COURT: All right.

13 (Whereupon PGI Exhibit Nos. 8 and 9 were
14 published to the jury.)

15 BY MR. JENKINS:

16 Q Now, after receiving the documentation
17 concerning expenses, what did the Smithsonian do?

18 A We reviewed the information we had received
19 and then we issued a written response to Rathe.

20 Q And when you say, "Written Response," turning
21 your attention to PGI Exhibit 10.

22 Would you identify that document?

23 A Yes, this is a letter from John Cobert, the

1 Contracting Officer to Richard Rathe dated December 2nd of
2 1999.

3 Q Who prepared the text of the letter?

4 A I did.

5 Q And what are you communicating to him in
6 Exhibit 10 generally speaking?

7 A In this letter we are rejecting the payment
8 amount initially requested by Rathe and PGI and we are
9 offering a payment amount of \$192,750.

10 Q And what was the original amount of the claim
11 from Rathe for the feasibility study?

12 A It was \$559,213.10.

13 Q How much did the Smithsonian initially
14 approve?

15 A \$127,153.06.

16 Q Did you -- that being the Smithsonian, also
17 make an evaluation of the appropriateness of American
18 Smithsonian Exhibition charges?

19 A We did.

20 Q And what conclusions did you reach in that
21 regard?

22 A I believe we -- we approved all but
23 approximately \$8,000 of those charges.

1 Q Were any of Rathe's invoices for the American
2 Smithsonian Exhibition included in your review for
3 American Smithsonian Exhibition expenses?

4 A I don't believe so.

5 Q And the information which you relied upon in
6 performing your evaluation; from whom did you receive that
7 information?

8 A We received that information from Rathe.

9 Q Now, turning your attention to Page -- I
10 believe it is 6 of that exhibit, Attachment B.

11 Q What are you communicating in this attachment?

12 A In the attachment I was trying to show a
13 breakdown of how the Smithsonian arrived at the final
14 amount we were offering.

15 MR. JENKINS: Your Honor, I'd move PGI Exhibit
16 10 into evidence.

17 MR. TOLCHIN: No objection.

18 THE COURT: No objection?

19 MR. CRAIG: No objection, sir.

20 THE COURT: All right, Exhibit No. 10 will be
21 received.
22
23

1 (The document heretofore marked
2 PGI Exhibit No. 10, for
3 identification, was received
4 in evidence.)

5 MR. JENKINS: And I'd like to publish it to
6 the members at this time.

7 (Whereupon, PGI Exhibit No. 10 was published
8 to the jury.)

9 BY MR. JENKINS:

10 Q Sticking with Attachment B, the breakdown, I'd
11 like to just go through some of the areas that you
12 evaluated and the conclusions that you reached.

13 First of all, as a predicate, let me ask you
14 this; in this relationship between PGI, Rathe and the
15 Smithsonian, who was the customer?

16 A The customer would be the Smithsonian.

17 Q Now, at the very top of Attachment B.

18 MR. JENKINS: And let me ask, can everybody
19 see this?

20 THE JURY: (A yes response.)

21 BY MR. JENKINS:

22 Q What is the breakdown of the total amount
23 claimed for amounts owed for the feasibility study?

1 A It breaks down to an amount owed to PGI and
2 an amount owed to Rathe and an amount owed to Odell.

3 Q Now, after the break at the top of the page,
4 you indicate that there are some calculations that you
5 have performed.

6 Let me ask you specifically -- for the Rathe
7 calculations you've made some deductions.

8 What deductions did you make for pre-award
9 charges?

10 A Forty-four thousand six hundred dollars.

11 Q And why did you deduct that amount?

12 A Those were charges incurred by Rathe prior to
13 the Smithsonian issuing a contract award.

14 MR. TOLCHIN: Your Honor, I've been sitting
15 here quietly, but can I have a proffer as to what
16 relevance this has to the conversion claim?

17 I just -- I just don't see it.

18 THE COURT: Sustained.

19 Do you want to make a proffer?

20 MR. JENKINS: Yes, certainly.

21 THE COURT: Approach.

22 BENCH CONFERENCE

23 MR. JENKINS: The relevance of this, Your

1 Honor, is the customer -- for the claims asserted by Rathe
2 and they are claiming that they retained money which is
3 owed to them.

4 And our position is it is not owed to them,
5 but it is owed to PGI and to Rathe in some pro-rata
6 portion in accordance with the agreement.

7 And to suggest to the jury that the attorney
8 -- that claims made by Rathe Productions overstated the
9 amounts owed and the adjustments made would allow them to
10 infer that the amounts claimed by PGI were correct
11 amounts.

12 MR. TOLCHIN: Which has nothing to do with any
13 -- any amounts that we're claiming or anybody's claiming.
14 This -- this was even overtaken by events in negotiations.

15 They went up from 192 to 232. This is just a
16 negotiation between two parties. It has nothing to do
17 with the PGI-Rathe dispute.

18 This is totally a -- this goes to the
19 substantive claim that they are not putting on.

20 THE COURT: Anything you want to say?

21 MR. CRAIG: No, Your Honor.

22 THE COURT: Anything else?

23 MR. JENKINS: No, Your Honor.

1 THE COURT: I am going to sustain the
2 objection.

3 OPEN COURT

4 BY MR. JENKINS:

5 Q Moving on, Miss Engelhardt, turning your
6 attention to PGI Exhibit 11.

7 A Yes.

8 Q Let me ask you; what is that document?

9 A This is a letter from Richard Rathe to me
10 dated January 12th of 2000. In it Mr. Rathe is rejecting
11 the Smithsonian's offer to pay a hundred and -- roughly
12 \$192,000.

13 Q Did Mr. Rathe make any counter-proposal?

14 A He does. He makes a counter-proposal of
15 \$315,588.51.

16 MR. JENKINS: At this time, Your Honor, I
17 would move PGI Exhibit 11 into evidence.

18 MR. TOLCHIN: No objection.

19 THE COURT: All right, 11 will be received
20 without objection.

1 (The document heretofore marked
2 PGI Exhibit No. 11, for
3 identification, was received
4 in evidence.)

5 MR. JENKINS: And I'd publish it to the
6 members.

7 THE COURT: All right.

8 (Whereupon, PGI Exhibit No. 11 was published
9 to the jury.)

10 BY MR. JENKINS:

11 Q Now, Miss Engelhardt, calling your attention
12 to the second page of the exhibit, does Rathe Productions
13 make any representations to you as to the distribution of
14 amounts recovered should the Smithsonian agree with the
15 settlement figure?

16 A Not specifically, no.

17 Q Is there a discussion as to the percentages
18 that would be recovered?

19 A Yes, there is.

20 Q And what is the discussion in that regard?

21 MR. TOLCHIN: Your Honor, the document does --
22 it speaks for itself. It says twenty-three percent. I
23 don't think we need the witness to read it.

1 MR. JENKINS: Your Honor, if he is willing to
2 stipulate as to my theory of the numbers, then I'll be
3 happy to move on.

4 THE COURT: I'll overrule the objection and
5 let you ask her.

6 BY MR. JENKINS:

7 Q Miss Engelhardt, do you recall the question or
8 do I need to -- I can rephrase it for you.

9 A Yes, please.

10 Q Was there any representation as to the
11 percentage of distribution of the amounts recovered?

12 A Yes, there is.

13 Q What is that percentage?

14 A It's states that the Smithsonian's offer to
15 reimburse on fifty-percent of the initial \$250,000 fee is
16 only twenty-three percent of the entire amount that Rathe
17 and PGI initially claimed.

18 Q Now, calling your attention to the figure of
19 \$315,588, what does that figure represent in terms of
20 combination of costs or expenses?

21 A That represents an amount of \$250,000 for work
22 performed on the feasibility study and the remainder
23 represents work performed on the the American Smithsonian

1 Exhibition.

2 Q And the \$65,588; whose invoices were those?

3 A Those were PGI invoices.

4 Q Were there any Rathe invoices included in
5 this?

6 A No, there weren't.

7 Q Now, after January 12th of 2000, did you have
8 any further discussions with Rathe Productions concerning
9 the amounts owed for the International Feasibility Study?

10 A We did.

11 Q And what were the general nature of those
12 discussions?

13 A We rejected Rathe's counter-offer of
14 approximately \$350,000 and again restated our initial
15 offer of roughly \$192,000.

16 Q Did you ask for any analysis from Rathe in
17 deciding whether to settle the matter?

18 A No, we did not.

19 Q Did you ask for any supplemental information
20 concerning a comparison of the Smithsonian's offer and
21 Rathe's offer?

22 A Yes, we did.

23 Q Turning your attention to PGI Exhibit 19, and

1 I'd just ask you, what is that document?

2 A This is a letter from Rathe to John Cobert
3 and to me. It provides a breakdown of the initial
4 amount Rathe requested and the amount the Smithsonian
5 offered.

6 And it further breaks that down into
7 components. An amount for America's Smithsonian work;
8 an amount due to Odell, Roper, Simms and the balance
9 remaining which would then be split fifty-fifty between
10 Rathe and PGI.

11 MR. JENKINS: Now, Your Honor, I'd offer
12 Exhibit 19 into evidence at this time.

13 THE COURT: Any objection.

14 MR. CRAIG: None here.

15 MR. TOLCHIN: No, Your Honor.

16 THE COURT: All right, Exhibit 19 will be
17 received without objection.

18 (The document heretofore marked
19 PGI Exhibit No. 19, for
20 identification, was received
21 in evidence.)

22 MR. JENKINS: I'd publish it to the members.

23 THE COURT: All right.

1 (Whereupon, PGI Exhibit No. 19 was published
2 to the jury.)

3 BY MR. JENKINS:

4 Q Miss Engelhardt, I'd like to go through --
5 we'll go through these sort of page by page.

6 What was the purpose of requesting comparison
7 accounting between the Smithsonian's offer and the Rathe
8 offer?

9 A John Cobert and I had a phone conference with
10 Richard Rathe in which he suggested that the parties meet
11 half way essentially in order for Rathe, PGI and Odell to
12 each receive at least some reduced payment.

13 We requested, at that point, that Mr. Rathe
14 submit that request to us in writing and the results of
15 that request was the letter that you see here
16 (indicating).

17 Q Now, in the chart that is displayed in the
18 middle of the page, under either RPIs amount or under,
19 "SI last offer;" is there an amount allocated for
20 American's Smithsonian Exhibition billings?

21 A Yes, there is.

22 Q Is there an amount due Odell-Roper?

23 A Yes, there is.

1 Q Under either scenario, how much is Odell-Roper
2 owed?

3 A Fifty thousand dollars.

4 Q And then, is there an analysis of what is to
5 happen to the balance of the money remaining under either
6 scenario?

7 A There is.

8 Q What is that analysis?

9 A That Rathe and PGI would each receive half of
10 the balance.

11 Q Now, the second page of the letter also
12 discusses what would happen in the event of a reduced
13 payment.

14 What representation did Rathe make to you as
15 to what would happen if there were a reduced final
16 payment?

17 A That each of the parties, meaning Rathe, PGI
18 and Odell would each receive some reduced amount.

19 Q And who were the "cc" addressees on that
20 letter?

21 A C.B. Wismar, Ed Tolchin, and Bob Odell.

22 Q Do you know who Mr. Wismar is?

23 A I do.

1 Q Who is he?

2 A He -- at least at the time, worked for PGI.

3 Q Do you know who Mr. Odell is?

4 A No, I do not.

5 Q Do you happen to know who Mr. Edward Tolchin
6 is?

7 A I do.

8 Q Who is that?

9 A He is Rathe's attorney.

10 Q Do you see him in court today?

11 A I do.

12 Q Now, Mrs. Engelhardt, after receiving PGI
13 Exhibit 19, were there any negotiations further concerning
14 resolving the amounts owed for the feasibility study?

15 A Briefly, yes.

16 Q And describe for me, briefly, what those
17 negotiations were.

18 A The Smithsonian had received consent from the
19 Smithsonian's Under-Secretary to offer a final payment
20 amount of \$250,000 to settle the matter.

21 We conveyed that to Rathe and Rathe agreed.

22 Q Now, was there a settlement agreement executed
23 in this regard?

1 A There was.

2 Q Turning your attention to PGI Exhibit 15, do
3 you recognize that document?

4 A I do.

5 Q How do you recognize it?

6 A I drafted it.

7 Q And what is the document?

8 A It is a settlement agreement between the
9 Smithsonian, Rathe and PGI.

10 Q And what does this agreement represent?

11 A This provides for the Smithsonian to make a
12 final payment of \$250,000 for work performed on both the
13 International Tour Feasibility Study and America's
14 Smithsonian.

15 Q Turning your attention to Page 3 of the
16 exhibit, who executed the exhibit on behalf of the
17 Smithsonian?

18 A John Cobert.

19 Q Who executed the exhibit on behalf of Rathe
20 Productions?

21 A Richard Rathe.

22 Q And who executed it on behalf of PGI?

23 A Richard Rathe.

1 Q Did you speak with anybody at PGI prior to the
2 execution of this agreement?

3 A No, I did not.

4 Q Why didn't you?

5 A Because we had received the letter from C.B.
6 Wismar which stated that Rathe was authorized to negotiate
7 on PGI's behalf.

8 Q Now, did you ask Rathe whether or not they had
9 talked to PGI about this settlement agreement?

10 A No, I did not.

11 Q Why not?

12 A Because PGI had been copied on all
13 correspondence we had received to date.

14 Q Do you know whether or not PGI actually
15 received that correspondence?

16 A No, I do not.

17 MR. JENKINS: Your Honor, I move Exhibit 15
18 into evidence.

19 MR. TOLCHIN: No objection.

20 THE COURT: All right, 15 will also be
21 received without objection.
22
23

1 (The document heretofore marked
2 PGI Exhibit No. 15, for
3 identification, was received
4 in evidence.)

5 MR. JENKINS: I'd publish that to the members
6 of the jury.

7 (Whereupon, PGI Exhibit No. 15 was published
8 to the jury.)

9 BY MR. JENKINS:

10 Q Was there another settlement agreement
11 executed after PGI Exhibit 15?

12 A There was.

13 Q And describe for me the circumstances
14 surrounding the execution of that second settlement
15 agreement.

16 A Shortly after executing the settlement
17 agreement, it was brought to my attention that there
18 was a -- there were two typographical errors on the
19 first page.

20 Those errors were that PGI was left out of the
21 introductory paragraph and the "Now, therefore" clause.
22 So, I made those changes and sent Rathe a second revised
23 settlement agreement for their signature.

1 Q With respect to PGI Exhibit 15, the settlement
2 agreement that was first executed, did you send a copy to
3 PGI?

4 A No, I did not.

5 Q Why not?

6 A Because, at that point, we were negotiating
7 solely with Rathe.

8 Q Did you expect Rathe to do that?

9 A Yes.

10 MR. TOLCHIN: Objection, not really relevant.

11 THE COURT: I'm going to overrule that. I'll
12 allow her to answer the question.

13 BY MR. JENKINS:

14 Q I think the answer to the question was --

15 A Was yes.

16 Q Now, turning your attention to PGI Exhibit 16.

17 A Okay.

18 Q Is this the second settlement agreement?

19 A It is.

20 Q When was it executed by Mr. Rathe?

21 A August 29th of 2000.

22 MR. JENKINS: I'd offer Exhibit 16 into
23 evidence, Your Honor.

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MR. TOLCHIN: No objection.

THE COURT: All right; it will be received without objection.

(The document heretofore marked PGI Exhibit No. 16, for identification, was received in evidence.)

MR. JENKINS: I'd publish that to the members.

(Whereupon, PGI Exhibit No. 16 was published to the jury.)

BY MR. JENKINS:

Q Did you send a copy of the settlement agreement to PGI?

A No, I didn't.

Q Why not?

A Again, because we were authorize to negotiate with -- solely with Rathe at that point in time.

Q Did you expect Rathe Productions to take care of that?

MR. TOLCHIN: Same objection.

MR. JENKINS: May I be heard, Your Honor?

THE COURT: I'm waiting.

MR. JENKINS: One of the elements of

1 conversion is wrongfulness and effort to conceal? The
2 fact that they received a payment from PGI is certainly
3 instructive on the question of wrongfulness.

4 THE COURT: Overruled.

5 BY MR. JENKINS:

6 Q Between the time that you opened settlement
7 negotiations with Rathe Productions in about March of
8 1999, and the time that the settlement actually occurred
9 in July of 2000, did you speak to anybody at PGI?

10 A I don't believe so, no.

11 Q Did you feel you needed to?

12 A No, I didn't.

13 Q Who were you looking to to take care of that
14 for you?

15 A Rathe Productions.

16 MR. TOLCHIN: Your Honor, it's not only
17 objectionable. It's cumulative at this point.

18 THE COURT: At this point it is.

19 MR. JENKINS: That's fine, Your Honor.

20 THE COURT: Okay.

21 BY MR. JENKINS:

22 Q Did you issue a check to Rathe Productions?

23 A We did, yes.

1 Q And turning to PGI Exhibit 14, is that a copy
2 of the check that the Smithsonian issued to Rathe
3 Productions in the amount of \$250,000?

4 A It is.

5 Q When was that check issued?

6 A July 25th of 2000.

7 MR. JENKINS: Your Honor, I'd move for the
8 admission of PGI Exhibit 14.

9 MR. TOLCHIN: No objection.

10 THE COURT: All right; 14 will be received
11 without objection.

12 (The document heretofore marked
13 PGI Exhibit No. 14, for
14 identification, was received
15 in evidence.)

16 MR. JENKINS: Publish that to the members,
17 Your Honor.

18 THE COURT: All right.

19 (Whereupon, PGI Exhibit No. 14 was published
20 to the jury.)

21 BY MR. JENKINS:

22 Q Did you also receive an invoice from Rathe
23 Productions in connection with the settlement?

1 A I did.

2 Q I turn your attention to PGI No. 13.

3 Is that the invoice you received?

4 A Yes.

5 Q Who requested this invoice?

6 A I requested the invoice.

7 Q Why did you?

8 A It's standard Smithsonian procedure for our
9 accounting office to issue a payment. They must receive
10 an invoice in order to do so.

11 MR. JENKINS: I'd move the admission of PGI
12 Exhibit 13, Your Honor.

13 MR. JENKINS: No objection.

14 THE COURT: It will be received without
15 objection.

16 (The document heretofore marked
17 PGI Exhibit No. 13, for
18 identification, was received
19 in evidence.)

20 MR. JENKINS: May I publish to the members?

21 THE COURT: Yes, sir.

22 (Whereupon, PGI Exhibit No. 13 was published
23 to the jury.)

1 BY MR. JENKINS:

2 Q Miss Engelhardt, I noticed in the middle
3 of the invoice it states the purpose of the settlement
4 agreement.

5 What is the purpose of the settlement
6 agreement according to the invoice prepared by Rathe
7 Productions?

8 A It reads "Settlement agreement for
9 International Tour."

10 Q What is the amount?

11 A Two hundred and fifty thousand dollars.

12 Q To the best of your recollection, what was the
13 amount that the Notice to Proceed provided for the payment
14 for the feasibility study?

15 A Two hundred and fifty thousand dollars.

16 Q When entering the settlement agreement with
17 Rathe Production, did Rathe make any representations to
18 you as to the disposition of that money?

19 A Not at that time, no.

20 Q Did they make a representation at any other
21 time?

22 A During the phone conference that John Cobert
23 and I had with Mr. Rathe, yes.

1 Q What representation was made?

2 A That each of the parties would receive some
3 reduced amount.

4 Q Have you learned subsequent to that telephone
5 conversation whether that has happened?

6 A I have learned that that has not happened.

7 MR. TOLCHIN: Objection, now they are asking
8 for hearsay.

9 THE COURT: Sustained.

10 MR. JENKINS: That's all I have, Your Honor,
11 and I tender the witness. Thank you.

12 THE COURT: All right; Mr. Craig.

13 MR. CRAIG: Thank you, Your Honor.

14 EXAMINATION ON BEHALF OF PLAINTIFF ODELL-SIMMS

15 BY MR. CRAIG:

16 Q Hello, Miss Engelhardt, I'm Chris Craig and
17 represent Odell-Simms in this matter.

18 To the best of your recollection, at the
19 beginning of this time, when this Notice to Proceed was
20 prepared and executed, what was the relationship between
21 Rathe and PGI as far as the Smithsonian was concerned?

22 A They had proposed to us as a joint venture.
23 I believe, at that time, they had not yet formally formed

1 the joint venture.

2 Q At one time -- I noticed in looking at the --
3 the settlement agreement you say almost the same thing.
4 That no joint venture was formed.

5 At what point did you learn that no joint
6 venture agreement had been entered into?

7 A I don't remember exactly. I believe it was in
8 the fall of the year that they began performing the work.
9 It may have been '97.

10 Q Fall of '97; can you remember more
11 specifically than that?

12 A No, I can't.

13 Q And did you have, as -- in your position in
14 the Smithsonian, did you have any direct interaction with
15 Odell, Simms and Associates?

16 A No, I did not.

17 Q Did you have any -- did the Smithsonian have
18 any reason to believe that Odell, Simms and Associates
19 failed to perform their portion of the agreement; their
20 agreement?

21 A No, I did not.

22 Q Did either Rathe or PGI represent to you that
23 they had negotiating power on behalf of Odell, Simms and

1 Associates?

2 A Not directly, no.

3 Q I'd like to turn your attention then to --
4 back to -- it's the -- it says PGI No. 19. If I could
5 turn your attention to that.

6 A Okay.

7 Q In the chart there is a line that says that
8 the amount due Odell-Roper is \$50,000 and that falls under
9 both the Rathe Productions as well as the SI last offer.

10 What does that mean to you?

11 A The Smithsonian did not reject that charge.

12 MR. CRAIG: I have no further questions.

13 THE COURT: All right, Mr. Tolchin.

14 EXAMINATION ON BEHALF OF DEFENDANT RATHE

15 BY MR. TOLCHIN:

16 Q Hello, Miss Engelhardt, how are you?

17 You don't know anything about the internal
18 agreements between Rathe and PGI as to the disposition of
19 this money, do you?

20 A No, I don't.

21 Q And you don't know anything about Rathe
22 Productions billings to PGI for the American Smithsonian
23 Tour that may have been included in PGI's billings to the

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1 (Whereupon, at approximately 5:17 o'clock, the
2 jury retired from the courtroom.)

3 MOTION TO STRIKE

4 MR. TOLCHIN: Your Honor, we'd move to strike
5 the evidence and ask that judgment be entered in favor of
6 Rathe Productions on the claim of PGI's conversion claim
7 now that they have put on their case.

8 The theory of their case is not contract.
9 They are not suing based upon a contract. They are not
10 suing based either on that they did work and there was
11 money due for the work.

12 They are suing based upon a single tort
13 theory, conversion. They are asking for damages and they
14 are asking for punitive damages.

15 That's what they are asking for in their
16 Motion for Judgment. Now, if you look in their Motion for
17 Judgment and I'll address the punitive damages issue
18 first.

19 Your Honor, as you know, under Wellsettler
20 from Virginia Law, you have to be able to provide evidence
21 of actual malice.

22 Not even inferred malice, pending malice; not
23 even bad faith; but actual malice. And malice is defined

1 as in the Cammark Corp. versus Hailey, as "Willful
2 wrongdoing beyond the mere breach of the duty imposed
3 by a contract."

4 And it's defined in jury instructions as
5 "Sinister or corrupt motive such as hatred, personal
6 spite, ill-will, or a desire to injure the plaintiff.

7 Now, they've rested their case. They
8 have presented three witnesses. The last one was
9 Miss Engelhardt who had absolutely no information about
10 the internal dealings of the parties.

11 The first one was -- I'm sorry; the second one
12 was Mr. Wismar who simply stated that he didn't remember
13 an agreement. That's all he stated.

14 He didn't even say that he didn't know that
15 there was an agreement. He had no recollection. I think
16 his exact words were -- I wrote them down as he said them.

17 His exact words were "Not to my recollection."
18 That's the only thing that he testified about and
19 Miss Engel testified that she thought she was owed the
20 money.

21 But she also hasn't testified with respect to
22 any sinister or corrupt motive such as hatred, personal
23 spite, ill-will or desire to injure the plaintiff.

1 They should have sued us in contract. They
2 should have sued us in breach of an agreement. They chose
3 not to.

4 But, because they chose not to, they are stuck
5 with what it is that they pled in their Motion for
6 Judgment and the evidence that they tried to present to
7 the jury.

8 And they tried to make this into a tort case,
9 so they could have punitive damages. They have not shown
10 the actual malice needed to get punitive damages.

11 They didn't put on any evidence and we ask
12 that that part of the Motion for Judgment be stricken.

13 Additionally, we ask that the entire Motion
14 for Judgment be stricken because they are suing again, not
15 for contract, but they are suing for conversion.

16 The definition of a conversion is, "Any
17 wrongful exercise or assumption of authority over
18 another's goods depriving him" -- or it, I guess, "of
19 their possession and any act of dominion wrongfully
20 exerted over the property and denial of the owner's right
21 or inconsistent with. . ." --

22 The law is clear that when a check is written
23 to someone and they put the check in to evidence -- and

1 it's written to Rathe Productions, Inc. -- it's their
2 exhibit.

3 When a check is written to someone, it's that
4 person's money. And when that person takes that check and
5 cashes it, he's not assuming authority over somebody
6 else's property.

7 The check is written to him, to Rathe
8 Productions, Inc. When that check is written and Rathe
9 Productions, Inc. cashes it, it's their money.

10 Now, they may have an agreement on the side.
11 We say the agreement is one thing. They could have said
12 the agreement was something else, but they chose not to go
13 on that theory.

14 They chose to say that by taking that \$250,000
15 and cashing that check, putting it in to the account, --
16 putting it in to Rathe Productions' account, that
17 constituted conversion of PGI's money.

18 You cannot, as a matter of law, -- because the
19 law is clear that when a check is written to someone, it's
20 that person's money.

21 It may be, again, that they have an agreement
22 that says after the check is cashed, -- they may have an
23 agreement that says it should be disbursed in various

1 ways, but if it is not disbursed in the way -- as agreed,
2 that becomes a breach of contract.

3 It does not become conversion. It simply
4 becomes a breach of agreement. The conversion had to take
5 place when that money was taken.

6 The money was taken when the check was cashed
7 and that check was written to Rathe. It was not written
8 to Rathe-PGI.

9 Indeed, if you look in their Motion for
10 Judgment, they tried to avoid this issue because in the
11 Motion for Judgment what they pleaded is -- in Paragraph
12 18, they pleaded "Upon information or belief, the
13 Smithsonian check for the \$250,000 was made payable to the
14 order of both PGI and Rathe."

15 That's how they tried to avoid this law in
16 order to get within the conversion claim.

17 But the evidence they presented was not that
18 it was written to both PGI and Rathe, because it wasn't.
19 It was written to Rathe.

20 So, when that check was cashed, which was the
21 only point that conversion could occur, because that's
22 when the money was taken, that was Rathe's money.

23 Rathe had no obligation under a conversion

1 theory to give the money to PGI because Rathe had put it
2 into their account.

3 They had an obligation. It was a contractual
4 obligation to split the money after that, but that can't
5 be conversion.

6 That can be a breach of contract, but they
7 chose not to sue for breach of contract. They never even
8 pled a breach of contract in their Complaint -- in their
9 Motion for Judgment.

10 Now, the authority for that, if you look at
11 Comeux versus First Union National Bank, Credit Corp.
12 versus Kaplan and United Leasing Corp versus Thrift
13 Insurance Corp.

14 The cites are -- Thrift-United Leasing is 247
15 VA 2.999. The Credit Corp versus Kaplan case is 198 VA 67
16 and the Comeux, C-O-M-E-U-X versus First Union National is
17 a Virginia Circuit case out of Richmond in, I believe,
18 February of 2001. A brand new case.

19 They are the cases that, (A), define what
20 conversion is; but, (B), make it clear that when a check
21 is written to someone it's that person's money and he can
22 cash it.

23 And, indeed, you know that from just plain old

1 common sense. If I write you a check, that's your money.

2 You have the right to cash it. That's what
3 the Code says; that's what everything says. It's your
4 money.

5 Now, if you have an obligation to disburse
6 that money later on, it's not conversion if you don't. It
7 may be a breach of contract, but it cannot be conversion
8 as a matter of law.

9 So, we'd ask that the evidence of PGI be
10 stricken. There's no punitive -- there's no evidence of
11 actual malice, so punitive damages has to go.

12 And there's certainly is no evidence of
13 conversion here. There may be evidence of a breach of
14 contract, but that's not what they pled and it's not what
15 they are asking the jury to come with.

16 MR. JENKINS: Your Honor, obviously we take
17 an entirely different view. First of all, we have
18 adequately, not only pled a conversion, but also proven
19 a conversion.

20 Conversion is defined as "The wrongful
21 exercise or assumption of authority, personally or by
22 procurement, over another's property depriving him of
23 possession of the property."

1 I'm not alleging that they converted the
2 check, Your Honor. I've alleged that they converted the
3 settlement proceeds from the American Smithsonian
4 Exhibition Tour.

5 The fact that it was transmitted by check
6 or actual cash dollars or wire transfer doesn't change
7 the fact that we have alleged conversion of those funds
8 which rightfully belong, at least in some portion, to PGI.

9 So, we have put on sufficient evidence that
10 there is an agreement and that PGI had a property interest
11 in at least \$100,000 of that settlement proceeds.

12 That Rathe received that. That Rathe retained
13 that and that despite PGI's demand to pay over, they did
14 not pay over and as a result PGI has been deprived of the
15 use of that property since July of 2000.

16 Secondly, Your Honor, as to the question of
17 punitive damages, the issue of punitive damages is
18 certainly at issue.

19 There is sufficient evidence for the jury to
20 find that the -- Rathe Productions Company has acted with
21 spite towards PGI by receiving and retaining the money
22 and, thereafter, remaining quiet about it in an effort to
23 hide or conceal the fact that it retained the money.

1 There's sufficient evidence both as to the
2 conversion and as to the punitive damages claim and for
3 that reason, Your Honor, we ask that the Court deny the
4 Motion to Strike.

5 THE COURT: Do you have anything you wish to
6 say, Mr. Craig?

7 MR. CRAIG: No, sir, Your Honor.

8 THE COURT: All right; with regards to the
9 Motion to Strike the punitive damages claim, the Court is
10 going to sustain that motion.

11 I believe -- I don't believe that there has
12 been sufficient evidence to go forward to the jury on the
13 issue of punitive damages.

14 There just does not -- there just hasn't been
15 that evidence there.

16 The Court will take it under advisement as to
17 your Motion to Strike the rest of the case with regards to
18 conversion.

19 It's questionable, I agree. However, I am
20 going to let it go forward. You will be allowed to renew
21 your motion, of course, at the conclusion of the case.

22 Okay; at this time we are going to go ahead
23 and call the jury. I'll tell them that we will be

1 resuming tomorrow morning at 9:30.

2 As I've instructed counsel, have your -- go
3 ahead and get your instructions worked out between you so
4 that you can tender them to the Court at sometime before -
5 - so I can at least get an idea of what we have
6 to do with regards with the jury.

7 And obviously with regards to this ruling, you
8 can take out anything regarding punitives at this time.

9 (Whereupon, at approximately 5:26 o'clock
10 p.m., the jury returned to the courtroom and resumed their
11 place in the jury box.)

12 THE COURT: All right, ladies and gentlemen,
13 at this time I am going to let you go for the evening. I
14 am going to direct that you return to this courtroom
15 tomorrow morning at 9:30.

16 And as soon as everyone has been assembled, we
17 will get started right around 9:30. Have a good evening.

18 Again, as you go home tonight, don't worry
19 yourself about this case until tomorrow morning when we
20 will assemble again.

21 Have a good evening.

22 * * * * *

V I R G I N I A

IN THE CIRCUIT COURT OF ARLINGTON COUNTY A 2002

- - - - - x
PGI, INC.,

Plaintiff,

-v-

RATHE PRODUCTIONS, INC.,

Defendant.

- - - - - x
ODELL, SIMMS & ASSOCIATES, INC.,

Plaintiff,

-v-

PGI, INC.,

and

RATHE PRODUCTIONS, INC.,

Defendants.

- - - - - x

AT LAW NO. 01-100

Consolidated with
AT LAW NO. 01-171

Circuit Courtroom 10A
Arlington County Courthouse
Arlington, Virginia

Thursday, November 15, 2001

The above-entitled matter came on to be heard,
with a jury, before the HONORABLE WILLIAM T. NEWMAN, JR.,
JUDGE, in and for the Circuit Court of Arlington County,
in the Courthouse, Arlington, Virginia, beginning at 9:30
o'clock a.m.

FILED

DAVID A. BELL, Clerk
Circuit Court Arlington County VA
By *[Signature]* Deputy Clerk



APPEARANCES:

On Behalf of PGI, Inc.:

JOHN S. JENKINS, JR., ESQUIRE

On Behalf of Odell, Simms & Associates,
Inc.:

CHRISTOPHER T. CRAIG, ESQUIRE

On Behalf of Rathe Productions, Inc.:

EDWARD J. TOLCHIN, ESQUIRE

* * * * *

C O N T E N T S

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
JOHN SIMMS	7	-	-	-
By Mr. Jenkins	-	40	-	-
By Mr. Tolchin	-	48	-	-
DAVID BENNETT	54	-	-	-
By Mr. Jenkins	-	-	-	-
By Mr. Tolchin	-	63	-	-
RICHARD RATHE	69	-	172	-
By Mr. Jenkins	-	114	-	-
By Mr. Craig	-	153	-	-
DARYL HARTLEY-LEONARD	188	-	-	-
By Mr. Craig	-	-	-	-
By Mr. Tolchin	-	194	-	-
CYRIL WISMAR	198	-	-	-
By Mr. Craig	-	-	-	-
By Mr. Tolchin	-	-	-	-

* * * * *
E X H I B I T S

FOR IDENTIFICATION IN EVIDENCE

Odell-Simms' Exhibit No. 17	-	39
Odell-Simms' Exhibit No. 27	-	17
Odell-Simms' Exhibit No. 29	-	22
Odell-Simms' Exhibit No. 32	-	29
Odell-Simms' Exhibit No. 33	-	35
Odell-Simms' Exhibit No. 34	-	39
Rathe Productions' Exhibit No. 1	-	90
Rathe Productions' Exhibit No. 5	-	88
Rathe Productions' Exhibit No. 13	-	98
Rathe Productions' Exhibit No. 14	-	100
PGI's Exhibit No. 20	-	204

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* * *

1 Whereupon

2 JOHN SIMMS

3 a witness, was called for examination by counsel on behalf
4 of Odell, Simms & Associates, Inc., and after having been
5 previously duly sworn by the Clerk of the Court, was
6 examined and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. CRAIG:

9 Q Good morning.

10 A Good morning.

11 Q Please state your name for the record.

12 A It's John Martin Simms.

13 Q Mr. Simms, where are you employed?

14 A Odell, Simms & Associates, Inc.

15 Q What's your position at Odell-Simms?

16 A I'm President and CEO.

17 Q What is your jurisdiction? What are your
18 duties at Odell-Simms?

19 A General management, direction of the company,
20 negotiating contracts, all financial matters, including
21 collection of debts.

22 Q What's your background?

23 A I have a twenty-five year background in

1 marketing and data process -- database management, and I
2 am -- I have a college degree and also a law degree.

3 Q What's the nature of the business of Odell-
4 Simms?

5 A We're in a variety of marketing activities,
6 but principally the area of fund raising and corporate
7 sponsorship.

8 Q Did there ever come a time when you became
9 aware of a corporation called Rathe Productions,
10 Incorporated?

11 A Yes.

12 Q When did you first become acquainted with
13 Rathe Productions, Incorporated?

14 A I would expect that I probably became aware of
15 them for the first time in the winter of 1997. It might
16 have been at the end of '96, but I don't recall exactly.

17 Q On what occasion did you become aware of Rathe
18 Productions, Incorporated, in the winter of '96 or '97?

19 A There was discussion regarding the assistance
20 that we might give to the Smithsonian with the finishing
21 out of their domestic tour of the America's Smithsonian.

22 And we knew of the involvement of Rathe
23 Productions in that process and that there were

1 discussions about finishing out the tour and possibility
2 of an international tour, that that was under
3 consideration by the Smithsonian.

4 Q Have you ever become aware of a company called
5 PGI, Incorporated?

6 A Yes. It was about the same time.

7 Q Under what circumstances did you become aware
8 of PGI, Incorporated?

9 A The same in that they would also be involved
10 in the conclusion of the domestic tour, and that -- that
11 they would be partners with Rathe Productions in the
12 possible international tour that would follow.

13 Q Were you ever asked -- Odell-Simms, I mean --
14 was Odell-Simms ever asked to be a participant in that
15 international feasibility study tour -- feasibility study?

16 A Yes, we were. We were formally asked in
17 August of 1997. That was when we were given the contract
18 to perform our duties for the international feasibility
19 study.

20 Q Could you describe the circumstances
21 surrounding that offer to be a part of the feasibility
22 study?

23 A We were called to a meeting at PGI's offices,

1 located right here in the Rosslyn area, Arlington area,
2 and at that meeting we were told that Rathe/PGI had been
3 given a Notice to Proceed -- I believe was the terminology
4 by the Smithsonian -- to conduct the feasibility study,
5 and that we were being asked to conduct a portion of the
6 study that had to do with the feasibility of raising the
7 corporate sponsorship dollars that might make it possible,
8 or some portion of it possible.

9 Q Do you recall who was at that meeting?

10 A Yes. Mark Sirangelo, who was at that time the
11 President of PGI; Doug Ducate, who I believe was a Senior
12 Vice President, and was, I think, probably had overall
13 charge of this matter for PGI; and C.B. Wismar.

14 On our part, Bob Odell, who is the Chairman of
15 our company and my partner was present, David Bennett, and
16 Tony Lynch.

17 Q At that meeting, what was it that Odell-Simms
18 was asked to do in support of this project?

19 A Well, it was explained to us that there would
20 be a number of aspects to the feasibility study.

21 And some of those that we had -- we would not
22 be participating in or needed for would be the decision
23 about what the markets were that the tour might go to;

1 what the themes might be; what artifacts might be
2 displayed and have the greatest appeal; how it would be
3 presented; how they would deal with security issues, all
4 those kinds of things.

5 Our piece of it was more narrowly focused in
6 contacting a number of corporations who might have an
7 interest in participating to -- who might see themselves
8 in a position to benefit by having their corporate name
9 associated with an international tour of artifacts, and to
10 contact them and conduct interviews by phone and in person
11 to discuss the matter with them and get their feedback as
12 to their interests and in what portion of that tour they
13 might be interested in various markets, if they had an
14 interest in participating in one in London but maybe not
15 one in Paris or Berlin, all those kinds of issues, and at
16 what level they might be willing to support it
17 financially.

18 Q Were you asked to provide periodic reports or
19 anything along those lines?

20 A Yes, we were. However, the time frames for
21 this whole study were quite short.

22 Q What was the time frame for the study as you
23 recall?

1 A Well, this meeting occurred sometime in the
2 early part of August of 1997, and we'd made our final
3 submission in October of 1997 as I recall.

4 So it was really just a period of weeks for us
5 to conduct these studies. This study and some of the --
6 some of the work was actually done, the interviews in
7 London and Berlin, so we really had to hit the road to get
8 this process done.

9 Q Did you have a deliverable or a product that
10 you had to produce?

11 A Yes. We had a written submission which
12 itemized the companies who were contacted and the
13 substance of the interviews and the results of those, and
14 then a summary of the information with our own
15 recommendations about the findings and the feasibility of
16 raising money to do the tour.

17 And it's my understanding that was also --
18 that was incorporated into the final report. It's a
19 separate tabbed chapter without edits.

20 Q What was the agreement in terms of
21 compensation for Odell-Simms?

22 A We were told that the partners, Rathe and PGI,
23 had an understanding, with the Notice to Proceed with the

1 Smithsonian, that they were to be paid a sum of money to
2 conduct the feasibility study in the case that the
3 decision was made for the international tour not to be
4 conducted.

5 In other words, they were given the
6 opportunity to do the international tour in the case that
7 the Smithsonian decided to move forward with it which
8 would be of much greater value than the value of doing the
9 study, and we were -- we were told that we would be paid
10 \$50,000 in the case that there was a decision by the
11 Smithsonian not to conduct the study -- not to conduct the
12 international tour, and in the case that it was decided by
13 the Smithsonian to conduct the international tour that we
14 would have the right to negotiate a contract to do all the
15 fund raising and corporate sponsorship for that tour,
16 which would be of much greater value than \$50,000.

17 Q So you would forego any fee if the tour went
18 forward and presumably recoup?

19 A Right. From fees and commissions for the
20 actual fund-raising work.

21 Q How about expenses? How were expenses dealt
22 with in just conducting the feasibility tour -- the
23 feasibility study, excuse me?

1 A Yes. Our travel and out-of-pocket expenses
2 were billed to the partnership and reimbursed.

3 Q They were reimbursed?

4 A Yes.

5 Q To the best of your recollection, did Odell-
6 Simms perform under this agreement?

7 A Yes, we did completely and on time, and we
8 have never heard from either one of the partners any word
9 of complaint about the work that was done, and I don't
10 think -- I do not think there was any, and I know that in
11 our conversations in a subsequent meeting with the
12 Undersecretary at the Smithsonian, they were also pleased
13 with the portion of the work that we had done.

14 Q You spoke with the Undersecretary?

15 A I spoke with Connie Newman, who, at the time,
16 was Undersecretary of the Smithsonian. I think I met with
17 Ms. Newman sometime in February or very early March of
18 1998, and she was very complimentary, and David Bennett
19 and I were both present at that meeting.

20 Q Going back to the meeting of August, you place
21 it around August of 1997 -- there should be a large book,
22 hopefully -- yeah, it's gray.

23 A Gray?

1 Q If you will turn to Tab Number 27.

2 Do you recall, Mr. Simms, whether at this
3 meeting in August of 1997, whether there was any sort of
4 documentation of that meeting?

5 A Yes. The document that is Exhibit 27 was
6 provided to us by PGI in that meeting.

7 Q Do you see some handwriting on this document?

8 A Yes. These are my notes from that meeting,
9 and this is my copy of that document.

10 Q In the upper right-hand corner, there's some
11 scribblings.

12 Can you describe what that is?

13 A Well, in the upper right-hand corner, I have
14 indicated the date of the meeting and the participants on
15 PGI's side, which were -- it's noted C.B., Doug, and Mark.
16 That's Doug Ducate, Mark Sirangelo, and C.B. Wismar.

17 Q What is the scribbling towards the bottom?

18 A Uhm --

19 Q Is that your handwriting?

20 A Yes, this is all my handwriting, and it would
21 be -- it would have been a note from a conversation that
22 day that the tour would be conducted over possibly a two-
23 year period, that there would be as many as nine cities,

1 excluding Japan, and I guess that might be added, and that
2 there might be as much as \$80 million in sponsorship money
3 needed to conduct the tour.

4 And then a variety of itemized notes, I guess,
5 which would have been as following the discussion dealing
6 with the issues of artifacts, and which destinations, and
7 which corporations might be interested in various markets,
8 and what events might be conducted that might be in
9 conjunction with the -- with the exhibit that the
10 corporations might be interested in participating in and
11 sponsorship issues.

12 There's some longhand division in the lower
13 right-hand corner, and I don't know what that means. It
14 might have been --

15 Q Fair enough.

16 A It might have been some calculation of fee or
17 some other matter. I don't know.

18 Q This document seems to have, at the top, tasks
19 and a compensation section. You've testified already
20 about the compensation that you expected to receive in
21 agreement to do this work and the work that you agreed to
22 perform.

23 Does this document accurately represent the

1 agreement that you went forward with at that time?

2 A Yes, it does.

3 Q At that meeting in --

4 MR. CRAIG: Actually, I'd like to move this
5 document into evidence.

6 MR. TOLCHIN: No objection.

7 MR. JENKINS: No objection, Your Honor.

8 THE COURT: It will be received without
9 objection.

10 (The document heretofore
11 marked Odell-Simms' Exhibit
12 No. 27 for identification was
13 received in evidence.)

14 BY MR. CRAIG:

15 Q Mr. Simms, when you were asked to come to that
16 meeting and presented with this document discussed, was
17 that the first time that you were approached about working
18 on the international feasibility study?

19 A No. We had had conversations with Rathe and
20 PGI beginning in probably the early spring, or maybe the
21 late spring -- I don't exactly remember the time frame --
22 of '97.

23 And we were told by them that there would be

1 an RFP issued by the Smithsonian Institution that they
2 were -- they would be responding to, and that they were
3 interested in us participating in the international tour
4 if it were to occur and wanted to know of our interest,
5 which we indicated that we were interested, and that we
6 had submitted at some point in that along the way, to
7 Rathe Productions information about us in the form of a
8 brief proposal of our suitability or capability to do that
9 work.

10 Q Place that in time.

11 A That would have been probably sometime in May
12 of '97 when we made that offering. Then --

13 Q What was it again that you were doing?

14 A We were requested to submit a statement of our
15 capability to do the work on the international tour to
16 Rathe Productions.

17 Q Who asked you to do that?

18 A It was in all probability Rick Rathe, but
19 Robert might have been involved in that, his brother.

20 Q They asked you to put out some specifications
21 on what Odell-Simms was capable of doing if they were to
22 be asked to do the feasibility study?

23 A That's right.

1 Then in June, I believe it was, we were
2 forwarded -- they forwarded to us a request for proposal
3 which they asked us to formally respond to.

4 And I remember at that time, we were concerned
5 about that because we had been under the impression that
6 we were going to be part of this had they moved forward,
7 and apparently they were circulating an RFP to other
8 corporate sponsorship entities for that work, and we were
9 concerned about that.

10 Q What was your concern?

11 A Well, that -- this came out of the blue and
12 that we didn't know that they were going to be soliciting
13 proposals from any other entities, or that there might be
14 others involved in that process, and that at that time, we
15 had, you know, an expectation of being involved should
16 the -- should the Smithsonian decide to go forward and
17 give Rathe and PGI this contract.

18 So we felt this was a bit of a breach of
19 faith, but -- because it came as a surprise.

20 Q Could you turn to Exhibit 29 in the same book?

21 Does that document look familiar to you?

22 A Yes.

23 Q What is that document?

1 A This is the request for sponsorship proposals
2 that I just spoke of, and was sent to us and -- by the
3 partners as Rathe/PGI joint venture, who were the
4 producers of the America's Smithsonian.

5 Q Presented to you by Rathe/PGI as a joint
6 venture?

7 A Yes, and I --

8 Q What was the date of that document?

9 A That's June 27th, '97.

10 Q And you do recall receiving that?

11 A Yes.

12 Q Did you respond to that?

13 A Yes.

14 Q In what way?

15 A I believe we submitted -- we submitted an
16 additional written submission, or asked if we should at
17 that point. It may have been that they accepted our
18 earlier submission as part of that, but we may have
19 actually formally responded.

20 Q Do you recall having any interaction with
21 Rathe Productions between this June 27th document and the
22 August meeting?

23 A Well, there were a number of interactions with

1 both PGI and Rathe because there was -- at the time, the
2 America's Smithsonian tour was still in process, and it
3 was taking place in other cities, and was -- there was the
4 hope that it also may continue in other cities around the
5 country that had yet not found funding.

6 So there was constant dealing with them, at
7 least on that matter, and, you know, numerous occasional,
8 informal side-conversations about this opportunity and how
9 good it would be for all of our companies should it
10 happen.

11 Most of those conversations with -- in
12 connection with the America's Smithsonian were taking
13 place with other members of my staff, because I was --
14 they were actually out in the field on some occasions at
15 these sites where that tour was taking place.

16 Q In the August meeting --

17 MR. CRAIG: Actually, Your Honor, I'd like to
18 move this document into evidence.

19 THE COURT: It's 29?

20 MR. CRAIG: Exhibit 29.

21 MR. TOLCHIN: No objection.

22 MR. JENKINS: Without objection, Your Honor.

23 THE COURT: All right. 29 will be received

1 without objection.

2 (The document heretofore
3 marked Odell-Simms' Exhibit
4 No. 29 for identification
5 was received in evidence.)

6 BY MR. CRAIG:

7 Q Now, at the time of the August meeting, when
8 you at Odell-Simms agreed to go forward and do the
9 feasibility study, your portion of the feasibility study,
10 tell me your understanding of who was hiring you to do the
11 work.

12 A Rathe/PGI presented themselves to us as a
13 joint venture partnership.

14 Q Who did Odell-Simms answer to then while
15 doing, if at all -- did Odell-Simms answer to anybody
16 while doing the work?

17 A For the feasibility study?

18 Q Correct.

19 A It was explained to us in the meeting in
20 August that we had at PGI's offices, that Rathe
21 Productions was in the field finishing up the America's
22 Smithsonian tour and that PGI would be taking the lead on
23 the feasibility study and coordinate our activities.

1 Q Do you recall approximately when you completed
2 your work in the field?

3 A We would have completed the work in the field
4 sometime during September and provided our written
5 submission in October.

6 Q In October, after you had provided your
7 written submission, what happened next in terms of your
8 relationship with Odell -- I should say Rathe and PGI?

9 A Well, at that time we knew we were in that
10 interim period where they were going to incorporate our
11 materials into a final feasibility study.

12 And then they would begin a process with
13 Rathe, PGI, and the Smithsonian that would discuss whether
14 to go forward with the -- with the international tour, and
15 a decision would be made at some point in the future. We
16 didn't know exactly when that point would be.

17 Q Why was that decision important to you?

18 A Well, it would mean that we either would be
19 able to get underway with the corporate sponsorship
20 activity for the international tour if the Smithsonian
21 decided to go forward, which we were very excited about,
22 and we would have, you know, devoted a lot of effort to
23 it, so we needed to plan for that.

1 In the alternative we were very interested, of
2 course, in getting paid for the work that we had already
3 done.

4 Q Did you hear what -- have you ever heard
5 whether the Smithsonian Institution decided to move
6 forward on that project?

7 A Yes. We did learn that a decision had been
8 made. I couldn't even tell you exactly when. I think
9 that period in which it was decided extended over a much
10 longer period than any of us had expected, including Rathe
11 and PGI.

12 I know that in the initial -- initial days,
13 there was some concern that this -- that the -- at the
14 Smithsonian -- on the Smithsonian side, that they had
15 adequate information to make their decision on the portion
16 of the study which was provided by PGI and Rathe; that is
17 to say, the portion that did not involve our work.

18 And I learned that when I met with Ms. Newman,
19 the Undersecretary of the Smithsonian, in February or
20 early March of '98. She had said that PGI and Rathe had
21 recently presented the findings and that there were
22 additional work that she wanted to have done by them, and
23 that they were going to complete that work and resubmit

1 it, which I believe occurred in March.

2 And she was at that time -- as I mentioned
3 earlier, was complimentary of our work because she said,
4 "I know which tab section was your work, and we didn't
5 have any problem or question about that, and thank you for
6 doing it."

7 Q So shortly after, say, March of nineteen -- I
8 should say after March of 1998, do you remember the -- do
9 you recall the first time that you knew for sure that the
10 project wasn't going to go forward?

11 A We probably would have learned that, and I
12 don't recall specifically, it would have -- in all
13 probability have been sometime in the latter part of '98
14 or early '99.

15 There was not a lot of conversation with us
16 and Rathe and PGI at the time. We were really not a part
17 of anything else that they were doing, and we were not
18 privy to conversations that they had with the Smithsonian.

19 Q What did you do, from Odell-Simms, to stay
20 abreast of the status of that decision?

21 A We made periodic calls to the Rathes and to
22 PGI.

23 There were some changes in personnel at PGI

1 during part of that period. Our principal contact had
2 been Doug Ducate, and Doug left I would guess sometime in
3 June of '98.

4 And most of our contact at that time again was
5 with C.B. Wismar, who was -- C.B. travels quite a lot
6 actually putting on these exhibits around the country for
7 their brother company in meetings, and so he would get
8 back to us when he could.

9 We did have a meeting with C.B., with Cynthia
10 Engel and Daryl Hartley-Leonard in PGI's offices. I would
11 believe that probably would have been in the fall of 1998.

12 We requested the meeting so we could get a
13 better understanding of the recognition -- what was being
14 done to pursue -- what was being done on the international
15 tour if the decision had been made not to proceed by the
16 Smithsonian, what efforts were made for collection and
17 that sort of thing, and when we would be paid.

18 We got, as a result of that meeting, in that
19 meeting, confirmation that we were owed the \$50,000, and
20 that we would be paid at such time as the Smithsonian paid
21 the fee.

22 Q If you would turn in that same booklet to Tab
23 Number 32.

1 What's that document there, Mr. Simms?

2 A Well, that meeting must have occurred a little
3 earlier than I thought. This is actually May 6th of '98.
4 So rather than happening in the fall of '98, our meeting
5 with Cynthia Engel, Daryl Hartley-Leonard, and C.B. Wismar
6 took place I would assume in late April or early May.

7 And this was their follow-up letter
8 confirming, as it says here, their understanding that we
9 would get -- we would be paid \$50,000.

10 Q The second line there, what does that second
11 line suggest to you in that paragraph that you just read
12 from?

13 A Well, it says that --

14 MR. TOLCHIN: Objection. What does it suggest
15 to him? I don't think that's proper.

16 THE COURT: Sustained.

17 BY MR. CRAIG:

18 Q Mr. Simms, at this time, on May 6th, 1998, did
19 Odell-Simms believe that they were due any money?

20 A What time period?

21 Q May 6th, 1998, upon receiving this.

22 A Yes.

23 Q Why would you think at that time that you were

1 due to be paid?

2 A What they told us in this letter and in our
3 discussions was that while they confirmed their
4 understanding that we would be paid \$50,000, that that was
5 still contingent on a decision being rendered by the
6 Smithsonian, and that -- and that no fees were due until
7 this study was actually completed.

8 So it must have meant at this time that they
9 were still going back and forth with the Smithsonian with
10 regard to a final submission of the overall study.

11 Q Was your payment contingent on anything else?

12 A Only upon payment by the Smithsonian after a
13 decision not to proceed.

14 Q So at this time, May 6th, 1998, the decision
15 hadn't been made, and the payment hadn't been made; is
16 that correct?

17 A That's my -- yes, that was our understanding.

18 Q So would Odell-Simms have begun any sort of
19 collections at this time?

20 A No.

21 Q After May 6th --

22 MR. CRAIG: Actually, I'd like to move this
23 document into evidence.

1 THE COURT: Okay. That's Exhibit 32?

2 MR. TOLCHIN: No objection.

3 MR. JENKINS: Without objection, Your Honor.

4 THE COURT: It'll be received without
5 objection.

6 (The document heretofore
7 marked Odell-Simms' Exhibit
8 No. 32 for identification
9 was received in evidence.)

10 BY MR. CRAIG:

11 Q After May 6th of 1998, do you recall any
12 further contact in pursuit of a decision by the
13 Smithsonian?

14 A There would have been periodic conversations
15 with C.B. Wismar. I know that C.B. was probably called at
16 different interim points by either myself or, even more
17 often, by David Bennett, check in and see what else they
18 were doing.

19 We had a friendly relationship, and that was
20 also a good excuse to call to see what was going on, since
21 we weren't otherwise in the loop and being informed on a
22 regular basis of what was happening.

23 At another point in time, when David Bennett

1 and I were in New York on other business, we called the
2 Rathes and came by the office and met with Rick Rathe and
3 another one of his staff, really as a courtesy call, but
4 it was also a way of us checking in to see what was being
5 done.

6 They informed us at that time that they
7 were -- had been given -- they were taking the lead on the
8 collections effort on behalf of the partnership, and that
9 they were confident that they would be paid, and that they
10 would let us know just as soon as that occurred.

11 Q So if they were taking the lead on
12 collections, does that mean that the feasibility study at
13 that point -- I mean, the international tour had been
14 declined by the Smithsonian?

15 A Yes.

16 Q Do you remember when that meeting was?

17 A That -- I believe that would have been
18 sometime in the fall of 1999.

19 Q Fall of 1999.

20 So in the fall of 1999, is it fair to say that
21 you would then begin your collections process?

22 A Yes.

23 Q Who took the lead at Odell-Simms on

1 collecting?

2 A I did.

3 Q What did you do from, say, the fall of 1999
4 forward in pursuit of collections?

5 A I wanted to keep myself informed as to when
6 and if they were paid by the Smithsonian, that being
7 that --

8 May I have some water? Excuse me.

9 (The Bailiff complied with the request.)

10 BY MR. CRAIG:

11 Q I'll rephrase. In the fall of 1999, once you
12 in your mind were sure that the Smithsonian had chosen not
13 to go forward, what actions did you take to pursue
14 collections?

15 A Well, at first it was just to -- to stay in --
16 to get the best information that we could as to the timing
17 of the payment, whether any payment from the Smithsonian
18 had occurred to the partnership, at which point in time to
19 make sure that we were paid.

20 And the -- I called, I guess, the -- one of
21 the last calls that I made to find out that information
22 was in late July of 2000.

23 I spoke with Rick Rathe by telephone, and Rick

1 told me that the -- they had come to resolution with the
2 Smithsonian, and that he had understood that a check had
3 been cut, and that they should have it sometime in the
4 next week, and as soon as they received it, he would give
5 me a call.

6 I told him that I was going to be out of town
7 the first -- the last days of July, the first days of
8 August for about a week, and he said he would call me when
9 I got back in town.

10 When I got back, I didn't hear from Rick. I
11 gave him about ten days, as a courtesy, and then began
12 trying to contact him, and my calls were not returned.

13 Q So in the late summer, early fall of the year
14 2000, you're pursuing the collection through calls.

15 What was the next step that you took?

16 A On one occasion, my partner, Bob Odell, was
17 asked to come to New York and talk with Robert Rathe,
18 Richard's brother, about the potential project that they
19 had been asked to consider taking on and wanted our
20 thoughts as to its feasibility from a financial
21 standpoint, could sponsorship money be raised to pay for
22 this exhibit.

23 And my partner, Bob, took the meeting and when

1 he told me about that, I requested that he ask Robert to
2 make sure that Rick was in the office that same day
3 because I would travel with Bob to New York, and we could
4 have a discussion about payment of our fee. This would
5 have been approximately October of 2000.

6 My partner and I traveled by train to New York
7 and made the meeting with Robert Rathe and another
8 member -- two members of his staff, and Rick was not in
9 the office that day as we'd been told by Robert he would
10 be.

11 And we were told that he was -- he was ill,
12 and -- but I had not been told that my trip to New York
13 was unnecessary.

14 Q So in this meeting you and Bob Odell met with
15 Robert Rathe?

16 A With Robert. And we told Robert how unhappy
17 we were, that we had reason to believe that they had been
18 paid at that point.

19 He told us that he believed that they had --
20 that they had been paid, and that he was embarrassed that
21 his -- our phone calls had not been returned, and that he
22 would talk with Richard about it and get him to call me.

23 Q Did you follow up that meeting in any way?

1 A Yes. I tried to call Rick when I didn't hear
2 from him, and my calls were, again, unanswered.

3 Q Did you try to contact him through the mail?

4 A I -- at one point I believe I sent him a fax
5 saying that I had called to just have the -- because I
6 think I had gotten an answering machine, and then I -- we
7 sent a demand letter in -- I sent a demand letter in
8 December.

9 Q Back to October, if you'll turn to Tab Number
10 33.

11 Does that document look familiar to you?

12 A Yes. Yes. This is the fax, and it was
13 actually in response to the fact that Rick had not made
14 the meeting in New York and asking him to call me at his
15 earliest convenience.

16 MR. CRAIG: I'd move this document into
17 evidence.

18 MR. TOLCHIN: No objection.

19 MR. JENKINS: No objection, Your Honor.

20 THE COURT: All right. Exhibit 33 is received
21 without objection.

22

23

1 (The document heretofore
2 marked Odell-Simms' Exhibit
3 No. 33 for identification
4 was received in evidence.)

5 BY MR. CRAIG:

6 Q What's the date of this document?

7 A October 26th, 2000.

8 Q After October 26th, 2000, what was your next
9 step in collections?

10 A Well, I was frustrated. I -- I had made
11 repeated telephone calls, and none of them were answered.
12 I really didn't know how to proceed.

13 One day a fax showed up on our fax machine
14 from Rick out of the blue with some very unusual
15 computation of why we should accept a number less than
16 \$50,000 for the work that we had done, and that prompted a
17 demand letter from me the next week.

18 Q If you'll turn to Number 17.

19 What is that document?

20 A This is a copy of that fax that was sent to me
21 on December 7th, 2000, and it itemizes a whole series of
22 PGI and Rathe bills and costs, of which I was not a part
23 and didn't know anything about, don't care anything about.

1 That is expenses and costs that were incurred,
2 apparently, by their partnership on a number -- numerous
3 issues that may have involved the America's Smithsonian
4 tour, domestic tour, having nothing to do with the
5 international feasibility study, and their own internal
6 costs on the production of the international feasibility
7 study, which I'm not in a position to know or verify.

8 Q Prior to this document being sent to you, were
9 you ever asked by anybody to take less than \$50,000?

10 A No. When I -- when I got Rick on the phone,
11 if you recall the conversation that I mentioned a minute
12 ago that I had in late July of 2000, and he told me that a
13 check, he thought, was in the mail from the Smithsonian,
14 and that he would be in contact with me soon, he said
15 I'm -- he said, "When I get the check, I'm going to want
16 to talk to you about accepting less than \$50,000."

17 And I said, "On what -- by what rationale?"
18 And he said, "Oh, well, all this, you know, has cost us a
19 lot more than we expected, and, you know, and we're -- you
20 know, we took a lot of losses, and you know, we want to
21 ask you to take less than your \$50,000."

22 And I said, "Well, Rick, you know, I was not
23 your partner. I'm not going to be very open to a

1 discussion about what other costs you might have incurred
2 as part of the partnership in doing the international
3 study. You owe us \$50,000; that's been the understanding
4 from the start. I don't know why we should accept less
5 than that."

6 "Well, we'll talk about it later," he said,
7 "and I'll call you."

8 Q And the next time you heard from him was?

9 A And the next time I hear from him about that
10 is when I get a fax that suggested instead of us getting
11 \$50,000, we should get \$21,436.97 based on some
12 formulation that Rick has made up.

13 Q What was your response to this fax?

14 A On the -- a week later, I sent him a demand
15 letter. We realized at that point, after discussion with
16 my partners -- we decided that we really needed to just
17 kind -- that Rathe was not being honest with us, that we
18 were not going to get paid in full just by asking or based
19 on our -- their contractual obligation for the partnership
20 to pay us, and that we needed to bring it to a head, and
21 if payment was refused then begin legal action.

22 Q Let's turn to Document Number 34 in that
23 package.

1 What's that document there?

2 A That is the letter, the demand letter, that I
3 sent on December 14th, 2000.

4 In that letter, I reiterate the fact that we
5 are -- that the obligation to Odell-Simms by Rathe/PGI is
6 \$50,000. I make -- I try to make the point repeatedly
7 that -- which is really a restatement of obvious facts,
8 that we were not part of the partnership, we shouldn't be
9 expected to bear any of their losses, we were
10 subcontractors, we did what we were asked to do, there was
11 no complaint about our work, and now that they've been
12 paid, we should be paid.

13 Now, in the letter, understanding that at this
14 point, we're not going to be paid unless we pursue legal
15 action, as we are today, we offered to accept \$37,500
16 after a conversation with legal counsel as to what might
17 be the costs of pursuing collection.

18 And in order to avoid those expenses and
19 having to go through what we're going through now, we
20 offered \$37,500 contingent on them responding with payment
21 by December 22nd, 2000.

22 We received no response to this letter.

23 Q What did you do after that?

1 A We filed suit after the first of the year, in
2 the early -- I think it was in January 2001. No, I'm
3 sorry -- yes, 2001.

4 MR. CRAIG: I'd like to move Document 34 into
5 evidence.

6 MR. TOLCHIN: I'm going to object to 34 unless
7 Number 17 is received as well.

8 MR. JENKINS: Without objection, Your Honor.

9 MR. CRAIG: I'd like to move Number 17 in as
10 well.

11 MR. TOLCHIN: Objection removed.

12 MR. JENKINS: Without objection, Your Honor.

13 THE COURT: All right. At this point Exhibits
14 17 and 34 will both be received without objection.

15 (The documents heretofore
16 marked Odell-Simms' Exhibit
17 Nos. 17 and 34 for identification
18 were received in evidence.)

19 BY MR. CRAIG:

20 Q Until this day, have you agreed to accept
21 anything less than \$50,000 other than what you just stated
22 pursuant to this document?

23 A No. We have not and we reiterated repeatedly

1 that -- both to Rathe and PGI that that money -- that we
2 were owed \$50,000 for this study.

3 MR. CRAIG: That's all I have, Your Honor.

4 THE COURT: All right. Mr. Jenkins.

5 CROSS EXAMINATION

6 BY MR. JENKINS:

7 Q I represent PGI. I just have a few follow-up
8 questions to what Mr. Craig asked you.

9 After receiving the letter from Daryl Hartley-
10 Leonard -- I believe it was your Exhibit 32 -- did you
11 have an understanding that Odell-Simms would be paid its
12 \$50,000 when the Smithsonian paid the international
13 feasibility study tour?

14 A Yes.

15 Q Do you know who received that money?

16 A I've been told by Rick Rathe that they
17 received that.

18 Q Did PGI, to your knowledge, receive any money
19 related to the performance of services for the feasibility
20 study?

21 A I'm not aware of that.

22 Q You indicated in your direct examination that
23 beginning as early as July of 2000, you began dealing

1 directly with Rathe Productions concerning the collection
2 of the \$50,000 that you were owed.

3 Why is it that you were dealing directly with
4 Rathe Productions at that time?

5 A At that point in time we were told, either by
6 Rathe, or PGI, or both, that Rathe was taking the lead on
7 the collections efforts.

8 Now, that made logical sense to us because we
9 knew that over a period of years, Rathe Productions had
10 had a relationship with the Smithsonian, and, presumably,
11 from our standpoint, they were probably continuing to do
12 other business with the Smithsonian on other projects.

13 So given that they had a course of dealings,
14 they were probably in a better position, in a less
15 adversarial setting, to collect the money.

16 Now, our side of that, I mean, our concern all
17 along the way has been that --

18 MR. TOLCHIN: He's gone far beyond the
19 question at this point. He's not answering the question.

20 MR. JENKINS: Your Honor, he should be allowed
21 to answer the question.

22 THE WITNESS: We were just --

23 THE COURT: Hold on. He's your witness at

1 this point.

2 MR. JENKINS: He's explaining the answer to
3 the question as to why he was dealing with Rathe
4 Productions. I think he should be allowed to --

5 THE COURT: All right. You get the last word.

6 MR. JENKINS: Thank you, Your Honor.

7 THE COURT: Okay. It's overruled.

8 BY MR. JENKINS:

9 Q Continue.

10 A I was concerned that it wouldn't be pursued
11 aggressively by Rathe because they -- in that they --
12 while it made sense that they may be doing other business
13 with the Smithsonian, it may also be that they didn't want
14 to press too hard to collect this debt because the value
15 of the money that they would receive for their portion of
16 the feasibility study might be small in relation to the
17 revenues that they are generating from other business.

18 Now, I wasn't in a position to know what other
19 business they were doing at that time, but I knew
20 historically they had done quite a lot of business with
21 the Smithsonian.

22 So our concern was to, you know, stay after
23 them to at least -- to be assured that it was being

1 aggressively pursued and that they weren't just going to
2 neglect it and let it drop.

3 Q Now, you indicated that at least as of July of
4 2000, you spoke with Mr. Rathe, and that being, I think
5 you said, Rick Rathe --

6 A Yes.

7 Q -- concerning the receipt of the \$250,000 from
8 the Smithsonian for the feasibility study.

9 Thereafter, did you deal exclusively with
10 Rathe concerning your right to payment?

11 A Well, I attempted to deal with them, knowing
12 that they had received payment, up until the time that I
13 was sending the demand letter to Rathe Productions, and I
14 called Cynthia Engel at PGI to inform her that they would
15 also be receiving a demand letter, because they were the
16 Rathes' partners on the international feasibility study,
17 and it occurred to me that Cynthia Engel might not even be
18 aware of what had transpired.

19 Q Did you subsequently, or in connection with
20 sending that letter, speak with Ms. Engel on the
21 telephone?

22 A Yes.

23 Q Can you describe the conversation you had with

1 Ms. Engel?

2 A Well, I told her of my conversation --

3 MR. TOLCHIN: That's going to be hearsay at
4 this point, Your Honor. Objection.

5 MR. JENKINS: I'm not asking for any
6 statement. I'm asking him to describe the conversation.

7 THE COURT: I'm going to sustain the
8 objection.

9 BY MR. JENKINS:

10 Q What was the purpose of your discussion with
11 Ms. Engel?

12 A It was to inform her that she'd be receiving a
13 demand letter on behalf of PGI for their participation in
14 the international feasibility study along with the Rathes.

15 Q Did she question you as to why you were
16 sending it to her?

17 A Yes.

18 Q Did you make any statements to her as to why
19 you believed it necessary to send the letter?

20 A I told her that I had -- I had understood from
21 the Rathes that they had received payment in August, that
22 we had been since that time attempting to collect our
23 share of the money, and that we had reached a point where

1 we were convinced that we were going to have to pursue it
2 legally in order to collect.

3 Q Was the fact that Rathe Productions had
4 received the \$250,000 payment from the Smithsonian a
5 surprise to Ms. Engel?

6 A Yes.

7 MR. TOLCHIN: Objection. That's asking for
8 hearsay.

9 THE COURT: Sustained. It does.

10 MR. JENKINS: Your Honor, I'm asking for the
11 impression of the witness during the conversation. I'm
12 not asking for any statement. He's entitled to testify
13 about his present sense impressions during the course of
14 the telephone conversation.

15 MR. TOLCHIN: That's not what he asked.

16 MR. JENKINS: I'm not asking for a statement.
17 That's clearly not hearsay --

18 MR. TOLCHIN: That's not what he asked.

19 THE COURT: The question again was?

20 MR. JENKINS: Was Ms. Engel surprised to learn
21 that Rathe Productions had received the \$250,000 payment.

22 MR. TOLCHIN: I'm going to object on the
23 grounds that not only is it hearsay; he's not a

1 psychologist or a mind reader, either.

2 THE COURT: I'm going to sustain the
3 objection.

4 BY MR. JENKINS:

5 Q Did Ms. Engel give you reason to believe that
6 she was unaware that Rathe had received the money?

7 MR. TOLCHIN: You can't get it any way, Judge.
8 It's objectionable. It's hearsay.

9 THE COURT: Sustained.

10 BY MR. JENKINS:

11 Q At that time, did Ms. Engel offer to pay
12 \$50,000 to Odell-Simms?

13 MR. TOLCHIN: Your Honor, he's asking for
14 hearsay constantly.

15 THE COURT: Sustained. I think you made your
16 point.

17 BY MR. JENKINS:

18 Q Mr. Simms, just a couple of final questions.

19 With respect to your communications with Rathe
20 Productions, both orally and in writing from July of 2000
21 through your letter of December 14th of 2000, which is
22 Exhibit 34, why is it that you were communicating with
23 Rathe directly and not PGI at that point in time?

1 MR. TOLCHIN: Asked and answered, Your Honor.

2 THE COURT: Sustained.

3 BY MR. JENKINS:

4 Q Were you seeking to collect the money from
5 Rathe because Rathe had received the money?

6 MR. TOLCHIN: Leading, Your Honor.

7 THE COURT: Well, he's cross examining at this
8 point. I'll allow the question.

9 MR. TOLCHIN: It's been asked and answered,
10 too.

11 THE COURT: I'll allow it one last time.

12 THE WITNESS: I was communicating with Rathe
13 Productions because we had been told both by PGI and by
14 Rathe that they were in charge of collection efforts on
15 behalf of the joint venture for the feasibility study.

16 So if I were to get good information, I would
17 only get it from the Rathes because they were the only
18 party at that time in a position to know.

19 BY MR. JENKINS:

20 Q In Odell-Simms' Exhibit 32, the letter to you
21 from Mr. Hartley-Leonard, it confirms that Odell-Simms is
22 entitled to a \$50,000 payment, doesn't it?

23 A Yes.

1 Q It confirms that your entitlement --

2 MR. TOLCHIN: Objection, Your Honor.

3 We're now reading the letter to him, and
4 asking him to confirm what the letter says. It's in
5 evidence already.

6 THE COURT: That's been asked and answered at
7 this point, counsel.

8 MR. JENKINS: That's all I have of the
9 witness, Your Honor.

10 THE COURT: All right. Mr. Tolchin, do you
11 have any questions.

12 MR. TOLCHIN: Yes; just a few.

13 BY MR. TOLCHIN:

14 Q Mr. Simms, how are you today?

15 A Very well. Thank you.

16 Q Just a few quick follow-up questions.

17 That August 1997 meeting when you reached this
18 agreement, the beginning of August 1997, I just want to
19 make sure that the people who were there were Mark
20 Sirangelo, Doug Ducate, and C.B. Wismar from PGI.

21 Is that right?

22 A Yes.

23 Q Then Bob Odell, yourself of course, David

* * *

1 \$50,000.

2 MR. TOLCHIN: Okay. No further questions.

3 THE COURT: Any redirect?

4 MR. CRAIG: I have none, Your Honor.

5 THE COURT: All right. Is he excused?

6 MR. CRAIG: He's excused.

7 THE COURT: Okay. Thank you, sir.

8 (Witness excused.)

9 THE COURT: Your next witness?

10 MR. CRAIG: David Bennett.

11 Whereupon

12 DAVID BENNETT

13 a witness, was called for examination by counsel on behalf
14 of Odell, Simms & Associates, Inc., and after being duly
15 sworn by the Clerk of the Court, was examined and
16 testified as follows:

17 DIRECT EXAMINATION

18 BY MR. CRAIG:

19 Q Please state your name for the record.

20 A My name is David Bennett.

21 Q Where do you work?

22 A At Odell, Simms & Associates in Falls Church.

23 Q What is your background?

1 A I'm a fund raiser. I spent about ten or
2 twelve years now either working in politics -- I got out
3 of that about six years ago, and now work raising money
4 from companies and foundations, sometimes for charity and
5 sometimes for corporate marketing, or try to help them
6 sell products.

7 Q What is your position at Odell-Simms?

8 A I'm director of our fund raising and
9 sponsorship group, running all of our corporate
10 sponsorship and fund raising campaigns.

11 Q Who is your supervisor?

12 A John Simms.

13 Q Do you have any other supervisors?

14 A No.

15 Q Did there come a time when you were put on a
16 project to do an international feasibility study?

17 A Yes.

18 Q Do you recall when that was?

19 A I know the conversations began in 1997, and we
20 actually were contracted to do the work in August of 1997.

21 Q Prior to that time, had you done any -- strike
22 that.

23 Have you ever been involved in work through

1 Odell-Simms with a company called Rathe Productions,
2 Incorporated?

3 A Yes.

4 Q When was the first time you did work with
5 Rathe Productions, Incorporated?

6 A I think the company's had a relationship with
7 the Rathes dating back to before I joined the company.

8 Q Which would be when?

9 A Which would be six years ago this month. So
10 I've met on a number of projects with them in terms of
11 trying to sell business together or trying to support
12 projects they were working on.

13 Q Had you done any other work with them on
14 anything having to do with the Smithsonian --

15 A Yes.

16 Q -- prior to that August --

17 Let me finish.

18 -- prior to that August meeting?

19 A Yes. I had.

20 The firm was involved in another related
21 project for the Smithsonian, part of a domestic tour of
22 these same artifacts.

23 Part of the idea for the international

1 feasibility study was to determine if it was possible or
2 affordable to take those artifacts overseas. So this was
3 kind of a new phase in that relationship.

4 Q As far as the international feasibility study
5 goes, prior to August of '97 -- I think you said the 28th,
6 did you do any work with the Rathe folks on the
7 international feasibility study prior to the date you were
8 contracted?

9 A We did. We've been in discussions about the
10 international part of the tour since we first got involved
11 with the American part of the tour. That was kind of an
12 ongoing theme of the discussions that we had with them.

13 Q Did you assist them in any way in preparation?

14 A We did, when they asked us for input in terms
15 of their proposal that they were apparently going to
16 submit about the feasibility study and what kind of work
17 would need to be done and what kinds of questions would
18 need to be asked.

19 So we prepared some -- two or three pages of
20 material for them about the kind of work that would need
21 to be done from the marketing side.

22 Q What is your understanding of that two or
23 three page piece that you did -- what was your

1 understanding that that two or three page piece would be a
2 part of?

3 A It was to be incorporated into Rathe/PGI's
4 response to the Smithsonian's request for proposals about
5 this international tour.

6 Q So Odell-Simms actually helped them with their
7 response to the request for proposal?

8 A Yes, we did.

9 Q Were you paid for that?

10 A No, we were not.

11 Q And after that -- can you place that in time,
12 when you helped them out with their request to the
13 Smithsonian -- their response, I should say?

14 A Winter of '96, '97; it was sometime in that
15 period. I can't tell you more than that.

16 Q Okay. After the winter of '96, '97, when you
17 helped them submit an answer to the request for proposal,
18 what was the next interaction you had with Rathe on the
19 international feasibility study?

20 A We, I think it was, in -- it was in May I
21 think, we submitted another kind of couple of pages to
22 them, specifically what our company could do for Rathe/PGI
23 as part of this -- as part of this plan in terms of being

1 the subcontractor for the corporate sponsorship area.

2 Q Specifically, was that information delivered
3 to Rathe?

4 A Yes.

5 Q In August of '97, some sort of agreement, was
6 that -- in August of '97, you say there was some sort of
7 agreement on the performance side.

8 Were you involved in performing under the
9 agreement?

10 A I managed our performance.

11 Q You managed it.

12 What went into the feasibility study from your
13 end?

14 A Well, there were three tasks that we were
15 challenged to do.

16 The first was to work with Rathe/PGI
17 developing a presentation, something you could take to
18 companies or individuals that might be interested in
19 supporting it, saying, "Here's what the tour is supposed
20 to be. Here's what we're going to try and do." So we
21 worked on that.

22 Secondly, the biggest part was just to go out
23 and meet with companies and interview people like

1 Marketing Vice Presidents, or Chiefs of Staff, or things
2 like that, and just say, "This is an idea we have, this is
3 what it would cost, these are the kinds of benefits you
4 could get," the same way companies sponsor the Olympics.

5 We kind of took it out to them and said,
6 "Would you be interested in something like this?"

7 And so we conducted twenty-five, thirty-five
8 interviews with companies here in the U.S., and in Great
9 Britain, and in Germany, kind of taking this package to
10 them.

11 And then the third part was to write the
12 report. We submitted a report to Rathe/PGI for part of
13 their final submission to the Smithsonian, which really
14 addressed the question, is it possible to raise the amount
15 of money they need to go ahead with the tour, and if it
16 is, what are some of the improvements or decisions that
17 need to be made to help be successful in that process.

18 Q Did you write that report?

19 A Yes.

20 Q And did you submit it --

21 THE COURT: Mr. Craig, to the extent that you
22 can cut the cumulative information, would you, in terms of
23 your questions.

1 MR. CRAIG: Yes, Your Honor. Actually, that's
2 really all on that.

3 THE COURT: Okay.

4 MR. CRAIG: I have a couple of other things,
5 to fill in the blanks.

6 BY MR. CRAIG:

7 Q Mr. Bennett, this is a lawsuit to collect
8 revenues.

9 Were you involved at all in the collections
10 process from the Odell-Simms' side?

11 A I supported it. John Simms was the lead on
12 it, as he usually is, but I was part of many of the
13 conversations along the way.

14 Q Now, while you were working on the performance
15 of the agreement, which of the two companies were you
16 dealing with mostly?

17 A Mostly with PGI.

18 Q Why was that?

19 A Because they were kind of the day-to-day
20 contacts, partly because we're in Falls Church and they're
21 in Arlington, so it was easy, but they were the ones that
22 we were assigned to work with on a day-to-day basis.

23 Q Do you recall, other than Odell-Simms, who

1 else actually worked towards putting the feasibility study
2 together?

3 A We were the lead on it, but worked with both
4 PGI and Rathe because they had some relationships of their
5 own. So we worked with Rathe on, I think, three companies
6 that I can think of right away, and PGI as well, because
7 they worked with some big global companies.

8 So they were able to either interview those
9 people and contribute the information to our report, or
10 tell us, "Go see this person, this company, and we'll set
11 up a meeting for them."

12 Q So in creating your portion of the portion,
13 you worked with both companies?

14 A Yes.

15 Q From your standpoint as the manager of this
16 project, what was the relationship of Rathe and PGI to
17 each other?

18 A They were partners. That's how they were
19 treated to us; that's how it was presented to us, that
20 they were working together kind of as one unit. So
21 sometimes we worked with one and not the other.

22 Sometimes you have relationships where every
23 time you talk to one side, you need to let the other side

1 know, just to keep things -- it wasn't like that. It was
2 a very kind of open and communicative relationship, that
3 we worked for them together.

4 MR. CRAIG: Your Honor, that fills in the
5 holes. That's all.

6 THE COURT: All right.

7 MR. JENKINS: I have no cross examination of
8 this witness.

9 CROSS EXAMINATION

10 BY MR. TOLCHIN:

11 Q Just briefly, just for clarification. Odell-
12 Simms did work on the American Smithsonian tour, the
13 domestic aspect of it as well; is that right?

14 A Yes, sir.

15 Q You did tens of thousands of dollars' worth of
16 work on that aspect; is that an accurate statement?

17 A I believe that's an accurate statement,
18 including our expenses.

19 MR. TOLCHIN: I have no further questions.

20 THE COURT: All right. Is this witness
21 excused?

22 MR. CRAIG: This witness is excused, Your
23 Honor.

* * *

1 with what it is they were saying, anything specifically?

2 MR. JENKINS: Objection, Your Honor. The
3 question is vague. We've had a day-and-a-half of
4 testimony, and anything that was said --

5 THE COURT: Well, I think that he could,
6 specifically, if there is something he would take
7 exception to.

8 BY MR. TOLCHIN:

9 Q Was there anything of substance?

10 There may have been tidbits of information,
11 dates, or things like that you may disagree with.

12 A Well, I think the -- there's been much
13 testimony that's been accurate, but I think there's been a
14 lot of testimony that's been -- that's left a lot unsaid.

15 Q What is that specifically?

16 A Well, I think Ms. Engel's testimony -- she
17 talked about our meeting at PGI's headquarters, and the
18 only thing we discussed was this settlement of the
19 \$250,000 for the feasibility study.

20 And she's right; we did discuss that, and we
21 did agree about the split of \$100,000 to PGI, \$100,000 to
22 Rathe, and \$50,000 allocated for Odell-Simms. However,
23 what she failed to bring up was that was all wrapped

1 around \$162,000 that PGI collected from the Smithsonian on
2 our behalf and failed to remit to us.

3 Q When you say collected on your behalf --

4 MR. JENKINS: Your Honor, I'm going to impose
5 several objections at this point. One is foundation; two,
6 the witness has just testified as to speculation; three, I
7 believe this was also the subject of the Court's earlier
8 ruling.

9 MR. TOLCHIN: Well, it's not speculation.
10 This is exactly what he's saying occurred at the meeting,
11 and it certainly is not anything other than he's saying
12 what the basis of the agreement was that they reached.

13 THE COURT: I'm going to overrule the
14 objection. I think he can testify as to what supposedly
15 occurred at the meeting, and what his understanding was of
16 what occurred at the meeting.

17 THE WITNESS: We discussed making an effort to
18 collect the money because of their sort of hard-headed
19 behavior in sending, you know, a letter, you know, before
20 suit, and --

21 BY MR. TOLCHIN:

22 Q The Smithsonian, you mean? To --

23 A To the Smithsonian.

1 \$583,000 versus the \$250,000 that was collected.

2 And I must say that, in hindsight, looking at
3 this, this didn't take into account the \$163,000 -- the
4 \$250,000 paid, so in fact this recovery from the
5 Smithsonian for the international study for ourselves was
6 even much lower than this percentage, all right, and I
7 didn't ask Mr. Simms to share in that.

8 So this was my document to Mr. Simms, showing
9 him where I felt we were in negotiation. And I just want
10 to state this as well. This is an obligation that we feel
11 that Rathe Productions has to Odell-Simms.

12 MR. TOLCHIN: I have no further questions.

13 MR. JENKINS: Is it the Court's pleasure to
14 begin cross examination now, or what time were you
15 considering a lunch break?

16 THE COURT: We'll do it now.

17 CROSS EXAMINATION

18 BY MR. JENKINS:

19 Q Good afternoon, Mr. Rathe.

20 A Good afternoon.

21 Q When you began your negotiations with the
22 Smithsonian -- well, let me ask this as a predicate.

23 When did you first begin talking to the

1 Smithsonian about collecting monies that you believed were
2 owed both you and PGI?

3 A I believe it was after we had the meeting with
4 Ms. Engel, and Mr. Hartley, Daryl Hartley-Leonard.

5 Q Sometime after the summer of 1998?

6 A I believe so; yes.

7 Q The purpose of your negotiations with the
8 Smithsonian was to collect the amounts owed both PGI and
9 Rathe; is that correct?

10 A It was -- yes.

11 Q Your thinking was since Rathe Productions was
12 owed money, and PGI was owed money for work performed with
13 the American Smithsonian exhibition and international
14 tour, you would try to collect the maximum amount you
15 could to maximize the recovery for both companies.

16 Isn't that true?

17 A It wasn't just my thinking. It was the result
18 of the discussions we had with PGI.

19 Q So, in fact, it's true that your efforts were
20 focused towards collecting the maximum amount of money
21 that you could for both companies?

22 A Yes.

23 Q Now, in that effort to collect the amounts

1 owed, you had to make certain representations to the
2 Smithsonian, did you not?

3 A Yes.

4 Q As to costs and fees incurred.

5 A Yes; they asked for that.

6 MR. JENKINS: A moment, Your Honor.

7 (Whereupon, Mr. Jenkins set up an easel.)

8 BY MR. JENKINS:

9 Q Now, I'll turn your attention to PGI Exhibit
10 5. I turn your attention to Page 2 of PGI Exhibit 5.

11 In March of 1999, you provided the Smithsonian
12 with an initial breakdown of costs in connection with the
13 American Smithsonian -- excuse me, strike that -- in
14 connection with the feasibility study; is that correct?

15 A It was a combined feasibility study and the
16 America's Smithsonian.

17 Q At the top, your representation to the
18 Smithsonian is there's \$559,000 in costs incurred for work
19 performed on the feasibility study; is that correct?

20 A Yes.

21 Q Now, you heard Mr. Wismar testify yesterday
22 that PGI did approximately eighty percent of the work on
23 the feasibility study.

1 Did you recall that testimony?

2 A Yes, I did.

3 Q Is that accurate in your view?

4 A No, it's not.

5 Q Now, also you'll notice in the second column
6 that there are certain PGI invoices with respect to costs
7 incurred for the American Smithsonian exhibit.

8 Is that correct?

9 A Yes.

10 Q Nowhere in there is contained your assertion
11 that there is an additional \$162,000 owed to Rathe
12 Productions, is there?

13 A No. Because this was to the Smithsonian, not
14 to PGI.

15 Q Okay. So the answer to my question is, is no,
16 there is no assertion?

17 A In this document?

18 Q Correct.

19 A No, there's no assertion in this document.

20 Q Again, the goal of your endeavor was to
21 collect the maximum amount that you possibly could; is
22 that correct?

23 A From the Smithsonian, yes, that's correct.

1 Q Now, you testified also that part of your
2 strategy, if you will, in dealing with the Smithsonian was
3 to make an effort to demonstrate to the Smithsonian the
4 costs exceeded the amount that we were seeking to recover;
5 is that correct?

6 A Yes.

7 Q The purpose was to allow the Smithsonian to
8 obtain the full amount for the feasibility study; correct?

9 A Could you restate -- I'm sorry, I didn't quite
10 follow you.

11 Q Certainly. The purpose of stating the costs
12 for the international tour in excess of \$250,000 was to
13 demonstrate to the Smithsonian that the full amount was
14 due; correct?

15 A That we were jointly suffering an economic
16 hardship by accepting the full amount.

17 Q Now, that's because the Smithsonian needed
18 that information to kick the payments loose; correct?

19 A I don't know what their internal requirements
20 were.

21 Q Well, I believe you testified earlier that Mr.
22 Cobert had mentioned to you that he was having some
23 difficulty with leadership within the Smithsonian to get

1 that money?

2 A That's correct.'

3 Q So the purpose of your cost analysis in excess
4 of \$250,000 was to provide him with the basis to recover
5 the full amount for you; correct?

6 A I don't know that for a fact. I would be
7 reading his mind.

8 Q Well, why did you give him costs in excess of
9 \$250,000?

10 A He asked for it.

11 Q Did he tell you, "Mr. Rathe, I need a
12 demonstration of costs over \$250,000"?

13 A No, he did not.

14 Q He just told you he needed costs for the
15 feasibility study; correct?

16 A Yes, he did.

17 Q So you provided an outline of the costs
18 incurred for the feasibility study, and you provided costs
19 for PGI invoices for the American Smithsonian exhibition.
20 Correct?

21 A No; that's not correct.

22 Q Turning back, then, to Page 2 of the exhibit,
23 you would agree with me that you provided him an analysis

1 of your staff costs and fees for the international tour.
2 Correct?

3 A Yes.

4 Q And you provided him a listing of open
5 invoices for PGI. Correct?

6 A Yes. In -- in your last question you didn't
7 say open invoices.

8 There was approximately \$5 million of other
9 invoices that were paid to PGI, including our \$162,000
10 that was formerly paid to PGI, and this was the only
11 amount outstanding that was still open, unpaid from the
12 Smithsonian.

13 MR. JENKINS: I would object and move to
14 strike as non-responsive, Your Honor.

15 MR. TOLCHIN: I think he responded exactly to
16 what he asked.

17 THE COURT: Part of it is responsive, and part
18 of it is not. I'm going to ask the jury to disregard it,
19 and I'm going to ask that you re-ask the question.

20 MR. JENKINS: Sure.

21 BY MR. JENKINS:

22 Q You made a representation to the Smithsonian
23 as to the open PGI invoices; correct?

1 A The unpaid ones.

2 Q You did not make any representation as to any
3 invoices that Rathe, at that time, believed were open
4 invoices. Correct?

5 A I don't understand that question.

6 Q Well, you didn't tell the Smithsonian that you
7 were owed \$162,000, did you?

8 A The reason I didn't say that --

9 Q It's a yes or no question.
10 Did you tell the Smithsonian that you were
11 owed \$162,000, yes or no?

12 A PGI owed us \$162,000. The Smithsonian didn't.

13 Q Did you tell the Smithsonian that you were
14 owed \$162,000?

15 A No.

16 Q In fact, you've never told the Smithsonian
17 that you were owed \$162,000, have you?

18 A Because they paid PGI the money, and PGI
19 didn't pay it to us.

20 MR. JENKINS: I object and move to strike as
21 non-responsive.

22 THE COURT: Again, I will strike that.

23 Try to answer his questions. Your attorney,

1 again, will have an opportunity to go back and clarify any
2 of these matters with you.

3 THE WITNESS: Okay.

4 BY MR. JENKINS:

5 Q Did you ever tell the Smithsonian that you
6 were owed \$162,000?

7 A No, I did not.

8 Q In fact, you made representations to the
9 Smithsonian on at least two occasions that you were going
10 to pay money to Odell-Simms and PGI, didn't you?

11 A No, I did not.

12 Q Well, I would call your attention, then, to
13 PGI Exhibit 19.

14 I call your attention, Mr. Rathe, to the
15 second page of that exhibit and ask you to read, in the
16 first full paragraph, the last sentence of your letter to
17 the Smithsonian.

18 A "This will allow PGI, RPI, and Odell to
19 receive a reduced final payment and recover approximately
20 only thirty-two percent of our direct costs attributable
21 to the international study."

22 Q Who is that letter signed by?

23 A Myself.

1 Q Who did you send it to?

2 A I sent it to C.B. Wismar, Mr. Tolchin, and Mr.
3 Odell.

4 Q Who did you send the letter to?

5 A Oh, I'm sorry. I sent it to John Cobert and
6 Susan Engelhardt.

7 Q And you copied your attorney, Mr. Tolchin, Mr.
8 Wismar, and Mr. Odell; is that correct?

9 A Yes.

10 Q Now, that last sentence that you just read,
11 you represented to the Smithsonian that PGI, Odell and
12 RPI, which I guess is Rathe Productions, will receive a
13 reduced final payment. Correct?

14 A That's correct.

15 Q Did you pay Odell-Simms any money to date for
16 work performed in connection with the international tour?

17 A No.

18 Q Have you paid PGI any money --

19 A No.

20 Q -- for work performed to date for the
21 international tour?

22 A No. Subject to our agreement.

23 Q So the answer to my question is you have not

1 paid PGI any money; correct?

2 A That's correct.

3 Q Now, the first page of the letter provides an
4 analysis, a breakdown, if you will, of the allocation of
5 certain monies for a stated settlement amount.

6 Is that correct?

7 A Yes.

8 Q Let me ask you, first of all, your offer to
9 settle with the Smithsonian of \$323,891, that amount
10 represents the \$250,000 for the feasibility study plus the
11 \$73,000 for PGI invoices; isn't that true?

12 A It states here ASE billings, not PGI.

13 Q Those would be invoices for the American
14 Smithsonian exhibition?

15 A It says billings; yes.

16 Q What \$73,000 in ASE billings are you referring
17 to there?

18 A There's no breakdown of the bills there.

19 Q You authored this letter, didn't you?

20 A But there's no break -- you're asking me to
21 refer to this document. There's no breakdown in this
22 document.

23 Q I'm asking you as the author of the letter,

1 what does the \$73,000 refer to.

2 A That was unpaid bills for the America's
3 Smithsonian.

4 Q Would that be PGI invoices that are identified
5 on Page 2 of PGI Exhibit 5?

6 A These were the unpaid PGI invoices.

7 Q Now, you represented to the Smithsonian that
8 in the event that the Smithsonian paid \$323,891 to Rathe
9 Productions, that you would allocate \$73,891 to the ASE
10 billings; is that correct?

11 A That's correct.

12 Q Again, those are PGI bills; correct?

13 A Those were PGI bills.

14 Q And that you would pay, or allocate, to Odell,
15 Roper, \$50,000; correct?

16 A Correct.

17 Q Have you paid Odell, Roper the \$50,000?

18 A I think you asked me that once before, but
19 I'll answer it again. No, I haven't.

20 Q You also indicated then if there were a
21 balance of \$200,000, that it would be allocated \$100,000
22 to RPI and \$100,000 to PGI; correct?

23 A Yes.

1 Q That's a fifty-fifty split, isn't it?

2 A By my mathematics, yes.

3 Q Now, under the Smithsonian's last offer, there
4 would be \$65,588 allocated to the ASE billings; is that
5 correct?

6 A Yes.

7 Q And that Odell would, again, receive its
8 \$50,000?

9 A Yes.

10 Q The balance, then, would be split fifty-fifty?

11 A Yes.

12 Q Let me ask you this.

13 You've received \$250,000 from the Smithsonian,
14 haven't you?

15 A Yes.

16 Q Have you paid PGI any amount for the ASE
17 billings?

18 A I allocated their portion against the money
19 that they owed us.

20 Q Have you paid PGI any amount for the ASE
21 billings?

22 A No.

23 Q Have you paid Odell, Roper any amounts?

1 A No.

2 Q Now, you mentioned earlier your claim, I
3 should say, that you were owed \$162,000 from PGI.

4 That would be work performed with the American
5 Smithsonian exhibition; is that correct?

6 A Yes, it is.

7 Q It's not work performed in connection with the
8 feasibility study, is it?

9 A No..

10 Q Now, you also heard testimony both from, I
11 believe, John Simms and Cynthia Engel that John Simms'
12 company, Odell-Simms, and Ms. Engel's company, PGI, had
13 lost money on the contract with the Smithsonian.

14 Do you recall that testimony?

15 A Yes, I do.

16 Q Do you have any reason to believe that's not
17 truthful?

18 A I don't know their internal accounting.

19 Q Do you have any reason to believe that it's
20 not truthful, though?

21 A No.

22 Q In fact, you testified that you have lost
23 money, so to speak, on the deal; correct?

1 A Yes, that's correct.

2 Q Now, you mentioned earlier that the company,
3 that being your company, Rathe Productions, is
4 experiencing some financial difficulties.

5 Is that a fair characterization of your
6 testimony?

7 A Yes.

8 Q Is that the reason why you withheld the money
9 from both PGI and the Smithsonian?

10 A No. The reason that the money was not paid to
11 PGI and to Odell was because of the offsetting \$162,000
12 that was owed to Rathe Productions from PGI for money that
13 they collected from the Smithsonian.

14 Q There's no claim that Odell-Simms owes you any
15 money?

16 A No, there's not.

17 Q Yet, you haven't paid them the money that they
18 are owed, have you?

19 A And as I explained earlier, I do feel a
20 responsibility to pay them a -- some portion of their
21 claimed costs.

22 MR. JENKINS: I object and move to strike.
23 It's non-responsive, Your Honor.

1 MR. TOLCHIN: And I'm going to object, because
2 he's asked this question ten times already.

3 THE COURT: I'm going to allow it one last
4 time. I'll strike it, and you can ask the question one
5 last time.

6 MR. JENKINS: I think I can move on, Your
7 Honor.

8 THE COURT: All right.

9 BY MR. JENKINS:

10 Q Now, you had indicated on your direct
11 examination that there was an exchange of letters between
12 you and the Smithsonian concerning amounts owed Rathe
13 Productions and PGI; correct?

14 A Are you stating Rathe Productions and PGI
15 together, or I --

16 Q Well, generically, you and the Smithsonian
17 communicated concerning the collection of amounts owed;
18 correct?

19 A Yes.

20 Q As a result of those communications, you
21 reached a settlement agreement with the Smithsonian for
22 \$250,000.

23 A That's correct.

1 Q You testified, I believe, that there was an
2 invoice that you prepared and gave to Ms. Engelhardt as a
3 result of that settlement agreement. Correct?

4 A She requested an invoice.

5 Q That invoice, which I believe is in evidence
6 as -- if you'll bear with me -- PGI Exhibit 13 reflects
7 the settlement agreement is for the international tour;
8 correct?

9 A I believe you're correct. Yes.

10 Q It's not for American Smithsonian exhibition,
11 is it?

12 A No.

13 Q Now, at the very top of the invoice, you
14 reference a contract number.

15 What contract number is that?

16 A I -- I don't recall.

17 Q Is that the contract number for -- well, we'll
18 rephrase this.

19 Rathe had more than one contract with the
20 Smithsonian at that time, didn't it?

21 A In 2000? I don't think there were any active
22 contracts in 2000.

23 Q In May of 1997, when you executed the Notice

1 to Proceed, Rathe Productions had more than one contract
2 with the Smithsonian at that time, didn't it?

3 A I'm not sure. I don't recall.

4 Q I believe you testified that you were
5 performing services for the Smithsonian under a separate
6 contract, that being the construct of the exhibit displays
7 for the American Smithsonian exhibition?

8 A That was completed at that time.

9 Q So there was no continuing contract during the
10 time where you provided services to the Smithsonian under
11 the Notice to Proceed?

12 A No, there wasn't.

13 Q That was the only contract?

14 A That's correct.

15 Q Now, I'd like to call your attention to PGI
16 Exhibit 10, Attachment B.

17 MR. JENKINS: One moment, Your Honor.

18 (Pause.)

19 BY MR. JENKINS:

20 Q I'd like to run through some calculations with
21 you, if I might.

22 The initial sum of money that you were seeking
23 to recover from the Smithsonian was \$323,000, was it not?

1 A Yes.

2 Q That was made up of the \$250,000 for the
3 international tour plus the \$73,000 for open invoices.
4 Correct?

5 A Yes. I'm just looking here at the page you
6 asked me to look at. The total is \$334,000, not \$324,000,
7 but go ahead, I'm sorry.

8 Q You would agree with me that the amount that
9 you were initially seeking to recover was \$323,000;
10 correct?

11 A Yes.

12 Q PGI Exhibit 5, I believe, will confirm that
13 for you?

14 (The witness examined a document.)

15 A Yes, that's correct.

16 Q The Smithsonian counter-offered at, I believe
17 it was approximately \$192,000; correct?

18 A You're referring to that Schedule B,
19 Attachment B?

20 Q Correct.

21 A That's what it states there; yes.

22 Q Attachment B contains some calculations that
23 the Smithsonian applied to the amount that you were

1 seeking to recover at least in terms of the total costs to
2 arrive at its grand total; correct?

3 A As I stated before under my direct testimony,
4 that they were trying to come up with a justification to
5 pay us, and they were working through various iterations
6 of how they could try to structure that.

7 Q There were certain subtractions that the
8 Smithsonian made; correct?

9 A In their -- right. This was done internally
10 on their behalf, not -- I didn't work on this with them.

11 Q Correct.

12 Now, the Smithsonian was the customer here;
13 correct?

14 A That's correct.

15 Q Under the heading, "Total for Rathe Charges,"
16 are there some deductions made for charges that you sought
17 to recover?

18 A They -- that's what this says; yes.

19 Q Then there's an adjustment for time spent on
20 the feasibility study. Correct?

21 That would be the entry two, "Total Adjusted
22 for Rathe Charges"?

23 A Right.

1 Q So of the \$334,000, which you represented to
2 the Smithsonian were expenses, they credited you, if you
3 will, for \$73,000; correct?

4 A In this negotiation document; yes.

5 Q And for PGI, PGI had represented to you, which
6 you then represented to Rathe, that the charges were
7 \$174,522; correct?

8 A That's correct.

9 Q The Smithsonian made no deductions for claimed
10 expenses, did it?

11 A Not in this document, no.

12 Q Then, again, it applied a similar time
13 calculation to arrive at a \$54,538 figure.

14 A A time calculation? I don't know time -- what
15 do you mean by that?

16 Q Well --

17 A You mean a multiplication?

18 Q Footnote 2 indicates Rathe and PGI spent a
19 total of five months --

20 A Okay. Yes.

21 Q -- on the international festival concept out
22 of a total of sixteen months.

23 A Yes, yes.

1 Q That's the time calculation that they applied;
2 correct?

3 A Well, can I elaborate on this?

4 Q Is that the time calculation they applied?

5 A It's the time calculation they applied for
6 this quote, unquote international festival. This is why
7 they were trying to justify it.

8 Q Okay.

9 A This international festival.

10 Q And then there were --

11 A That was -- I'm sorry, go ahead.

12 Q Then there were the ASE expenses for \$73,891;
13 correct?

14 A Yes.

15 Q The Smithsonian recognized \$65,000 of those;
16 correct?

17 A In this analysis; correct.

18 Q So that would mean, under the Smithsonian's
19 analysis, \$72,000 would be chargeable for Rathe's time,
20 \$54,000 for PGI's time, plus \$65,000 for ASE expenses, and
21 will you agree with me that that's we'll say approximately
22 \$120,000?

23 A What does that \$120,000 refer to?

1 Q That would be an addition of the total charges
2 for PGI's time in the amount of \$54,000 plus the
3 recognized ASE expenses.

4 A I would say your mathematics are correct.

5 Q Okay. Then there was an allowance for Odell
6 in the amount of \$50,000 for assuming the Odell charge was
7 for work performed on the feasibility study -- Footnote
8 1 -- correct?

9 A Yes. That's what this states.

10 Q Odell did perform work on the feasibility
11 study, did they not?

12 A Yes, they did.

13 Q So you would agree with me, then, the
14 Smithsonian was going to allow at that stage \$242,000 in
15 total amount paid, the grand total of \$192,000 at the
16 bottom, plus the \$50,000 for Odell-Simms indicated at the
17 top of the page. Correct?

18 MR. TOLCHIN: Objection. Objection. He's not
19 letting him look at the front of the letter. That's not
20 what they were offering. He's just playing games now.

21 If you look at the front of the letter,
22 they're offering the \$192,000. That's Page 1 of the
23 letter.

1 MR. JENKINS: I'm asking him his understanding
2 of the letter --

3 MR. TOLCHIN: Well, he's not showing him the
4 letter.

5 MR. JENKINS: -- and the calculations.

6 MR. TOLCHIN: Well, he's only showing him
7 one page of the letter.

8 THE COURT: Why don't you restate the
9 question.

10 MR. JENKINS: Sure.

11 BY MR. JENKINS:

12 Q The Smithsonian offered a grand total of
13 \$192,000; correct?

14 A Correct.

15 Q The calculation that was arrived at -- the
16 calculation that was performed to arrive at that \$192,000
17 did not include, under Attachment B, an allowance for
18 Odell-Simms, did it?

19 A I disagree with that.

20 Q Where is the allowance for Odell-Simms?

21 A You were saying that -- your calculation that
22 you've come up with is \$242,000. The Smithsonian offer
23 was \$192,000, and it assumed that the Odell-Simms' charge

1 was within that \$192,000.

2 Q So you disagree with the contention that the
3 offer was tantamount to \$242,000 -- you believe it was
4 \$192,000.

5 Is that your testimony?

6 A That's my testimony.

7 Q Now, you responded, however, to the offer of
8 \$192,000, didn't you?

9 A Yes..

10 Q Your response was in the amount of \$315,000,
11 was it not?

12 A I believe it was. Yes.

13 Q I'm turning your attention to PGI Exhibit 11.
14 \$315,000?

15 A That's what it -- yes.

16 Q That \$315,000 represents the \$250,000 for the
17 feasibility study, plus the \$65,000 in recognized expenses
18 from the Smithsonian, doesn't it?

19 A Yes.

20 Q The Smithsonian rejected that number, did it
21 not?

22 A Again, these documents were for negotiations,
23 and as you asked me earlier, we were trying to recover the

1 most amount of money from the Smithsonian.

2 Q My question is, did the Smithsonian reject
3 your counterproposal for \$315,000?

4 A I don't know if they rejected it. I think
5 they came back with a counter-offer.

6 Q What was the --

7 A I don't remember if they rejected it out-of-
8 hand.

9 Q What was that counter-offer?

10 A Again, I don't recall that.

11 This might have been that they finally paid
12 the -- agreed to pay the \$250,000.

13 Q Well, there was a subsequent communication,
14 PGI Exhibit 19, between you and the Smithsonian.

15 We just went over that, did we not?

16 A Let me take a look at that.

17 Q That's PGI Exhibit 19.

18 (The witness examined a document.)

19 A Well, this is something different, because you
20 reflected on the exhibit -- in Exhibit 11, when you said
21 it reflects \$315,000, and in Exhibit 14, you reflect
22 \$323,000.

23 So, again, the numbers were all over the place

1 because, again, these were negotiating tools that we were
2 trying to maximize the value, and trying to have a -- give
3 the Smithsonian a rationale to pay us as much as possible.

4 Q Maybe I'm not asking the question clear
5 enough.

6 A Okay. Go ahead.

7 Q So I'll try and focus it.

8 A Sure.

9 Q On January 12th of 2000, you proposed to the
10 Smithsonian \$315,000 to resolve the claims of PGI and
11 Rathe, did you not?

12 A We asked them to reconsider their offer; yes.

13 Q You proposed \$315,000, did you not?

14 A In this letter of January 12th, we did.

15 Q Yes. Ultimately you proposed a lower number,
16 did you not?

17 That would be PGI Exhibit 19.

18 A Yes; we did.

19 Q The Smithsonian did not accept your
20 counterproposal for \$258,000, did it?

21 A No, it did not.

22 Q Ultimately, it settled on \$250,000, did it
23 not?

1 A Because that was the amount of the study; yes.
2 That was in the Notice to Proceed.

3 Q Okay. For the international tour?

4 A The Notice to Proceed was for both,
5 international and the ASE.

6 Q But what was the maximum amount recoverable,
7 if you recall, for work performed for the feasibility
8 study?

9 A \$250,000.

10 Q Now, to get from the \$315,000 figure that you
11 proposed in January to the \$250,000 figure that was
12 ultimately accepted, you negotiated away the \$65,000 in
13 American Smithsonian exhibition invoices, didn't you?

14 A No.

15 Q Well, if you do the math, Mr. Rathe, \$315,000
16 minus \$250,000 leaves you how much?

17 A Well, I think we all can do that calculation.

18 Q It's \$65,000, isn't it?

19 A That's correct.

20 Q Do you find it strange that the \$65,000 that
21 you negotiated away is the \$65,000 that the Smithsonian
22 recognized as being the appropriate American Smithsonian
23 exhibition charges?

1 A As I stated before, the way we split this --
2 the way the \$250,000 was split recognized all expenses and
3 all shortfalls for all of the members.

4 MR. JENKINS: Again, I object, Your Honor.
5 It's not responsive.

6 MR. TOLCHIN: Well, it's a question that's
7 unanswerable. All he's asking him to do is do the
8 mathematics, and he's done the mathematics. It's a
9 ridiculous question.

10 THE COURT: I'm going to sustain the
11 objection, but allow you to ask the question again.

12 BY MR. JENKINS:

13 Q Do you find it coincidental, Mr. Rathe, that
14 the difference between the amount that you proposed, the
15 \$315,000, and the amount that you accepted at \$65,000 --
16 excuse me, \$250,000, the difference being \$65,000, is the
17 amount that the Smithsonian recognized as being the
18 appropriate ASE billings from the PGI?

19 A I don't find any relationship.

20 Q So it's coincidence in your view that it's
21 \$65,000, \$65,000.

22 Is that your testimony?

23 A That's my testimony, yes.

1 Q Now, during the course of the negotiations,
2 beginning in December of 1999 where the first offer --
3 well, I guess it would be prior to that, March of 1999
4 when the first offer was \$323,000, and your decision, if
5 you will, to accept \$250,000 sometime after April 14th but
6 before July of 2000, did you tell PGI the status of your
7 negotiation?

8 A No. There was no reason to.

9 Q So the answer is no, you did not consult with
10 PGI; is that correct?

11 A That's correct.

12 Q Did you consult with Odell-Simms?

13 A We did after we received -- or were about to
14 receive the money.

15 Q But you did not, any time between March of
16 1999 and July of 2000, consult with Odell-Simms, did you?

17 A March of '99 and -- no, we did not.

18 Q Now, I think I'm going to turn your attention
19 now to what is in evidence as -- we'll use the Rathe
20 exhibit, and I believe it's Rathe 13.

21 That's the letter of authorization that you
22 yourself drafted for Mr. Wismar to sign; correct?

23 A Yes.

Q In Rathe Exhibit 13, the letter from Mr. Wismar to the Smithsonian, it indicates that Rathe Productions will pay the \$50,000 due Odell-Simms, does it not?

A Yes.

Q You were copied on this letter, were you not?

A Yes, I was.

Q In fact, you drafted the letter acknowledging that you would pay \$50,000 to Odell-Simms; correct?

A Yes.

Q You don't expect PGI to pay the \$50,000 to Odell-Simms, do you?

A No; not if -- if our agreement stood up correctly.

Q So you don't expect PGI to pay Odell-Simms the \$50,000, do you?

A No.

MR. TOLCHIN: Objection; asked and answered.

MR. JENKINS: I think I've got my answer.

THE COURT: Next question.

BY MR. JENKINS:

Q Now, Mr. Wismar has authorized you to represent PGI in connection with the payment of the

1 \$250,000 for the Smithsonian international feasibility
2 study, has he not?

3 A Yes.

4 Q He does not say in the letter, "You are
5 authorized to waive our claims," does he?

6 A It doesn't say that here.

7 Q He doesn't say, "You are authorized to keep
8 all of our money," does he?

9 A That was not the business of the Smithsonian.
10 That was between Rathe and PGI.

11 MR. JENKINS: Again, I object, Your Honor, as
12 non-responsive.

13 MR. TOLCHIN: Your Honor, then I object to the
14 questions. He's asking him questions, again, to read the
15 document, which is already in evidence, and if all he
16 wants him to do is read the document, then Mr. Jenkins can
17 read the document to the jury; we don't need to ask him
18 these questions.

19 But if he wants to have an explanation, that's
20 what he's trying to do, and Mr. Jenkins cuts him off.

21 THE COURT: Well, it's going to be your duty
22 to come back and explain that, but it is a yes or no
23 answer.

1 THE WITNESS: Can you restate it, please?

2 BY MR. JENKINS:

3 Q Do you need the question again?

4 A Yes.

5 Q Certainly.

6 You don't say in the letter that Rathe
7 Productions is going to keep all the money, do you?

8 A No.

9 Q I believe that you testified on direct
10 examination that after receiving the -- well, after
11 executing the settlement agreement with the Smithsonian
12 you did not thereafter tell PGI that you executed that
13 agreement, did you?

14 A No, I did not.

15 Q You didn't provide PGI a copy of that
16 agreement, did you?

17 A No, I did not.

18 Q You didn't tell PGI that you received that
19 money, did you?

20 A No.

21 Q You also indicated in your direct examination,
22 I believe, that you had some prior relationship with the
23 Smithsonian. When I say prior, I mean prior to PGI

1 joining the endeavor to perform services for the
2 Smithsonian in connection with the American Smithsonian
3 exhibition. Correct?

4 A The prior?

5 Q Relationship with the Smithsonian.

6 A Yes.

7 Q You worked on the American Smithsonian
8 exhibition, if you will, sort of from the beginning?

9 A Yes; we did.

10 Q Then at some point in time, PGI became
11 involved with the management, if you will, of the American
12 Smithsonian exhibition; correct?

13 A Yes.

14 Q How much time -- how long did you work on the
15 American Smithsonian exhibition prior to PGI's
16 involvement?

17 A Approximately one year.

18 Q How was it that PGI then became involved with
19 the exhibition? Did you approach PGI?

20 A There were some people we knew in Washington
21 that knew both companies and thought it would be a good
22 marriage.

23 Q So you did or did not approach PGI?

1 A Again, whether these people we both jointly
2 knew put us together, I don't -- you know, I don't know
3 who called who first.

4 Q But you were an existing service provider at
5 the time that PGI became involved; correct?

6 A Yes. Well, I think our contract for the work
7 that we had done for the Smithsonian had ended.

8 Q I believe your testimony was that during the
9 American Smithsonian exhibition in cities prior to San
10 Jose and Birmingham that you provided operational support.

11 A Yes.

12 Q So you were continuing to provide services
13 continuously through that time period, were you not?

14 A Yes.

15 Q So your contract wasn't over, was it?

16 A Again, I think it might have been over,
17 because I think we were subcontracted by another firm to
18 provide those services. So I don't believe we had an
19 ongoing contract with the Smithsonian.

20 Q Now, Mr. Tolchin examined you about -- and I'm
21 going to try to find the correct exhibit here -- bear with
22 me -- Rathe Exhibit 14.

23 Do you have any information to confirm that

1 this fax actually made it to C.B. Wismar?

2 A Just the fact that I know it was sent, and,
3 you know, we were having some ongoing conversations about
4 the -- some of the backup material, and he confirmed to me
5 verbally that he had received it.

6 Q Mr. Wismar confirmed to you that he had
7 received the fax which is Odell -- excuse me, Rathe
8 Exhibit 14?

9 A Yes.

10 Q That's your testimony?

11 A Yes, that's my testimony.

12 Q In fact, you and Mr. Wismar, in the August of
13 1999 time frame, were having discussions concerning staff
14 costs for the international tour, were you not?

15 A We were talking about that as well as this
16 backup.

17 Q In connection with your discussions concerning
18 staff costs for the international tour, you solicited from
19 Mr. Wismar information for you to include in the letter
20 you sent to the Smithsonian of August 24th, 1999, didn't
21 you?

22 A Yes.

23 Q Mr. Wismar transmitted that information to you

1 at your offices in New York, did he not?

2 A Yes. This Exhibit 14 reflects that package
3 that he was overnighting to me.

4 Q Now, Mr. Wismar did not request, did he, a
5 breakdown of your, and I'll call it recap of the
6 Smithsonian, did he?

7 A Yes, he did.

8 Q In fact, Mr. Wismar requested your staff costs
9 for the international tour, didn't he?

10 A No, he did not.

11 Q That's not your recollection?

12 A No. The recollection is that he requested
13 exactly how the money would be split, and I provided this
14 to him.

15 Q Again, but you have no information that this
16 fax actually made it to Mr. Wismar, do you?

17 A I answered that already.

18 Q Now, you acknowledge, do you not, that there
19 was an agreement between PGI and Rathe Productions that in
20 the event the \$250,000 for the feasibility study was paid,
21 that it would be split \$50,000 for Odell-Simms, \$100,000
22 to PGI, and \$100,000 to Rathe Productions.

23 Is that not true?

1 A It's partially true.

2 Q So the testimony of Ms. Engel yesterday as to
3 that aspect of the agreement between the parties, that was
4 truthful in your view, was it not?

5 A Partially, and she left out the corollary of
6 that, that it was subject to the -- our inter-company
7 bills being paid.

8 Q It's your view that she agreed to that?

9 A Not entirely.

10 Q Oh, she didn't agree to that?

11 MR. TOLCHIN: What is "that"? I object, Your
12 Honor. I think we're now getting confused as to what
13 "that" response refers to.

14 THE COURT: Why don't you restate the
15 question.

16 BY MR. JENKINS:

17 Q She didn't agree to the payment of inter-
18 company bills?

19 A She did agree to the payment.

20 Q That's your testimony?

21 A Yes.

22 Q Your view is Ms. Engel is mistaken in that
23 regard; correct?

A No, not --

MR. TOLCHIN: I object at this point. That --

THE COURT: I'm not sure I'm following the questioning now, either.

MR. JENKINS: I'll tighten it up, Your Honor.

THE COURT: Okay.

BY MR. JENKINS:

Q Ms. Engel testified yesterday that the division of the \$250,000 was to be \$100,000, \$150,000.

Correct?

A Yes.

Q It's your testimony today that there was an additional agreement reached wherein Rathe Productions would get a \$162,000 that it was allegedly owed; correct?

A That it is owed, yes. There was that agreement.

Q Now, Ms. Engel testified that there was no such agreement.

Do you recall that testimony?

A I don't think she specifically said there wasn't an agreement. She didn't mention it.

Q So -- well, I guess I'll get at it a different way.

1 Other than Rathe Exhibit 14, that being the
2 fax that you sent to Jessica Peristere, there is no other
3 writing that evidences any agreement between PGI and
4 Rathe, that PGI would either pay \$162,000 to Rathe or
5 allow this offset or recoupment, if you will, of \$162,000,
6 is there?

7 A No.

8 Q So the sole basis of your claim that PGI
9 agreed to pay \$162,000 is captured in Rathe Exhibit 14, is
10 it not?

11 A No.

12 MR. JENKINS: I have no further questions,
13 Your Honor.

14 THE COURT: Do you have any questions?

15 MR. CRAIG: I do.

16 THE COURT: All right.

17 BY MR. CRAIG:

18 Q Let's start, Mr. Rathe, at the end of your
19 direct examination. You testified that there's an amount
20 that's due to Odell-Simms, and I think you said, "This is
21 an obligation that we feel that Rathe has to Odell-Simms."

22 Can you explain that statement?

23 A Yes. Odell-Simms did provide services for the

* * *

* * *

1 MR. CRAIG: Nothing.

2 MR. TOLCHIN: Nothing, Your Honor.

3 THE COURT: Okay. Thank you.

4 At this time, defense rests -- I mean the
5 Plaintiff rests?

6 MR. JENKINS: Your Honor, with that, PGI
7 rests.

8 MR. TOLCHIN: We would renew our motion.

9 THE COURT: The Court still is going to deny
10 the motion at this time. You have leave to make it at the
11 conclusion of the case. I'm going to deny it again at
12 this time.

13 Ladies and gentlemen, at this point, both
14 sides have rested -- all three sides have rested, and the
15 Court has to take up a couple of issues before it can read
16 the jury instructions on the law to you.

17 Even though they all have rested, don't try to
18 decide anything quite yet until I have given you the law
19 which you will apply to this case. I'll try to get that
20 to you as soon as I can, and then let counsel argue the
21 case to you.

22 But for right now, we'll let you step back,
23 and as soon as I can, we'll get you back out.

1 (Whereupon, at approximately 2:56 o'clock
2 p.m., the jury retired from the courtroom.)

3 MR. TOLCHIN: Your Honor, if I could just
4 supplement for the record --

5 THE COURT: Yes, indeed.

6 MR. TOLCHIN: -- to supplement my motion.

7 THE COURT: Yes, sir.

8 MR. TOLCHIN: I did find a case last night
9 that I think is directly on point which confirms the
10 argument I made to you.

11 Your Honor, this is a Supreme Court case
12 called Economopoulos versus Kolaitis. I may be
13 mispronouncing it. I have the version off the Internet.
14 It's April 21, 2000; record number 991245 from the
15 Virginia Supreme Court, and what that case says -- it
16 deals with conversion.

17 And what it says there, it defines what
18 conversion is. It says, "Conversion is the wrongful
19 assumption or exercise of the right of ownership over
20 goods or chattels belonging to another in denial of or
21 inconsistent with the owner's rights.

22 "An action for conversion can be maintained
23 only by the person having a property interest in and

1 entitled to the immediate possession of the item alleged
2 to have been wrongfully converted."

3 In this case what happened is that there was a
4 motion to strike that was made at the end of the evidence
5 of the case. The Judge granted the motion. The Supreme
6 Court affirmed the granting of the motion to strike,
7 because in this case, the Court held, among other things,
8 that Plaintiffs were not entitled to the immediate
9 possession of Treasury Bills -- in this case, that's what
10 was at issue -- at the time that they were allegedly
11 wrongfully converted, because it has to be immediate
12 possession.

13 There has been no evidence whatsoever
14 presented that at the time that Rathe cashed that check,
15 that PGI had the right to immediate possession of that
16 check or any part of it.

17 There is no testimony whatsoever, and it can't
18 be as a matter of logic or law, because the check was
19 written to Rathe. It's in evidence. It has to be cashed
20 by Rathe. PGI can't cash it. It has to be placed in
21 Rathe's bank account because that's who it was written to.
22 That was the owner of the check.

23 So the Economopoulos versus Kolaitis case is

1 exactly on point, and that's exactly what the case law is.

2 I found in an older case, running that
3 backwards, that says -- this is on trover and conversion.
4 This case actually went off on trover but it's the same
5 issue, trover and conversion. This is Mullins versus
6 Sutherland, 109 Southeastern Reporter 420, a Virginia
7 Supreme Court case that says -- I'll just read the
8 headnote to you. It's the case as well -- well, actually,
9 I'll read it to you.

10 It's Headnote 6, but it says, "One who has
11 neither actual possession of the property nor the right to
12 demand the immediate possession thereof at the time it was
13 disposed of by the Defendant in violation of the contract
14 in this case cannot maintain an action of trover. And
15 it's saying -- it's trover and conversion or equivalent.

16 You need immediate possession. There's been
17 no evidence of the right to immediate possession. Even if
18 you take everything that they said, everything, they had
19 no right to immediate possession.

20 Even based on their testimony, Rathe was
21 supposed to distribute it to them at some point. That's
22 their claim, but it wasn't a right to immediate
23 possession; so, therefore, you can't have conversion.

1 They never sued in contract, which is what
2 they should have sued in. Instead they chose these crazy
3 conversion and assumpsit claims that don't make any sense.
4 They haven't proved the elements.

5 We ask that our motion to strike be granted.

6 MR. JENKINS: Well, I think again, Mr. Tolchin
7 misses the fundamental nature of the case, and that is at
8 the time that Rathe Productions cashed the check and
9 failed thereafter, immediately or at any point, to give
10 the money to PGI, and to Odell-Simms for that matter, as
11 they were required to do, that constituted a conversion of
12 their claim.

13 There's a case -- a Circuit Court case that's
14 very similar to the facts in this case, and I'll cite the
15 Court to Fox-Seko Construction versus Poulin Construction,
16 28 Virginia Circuit 1, out of Loudoun.

17 In this case, Fox owed Poulin Construction
18 money for services performed. Fox wrote a check to
19 Poulin; the check bounced. Fox wrote a second check to
20 Poulin; Poulin cleared and deposited the second check.
21 Poulin then thereafter cleared and deposited the first
22 check.

23 Fox demanded return of the amounts that Poulin

1 received for the first check, and Poulin thereafter did
2 not return that money under some claim of setoff.

3 The Court there said, "Recognizing that there
4 is an action under the Virginia Commercial Code for
5 conversion of a check," unlike what Mr. Tolchin has argued
6 to you, the Court there says, "There is no conversion of a
7 check involved in this case. The property converted was
8 the sum of \$18,000 which was by mistake credited to the
9 bank of Poulin.Construction.

10 "One does not need to argue whether the
11 original check was converted or the second check was
12 converted, because the conversion did not take place until
13 the failure to return the duplicate payment of
14 \$18,701.95."

15 That's exactly what we have in this case, Your
16 Honor. They received a payment in excess of the amount
17 that they are entitled to receive. They have failed, upon
18 our demand, to turn over that portion that belongs to PGI.
19 That is a conversion. Fox is on point. The case is very
20 similar. And the Court came to the same conclusion that
21 the Court should come to in this case.

22 The retention of the funds after receipt is a
23 conversion of those funds to the extent of PGI's interest.

1 It's pretty clear, Your Honor, and that the motion to
2 strike should be denied.

3 MR. TOLCHIN: If I could respond. That's
4 exactly the point. In that case -- I haven't read that
5 case, but from what he just read to us, there were two
6 checks, and as soon as that second check gets there, they
7 have to return that first check. They can't hold both of
8 them. That's the right to immediate possession of those
9 funds. That's exactly the point.

10 Indeed, if PGI's argument is accepted in this
11 case, then every single case of contract becomes a
12 conversion because every time I owe you money under a
13 contract and I don't pay you, you can claim conversion;
14 you converted the money you owe me.

15 That's what PGI's arguing. They're
16 essentially saying every breach of contract is a
17 conversion. Odell would have a conversion claim.
18 Everybody who walks in this courtroom with a contract case
19 has a conversion claim, because you haven't paid it, it's
20 converted. That is senseless. That cannot be the law,
21 and indeed it's not the law.

22 In Economopoulos versus Kolaitis, the case I
23 just read to you, it said specifically that's not the law;

1 they had to have the right to immediate possession of
2 those Treasury Bills, and if they don't, then they haven't
3 proven the right to a conversion claim.

4 The most that they might have is some other
5 kind of claim. There may be a thousand other claims out
6 there. But unless at the time -- at that specific point
7 in time they had an immediate right to it, then it's just
8 a contract case, then it's just a case where, hey, you owe
9 somebody money. That's it; but it's not a conversion
10 case.

11 Conversion has to be, I take your property,
12 and as soon as I take it, you have a right to it back.
13 That's what conversion is; I'm taking your property; you
14 have an immediate right to it back.

15 There has been no evidence in this case that
16 they had an immediate right to payment of that -- any part
17 of that two fifty. They may have had a claim that Rathe
18 has to pay it back, but they had no immediate claim.

19 Was it one day, two days, two weeks, ten
20 weeks, two months? Nothing. There is no evidence of
21 immediacy here, and therefore, Kolaitis is exactly on
22 point, and so was that case. So, that's exactly the
23 point.

1 THE COURT: Well, the Court has certainly
2 heard you, and you have certainly amplified your motion to
3 strike. Again, as I said you can renew your motion at the
4 appropriate time.

5 The Supreme Court has another case by a Greek
6 name that the Court is going to adhere to, and I will not
7 grant your motion.

8 All right. The first group, that you all have
9 agreed on, it starts as Instruction Number 7,
10 circumstantial evidence.

11 Is that the first group that you agreed?

12 MR. CRAIG: No. That's the --

13 THE COURT: That's the group you haven't
14 agreed to?

15 MR. JENKINS: Actually, I believe it is the
16 group we agreed to, Your Honor.

17 MR. CRAIG: I'm sorry; I've got it backwards.

18 MR. TOLCHIN: I haven't pulled out the -- may
19 I just take a quick look, and I'll tell you if that's the
20 agreed group.

21 (The Court handed documents to Mr. Tolchin for
22 his examination.)

23 MR. TOLCHIN: Yes.

* * *

1 THE CLERK: These (indicating) aren't going to
2 go back to the jury?

3 MR. TOLCHIN: Have these all been admitted?

4 THE COURT: No.

5 THE CLERK: That's why that's not going back
6 to the jury.

7 THE COURT: His is --

8 MR. CRAIG: Let me withdraw the exhibits that
9 have not been admitted.

10 (The Court and the Clerk conferred, off the
11 record.)

12 THE CLERK: Just for the record, the exhibits
13 contained in the three black books will be going to the
14 jury as admitted items of evidence.

15 THE COURT: Let's bring the jury back in.

16 (Whereupon, at approximately 3:59 o'clock
17 p.m., the jury returned to the courtroom and resumed their
18 seats in the jury box.)

19 THE COURT: Ladies and gentlemen, I am now
20 going to read to you the instructions of the law which you
21 will apply to this case, after which counsel will have an
22 opportunity to briefly argue the case to you.

23 You are the judges of the facts, the

1 credibility of the witnesses, and the weight of the
2 evidence.

3 You may consider the appearance and manner of
4 the witnesses on the stand, his or her intelligence, their
5 opportunity for knowing the truth and for having observed
6 the things about which they testified, the witnesses'
7 interest in the outcome of the case, their bias, and if
8 any have been shown, their prior inconsistent statements,
9 or whether they have knowingly testified untruthfully as
10 to any material fact in the case.

11 You may not arbitrarily disregard the
12 believable testimony of a witness. However, after you
13 have considered all of the evidence in the case, then you
14 may accept or discard all or part of the testimony of a
15 witness as you think proper.

16 You are entitled to use your common sense in
17 judging any testimony. From these things and all the
18 other circumstances of the case, you may determine which
19 witnesses are more believable and weigh their testimony
20 accordingly.

21 You must not base your verdict in any way upon
22 sympathy, bias, guesswork, or speculation. Your verdict
23 must be based solely upon the evidence and the Court's

1 instructions.

2 You must not consider any matter that the
3 Court rejected or struck from consideration. It is not
4 evidence and should be disregarded.

5 Any fact that may be proved by direct evidence
6 may be proved by circumstantial evidence; that is, you may
7 draw all reasonable and legitimate inferences and
8 deductions from the evidence.

9 When one party testifies unequivocally to
10 facts within his own knowledge, those statements of facts
11 and the necessary inferences from them are binding upon
12 him. He cannot rely upon other evidence in conflict with
13 his own testimony to strengthen his case.

14 However, you must consider his testimony as a
15 whole and you must consider a statement made in one part
16 of the testimony in light of any explanation or
17 clarification made elsewhere in his testimony.

18 Your verdict must be based on the facts as you
19 find them and on the law contained in all of these
20 instructions.

21 The issue in this case as to Odell-Simms &
22 Associates, Incorporated, OS&A's claim is:

23 1) Did either Defendant Rathe Productions

1 and/or Defendant PGI breach its contract to OS&A when
2 either one or the other failed to pay OS&A for its
3 performance under the agreement;

4 2) If so, what is the amount of money due
5 and owing of OS&A from either Rathe Productions and/or
6 PGI;

7 3) Is Rathe/PGI a joint venture;

8 4) If so, are Rathe Productions and PGI
9 each liable to OS&A for the entire obligation under the
10 agreement with OS&A.

11 You shall find your verdict for Odell and
12 against Rathe if it is proved by the greater weight of the
13 evidence that:

14 1) There was a contract between the
15 parties; and

16 2) That the Defendant Rathe breached the
17 contract.

18 If you find your verdict for Odell and against
19 Rathe, you shall also consider whether PGI is obligated to
20 pay any part of the verdict pursuant to a contract with
21 Rathe.

22 You shall find your verdict for Odell and
23 against PGI if it is proved by the greater weight of the

1 evidence:

2 1) That there was a contract between the
3 parties; and

4 2) That the Defendant PGI breached the
5 contract.

6 You shall find your verdict for PGI and
7 against Rathe if it is proved by clear and convincing
8 evidence that Rathe converted PGI's funds.

9 (Pause.)

10 THE COURT: You shall find your verdict for
11 Rathe if either Plaintiff failed to prove either or --
12 either any of the elements -- either or any of the
13 elements above.

14 Your verdict must be based on the facts as you
15 find them and on the law contained in all of these
16 instructions. The issues in this case are -- as to PGI's
17 claim are:

18 1) Did the Defendant Rathe convert funds
19 which rightfully belonged to the Plaintiff PGI;

20 2) If so, what is the amount of the
21 damages.

22 Conversion is the wrongful assumption or
23 exercise of the right of ownership over goods or chattels

1 belonging to another in denial of or inconsistent with the
2 owner's rights.

3 An action for conversion can be maintained
4 only by the person having a property interest in and
5 entitled to the immediate possession of the item alleged
6 to have been wrongfully converted.

7 When a party has the burden of proving an
8 issue by clear and convincing evidence, he must produce
9 evidence that creates in your minds a firm belief or
10 conviction that he has proved the issue.

11 Conversion must be proved by clear and
12 convincing evidence.

13 If you find your verdict for PGI, then in
14 determining the damages to which PGI is entitled, you
15 shall consider any of the following which you believe was
16 proven by the greater weight of the evidence:

17 1) The value of the property converted at
18 the time and place of conversion; or

19 2) The value of the payment Rathe
20 Productions received which rightfully belonged to PGI.

21 The burden is on PGI to prove by the greater
22 weight of the evidence each item of damage it claims. PGI
23 is not required to prove the exact amount of its damages,

1 but PGI must show sufficient facts and circumstances to
2 permit you to make a reasonable estimate of each item.

3 If PGI failed to do so, then it cannot recover
4 damage for that item.

5 You shall find your verdict -- you shall find
6 that Rathe Productions and PGI entered into a joint
7 venture if OS&A has proved by the greater weight of the
8 evidence that:

9 1) Rathe Productions and PGI entered into a
10 joint business enterprise for profit;

11 2) Rathe Productions and PGI had an express
12 or implied understanding of how to share in the profits
13 and losses;

14 3) Rathe Productions and PGI did not form
15 an actual partnership or corporate designation.

16 Plaintiff OS&A has the burden of proving each
17 element of its claim by a preponderance of the evidence.
18 The preponderance of the evidence is that evidence which
19 you find more persuasive.

20 An express contract is an agreement, either
21 written or oral, in which the terms are stated by the
22 parties.

23 A material breach of contract occurs if a

1 party fails to do something which he is bound to do
2 according to the contract which is so important and
3 central to the contract that the failure defeats the very
4 purpose of the contract.

5 You shall find your verdict for OS&A if OS&A
6 has proved by the greater weight of the evidence that
7 either Rathe Productions and/or PGI failed to perform
8 under the contract when it failed to pay OS&A for its
9 performance under the contract between Rathe Productions
10 and/or PGI; either Rathe Productions or PGI's actions
11 damage OS&A.

12 If you find your verdict for OS&A, then OS&A
13 is entitled to recover as damages all of the losses OS&A
14 sustained, including the amount for which OS&A was
15 entitled under the contract between OS&A and Rathe/PGI
16 which are a direct and natural result of the breach and
17 which OS&A has proved by the greater weight of the
18 evidence.

19 The losses must have been reasonably
20 foreseeable by the parties when they entered into the
21 contract.

22 The burden is on OS&A to prove by a greater
23 weight of the evidence that OS&A sustained damages when

1 OS&A was not paid under its contract with Rathe/PGI.

2 OS&A is not required to prove the exact amount
3 of OS&A's damages, but OS&A must show sufficient facts and
4 circumstances to permit you to make a reasonable estimate
5 of them. If OS&A fails to do so, OS&A cannot recover
6 them.

7 A joint venture exists when two or more
8 persons combine in a joint business enterprise for their
9 mutual benefit with an express or implied understanding or
10 agreement that they are to share in the profits or losses
11 of the enterprise and that each is to have a voice in its
12 control and management.

13 The requirement of a joint control does not
14 preclude the delegation of management duties to one of the
15 joint venturers.

16 When two or more persons join in a business
17 enterprise for their mutual benefit with an understanding
18 that they are to share in the profits or losses and that
19 each is to have a right to control or manage, then each
20 one is liable for all of the obligations of the other that
21 is committed within the scope of the enterprise.

22 Indemnification is the right of restitution
23 and rests on the concept that one person is unjustly

1 enriched at the expense of another when the other party
2 discharges a liability that it should be his
3 responsibility to pay.

4 A contract is an agreement for consideration
5 between two or more parties. A contract arises when an
6 offer is accepted.

7 An offer is a proposal of the terms on which a
8 person will enter into an agreement if the offer is
9 accepted by the person to whom it is made.

10 An acceptance is an unconditional promise to
11 be bound by the terms of the offer.

12 For a contract to exist, the minds of the
13 parties must have met on every material item of the
14 alleged agreement.

15 A contract must be both complete and
16 reasonably certain. It is complete if it includes all of
17 the essential terms. It is reasonably certain if all of
18 the essential terms are expressed in a clear and definite
19 way.

20 When two parties have exchanged promises as
21 consideration, each must be bound to do or refrained from
22 doing something.

23 Mr. Jenkins.

1 THE CLERK: Mr. Foreman, has the jury reached
2 its verdicts?

3 A JUROR: Yes, sir, we have.

4 THE CLERK: May I have them, please. Thank
5 you very much.

6 We the jury on the issues joined in the case
7 of PGI versus Rathe Productions, CL 01-100, find in favor
8 of PGI and assess damages at \$100,000; signed by the
9 foreman.

10 ~~We the jury on the issues joined in the case~~
11 of Odell-Simms versus PGI and Rathe Productions,
12 CL 01-171, find in favor of Odell-Simms and assess damages
13 against Rathe Productions at \$50,000.

14 THE COURT: All right. Counsel, is everybody
15 satisfied that the verdicts of the jury are unanimous?

16 MR. TOLCHIN: May we poll the jury, Your
17 Honor?

18 THE COURT: Yes, sir.

19 THE CLERK: Ladies and gentlemen, I'm about to
20 ask you are these verdicts I have just read your verdicts.

21 Zooie Walters, are these your verdicts?

22 MS. WALTERS: Yes.

23 THE CLERK: Louise McGlathery, are these your

1 verdicts?

2 MS. McGLATHERY: Yes.

3 THE CLERK: Joseph Kaczorowski, are these your
4 verdicts?

5 MR. KACZOROWSKI: Yes.

6 THE CLERK: Greg Morrison, are these your
7 verdicts?

8 MR. MORRISON: Yes.

9 THE CLERK: David Ross, are these your
10 verdicts?

11 MR. ROSS: Yes.

12 THE CLERK: John Kokal, are these your
13 verdicts?

14 MR. KOKAL: Yes.

15 THE CLERK: Anne Marie Williams, are these
16 your verdicts?

17 MS. WILLIAMS: Yes.

18 THE CLERK: So say they all, Your Honor.

19 THE COURT: Is counsel satisfied the verdicts
20 of the jury are unanimous?

21 MR. TOLCHIN: Yes, sir.

22 THE COURT: All right. At this time the Court
23 will receive the verdicts as being proper in their form,

1 and at this time we will release the jury.

2 Thank you for your service over the last
3 couple of weeks, and especially for your service with
4 regards to this particular case.

5 Certainly we know that it's gone on a little
6 bit longer than everybody wanted, and it was a little bit
7 intense at times for everybody, but we do appreciate the
8 time and attention that you gave to the matter.

9 Let me also say, as you've been jurors here,
10 that if you have picked up something over the last couple
11 of weeks that you think we could do better or that would
12 make jury service better for your fellow citizens as they
13 come, we'd appreciate it if you'd let us know about it.

14 You can drop us a line or call the Clerk's
15 Office or to Judge's Chambers. We always want to make
16 sure that everyone, because you are obligated to come and
17 serve, that it is as positive an experience as we can make
18 it.

19 We also know that over the last few years that
20 many people have questioned the jury system and wondered
21 whether or not people can truly come together, sit and
22 talk their way through problems and reach a solution, and
23 make a decision as citizens from varied backgrounds.

1 We hope that your experience as jurors has
2 proven that it can work and that our system does in fact
3 work. We do thank you for your service. We'll see you in
4 about three to five years.

5 By the way, you are now excused. You don't
6 have to call in anymore.

7 (Whereupon at approximately 6:54 o'clock p.m.
8 the jury was excused.)

9 THE COURT: Well, Mr. Jenkins, Mr. Craig, you
10 all can get together and you can draft an order, then
11 circulate it to counsel.

12 If there are motions, and I know that there
13 will be in this case, I'm sure, to be had, those motions
14 should be set for either the second or fourth Fridays for
15 argument, any motion that you may wish to make with
16 regards to the matter.

17 Those are my civil motions days, the second
18 and fourth Fridays of each month, and they will be heard
19 accordingly. Thank you.

20 MR. TOLCHIN: Thank you, Your Honor.

21 * * * * *

22 (Whereupon, at approximately 6:59 o'clock
23 p.m., the hearing in the above-entitled matter was

* * *

ORIGINAL

FILED¹

FEB 28 2002

DAVID A. BELL, Clerk
Circuit Court Arlington County VA
By Deputy Clerk

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF ARLINGTON COUNTY

3
4 PGI, INC.,)

5 Plaintiff,)

6 vs.)

At Law No.

7 RATHE PRODUCTIONS, INC.,)

CL01-100

8 Defendant.)

9 - - - - -

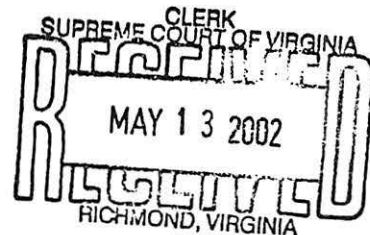
10 Arlington Circuit Court

11 Friday, December 14, 2001

12 Arlington, Virginia

13
14 The motion came on for hearing at 11:35 a.m. before
15 the Honorable W.T. Newman, Jr., Presiding Judge
16

17 - - - - -



* * *

* * *

P R O C E E D I N G S

- - - - -

1
2
3 MR. JENKINS: Good morning, Your Honor,
4 John Jenkins for PGI.

5 MR. TOLCHIN: Ed Tolchin for Defendant,
6 Rathe.

7 MR. CRAIG: Chris Craig, Your Honor.

8 JUDGE NEWMAN: Deja vu, gentlemen. All
9 right.

10 MR. TOLCHIN: I think we are here today on
11 a couple motions, but it is primarily our motion.

12 JUDGE NEWMAN: Yes, sir. I understand.

13 MR. TOLCHIN: The issue which we are
14 presenting to you now is the same issue we
15 presented to you throughout the trial, and that is
16 can this case, should this case have gone to the
17 jury on a claim of conversion.

18 And it is our position, as we have
19 expressed consistently, that this was a contract
20 case. We never were sued for breach of contract,
21 but that's all this case was is a breach of
22 contract case and never should have gone to the

1 jury on the issue of fraud because the elements of
2 conversion were never presented to the jury.

3 And the elements of a conversion could not
4 be presented to the jury primarily for two reasons.
5 One is the only wrong here was a contractual
6 breach. And the second reason is that the
7 plaintiff could not show an immediate right to the
8 property, again, because this was a contractual
9 situation and, therefore, the plaintiff had no
10 immediate right.

11 The reason why these are critical is
12 because the elements of conversion are
13 straightforward. The elements of conversion are
14 set forth in the Economopoulos case, which is the
15 April 21, 2000 case by the Supreme Court which we
16 have cited to the court several times. It is 259
17 Va. 806.

18 And the Economopoulos case is a case in
19 which the Supreme Court upheld a motion to strike
20 which the trial court granted with respect to a
21 conversion claim because the elements of conversion
22 were not there.

1 And the elements of conversion the court
2 held were a wrong committed by defendant assuming
3 or exercising ownership over an item, plaintiff's
4 property interests at the time of the conversion,
5 and plaintiff's immediate right to the property at
6 issue. So there has to be a wrong and an immediate
7 right.

8 When you have a contract claim, you don't
9 have the wrong. And because it is only a contract,
10 there is no immediate right because there was no
11 evidence that PGI had the right to that money on
12 day one or on day two or a month, a week, a year,
13 whatever. There was no specific time limitation
14 when they had a right to that money because it was
15 a contract. They were asserting that they had a
16 right to this money because of this agreement
17 between the parties of how to split the \$250,000.

18 Now, the problem with the wrong issue, the
19 issue about whether a breach of contract can be a
20 wrong, is clearly set forth in all the decisions
21 that we have cited to you in the McDevitt case, the
22 Oleyar case, and indeed in the Outer Kahos case,

1 which is from the Fourth Circuit, which is directly
2 on point.

3 The court, Fourth Circuit said when as in
4 the instant case the allegations of conversion are
5 nothing more than allegations of negligent
6 performance of contractual duties, such alleged
7 breaches of duty are not actionable in tort. And
8 the reason for that is because you can't change in
9 Virginia law, and it is very well settled Virginia
10 law, you can't take a breach of contract and change
11 it into a tort.

12 The only time you can have a tort is when
13 there is an independent breach of duty, not the
14 breach of a contractual duty. Here there was no
15 independent breach of duty, there was only a
16 contractual duty that was at issue.

17 Now, in their opposition memorandum they
18 tried to get around this. And the way they tried
19 to get around this is they say, well, first of all,
20 that's not true. Well, it is true. Then they try
21 to get around it by saying that really there was a
22 breach of loyalty here, and therefore it wasn't a

1 contractual issue, it was an issue of there was a
2 partnership and Rathe breached his duty of loyalty
3 to its partner, PGI.

4 The problem with that is severalfold. One
5 is just a real contextual problem. The jury, as
6 you recall, and you have the verdict, the jury
7 found that PGI was not liable to OS -- to Odell,
8 only Rathe was liable to Odell, but the jury was
9 instructed when two or more persons join in an
10 enterprise with the understanding that each should
11 have the right to manage, each one is liable for
12 all obligations of the other that is committed
13 within the scope of the enterprise. So they were
14 instructed that if they found this partnership,
15 that PGI would have to be found liable for the same
16 that Rathe was found liable. But the jury found
17 that PGI wasn't liable. So that argument is
18 inconsistent with the jury verdict.

19 Putting that aside, was there ever an
20 issue of duty of loyalty? Did you get any
21 instructions on duty of loyalty? Is duty of
22 loyalty mentioned in the motion for judgment? It

1 is not. It was never part of this case. They
2 never put it at issue.

3 Had they put it at issue, we probably
4 would have demurred early on or alternatively we
5 would have put in our other jury instructions or
6 our own evidence with respect to that issue.

7 They can't after the fact try to put a
8 square peg into a round hole and say really this is
9 a duty of loyalty case, which the jury rejected.
10 But putting that aside, it was never part of the
11 case, it was only part of OS&A's case, and the jury
12 rejected it, but it was never part of PGI's case.

13 We never put in any instructions, never
14 argued, never put in any evidence. They can't
15 after the fact try to pigeonhole this. It doesn't
16 work.

17 Moreover, it really is irrelevant because
18 it all comes back to the contractual issue. The
19 only way that they had a right to split \$100,000 of
20 that, to say that it was 100, 100, and 50, which
21 was PGI's position, was based upon this agreement.
22 And, indeed, if they were going on a duty of

1 loyalty argument, then all this evidence about this
2 agreement would never have come into evidence.

3 It never would have been part of the case
4 because it would have been irrelevant to the case.
5 So they are trying to back-door it, but they can't.
6 Even if they do back-door it, they are still stuck
7 with the same thing because there still is the need
8 for that contract to be the breach and that breach
9 cannot be the issue which causes the tort because
10 in Virginia you can't have a conversion claim
11 arising out of a breach of contract, there has to
12 be an independent breach of duty, and there isn't
13 any here.

14 Now, their second argument in their
15 opposition, we filed a reply, the second argument
16 in the opposition is this waiver argument. And
17 they cited these three cases, but they didn't cite
18 the Supreme Court case which rejected their very
19 reading of these three cases. And we cited that to
20 you. That was the Wright case.

21 And there are many other cases other than
22 Wright that specifically reject their argument.

1 For example, in State Farm Mutual Automobile
2 Insurance versus Kendrick, 254 Va. 206, the court
3 addressed the identical argument. And it says
4 Dr. Kendrick contends that State Farm is
5 procedurally barred from raising these issues on
6 appeal because it failed to object to the damages
7 instruction when it submitted these issues to the
8 jury. We do not agree. This is the Supreme Court
9 speaking.

10 "The record shows that State Farm objected
11 to the introduction of evidence of the expense of
12 future surgery and the resultant income loss.
13 Further, State Farm, at the conclusion of
14 Dr. Kendrick's evidence and again at the conclusion
15 of all the evidence, moved to strike the claim for
16 future damages. Finally, following the verdict,
17 State Farm moved to set aside the verdict on the
18 ground that the evidence did not support an award
19 of future damages. In order for a procedural
20 waiver to apply, the record must show that a
21 litigant invited a trial court to commit error,
22 either by failing to object or by agreeing to the

1 ruling."

2 It is clear from the record in the present
3 case that the trial court was fully aware
4 throughout the trial of State Farm's contention.
5 Their waiver issue doesn't make it on the Supreme
6 Court law, which is totally controlling in this
7 particular matter.

8 Third element; this immediate right. What
9 evidence did the court have of when they had the
10 right to that hundred thousand? None. It had no
11 evidence. The only thing they had a right to, the
12 only thing they put in was when the money was
13 received. At some point the money should have gone
14 back, \$100,000 should have gone back to PGI. Was
15 it on day one? Was it on day two? Day three?

16 If you remember the motion for judgment
17 and you look at it, they were actually trying to
18 prove the conversion there by saying the check was
19 written to PGI and to Rathe and Rathe signed PGI's
20 name on the check and cashed it. That indeed would
21 have been a conversion potentially because then we
22 would have stolen that instrument from them.

1 But it ends up that the evidence was that
2 the check was written only to Rathe and Rathe
3 didn't do that, so they were stuck trying to
4 back-door this, but they never put in any evidence
5 of an immediate right to that money because they
6 couldn't, because this was a contract action, not a
7 conversion action.

8 What we are left with is a situation in
9 which a plaintiff attempted to sue on a cause of
10 action that didn't exist because it wanted to
11 assert a punitive damages claim. That's what
12 happened in this case. And the court correctly
13 struck that punitive damages claim because there
14 was no evidence that they could have supported it.

15 It then was stuck with trying to push a
16 round peg into the square hole, the round peg of
17 the conversion theory into the square hole of a
18 contract action. And it can't do that under
19 Virginia law.

20 It is clear that the verdict should be set
21 aside, and it is clear that the judgment should be
22 entered in Rathe's favor in this particular matter.

1 I will just say one other thing. They
2 also tried to argue that Virginia law will allow a
3 breach of contract to serve as a basis for a
4 conversion claim. And they cite one case, actually
5 a case we have cited to the court throughout, which
6 is the Kaplan case, the Universal CIT Credit Corp.
7 versus Kaplan. They say in that case there was a
8 breach of contract but they misread the case.

9 There was no contract at all between the
10 appellee and appellant there. The only contract
11 was between another party, this guy Bailey, who
12 defaulted in the court below, never even, never
13 defended at all. And in dictum the court said
14 Bailey indeed did have a contract, didn't have a
15 right to a vehicle, it was a conditional sales
16 contract on a vehicle, but under their theory, as
17 soon as he defaulted, as soon as he failed to give
18 the car back, when the default occurred, that would
19 have been a conversion. That's their theory of the
20 case.

21 Their theory of the case is that if he had
22 a contract, Bailey, and he didn't give the car back

1 when he defaulted on the conditional sales
2 contract, that's a conversion. That's PGI's
3 theory. The court although in dictum didn't have
4 to address that because Bailey had defaulted below
5 said no, that's not the conversion. The conversion
6 is when he took and rubbed out the title
7 information and then sold the car because then
8 there was something that happened immediately,
9 there was something immediate, there was something
10 that was occurring. That was a conversion when he
11 took it and sold it to a third party, to an outside
12 party who personally became the appellee in this
13 case, the Kaplan, and there was another dealer.
14 You see, that's why this case, that's why our case
15 underscores why our case is a contract case.

16 Our case is a case in which their only
17 right arose out of this evidence that they were
18 putting in of this contract. It is a contract
19 case. It is not a conversion case. It should
20 never have gone to the jury. We ask that our
21 motion to strike that you took under advisement be
22 granted, and that the verdict be set aside.

1 MR. JENKINS: Good morning, Your Honor.

2 Just a few introductory remarks. I understand that
3 Mr. Tolchin has referred to a reply brief that was
4 supplied to the Court.

5 I would ask that the Court not consider it
6 because I was not afforded the opportunity to
7 examine that brief until 10:00 o'clock this morning
8 and as a result have not prepared any arguments to
9 address those specific issues raised. I move the
10 Court to not receive that as timely.

11 MR. TOLCHIN: I believe it was faxed to
12 his office yesterday.

13 MR. JENKINS: I was at my office until
14 8:00 o'clock last night, didn't receive it until
15 10:00 o'clock this morning. Now, I find it
16 interesting that Rathe Productions fails to
17 acknowledge and recognize to the Court both in its
18 argument and in its pleadings that the Court has
19 actually already addressed this issue on two
20 occasions. On one occasion the Court took the
21 motion to strike under advisement; and on the
22 second occasion the Court denied their motion.

1 And I had, took the liberty of having the
2 transcript prepared where the Court in response to
3 Mr. Tolchin's request, "we would renew our motion"
4 -- I am reading now Your Honor's words -- "the
5 Court is still going to deny the motion at this
6 time."

7 Mr. Tolchin's brief seems to suggest that
8 somehow the motion is still under advisement before
9 the Court. The Court denied the motion at the
10 close of the case.

11 Now, Your Honor, the standard, I think,
12 that I have set out in my brief for the Court is
13 important as the procedural context of this case
14 arises. PGI is entitled, having secured a jury
15 verdict in its favor, to all the direct and
16 reasonable inferences that would flow from that.

17 And, in addition, the Court should not set
18 aside a jury verdict in this case unless there is
19 no evidence before the Court to support PGI's
20 contentions.

21 Not to overstate the matter, Your Honor,
22 but certainly in this circuit and if not in

1 Virginia, jury verdicts are virtually bulletproof
2 because the same arguments that Mr. Tolchin is
3 making to you today as a matter of law, he has,
4 Number 1, made before this Court before and lost
5 and, Number 2, made before the jury and lost.

6 Now, primarily the motion should not be
7 well received by the Court because Mr. Tolchin has
8 waived the right to make this objection. I have
9 set out in my papers in detail that the Spitzli
10 case, the Holles case, and several others that I
11 have cited to the Court stand for the proposition
12 that he has failed to object to the Court's
13 instructions on the issue of conversion. And
14 having failed to have done so, he has waived that
15 issue.

16 Spitzli and Holles both, Your Honor, are
17 instructive on this point, where in Spitzli the
18 Supreme Court of Virginia found that, as in this
19 case, the defendant moved to strike the evidence
20 both at the conclusion of the plaintiff's case and
21 at the conclusion of all the evidence.

22 And in that case the defendant failed to

1 reserve the objection at the instruction stage and
2 as a result constituted waiver of any contention
3 that the trial court erred as not ruling on those
4 issues as a matter of law.

5 And in this case, Your Honor, the
6 instructions that the Court gave were actually
7 Mr. Tolchin's instructions; OSA instruction, I
8 believe it was H, and Rathe instruction 19, both on
9 the issues of conversion and as to the existence of
10 a joint venture.

11 So that the arguments that are being made
12 by the defendant now are somewhat disingenuous,
13 having put those facts or those legal issues, at
14 least, before the jury affirmatively.

15 Mr. Tolchin also seeks to rely on the case
16 of Wright versus Norfolk & Western Railway for the
17 contention that somehow he has not waived the right
18 to raise the issue before the Court. However, that
19 case was decided, Number 1, on its facts, wherein
20 the instruction at issue in that case was agreed
21 upon prior to the close of evidence and prior to
22 the defendant in that case making a motion to

1 strike. That's not the circumstance, the
2 procedural posture in this case, Your Honor.

3 As a result, Mr. Tolchin has invited the
4 Court to commit the error that he now complains the
5 Court committed. Mr. Tolchin and Rathe invited the
6 instruction on conversion, did not object to the
7 conversion instruction. In fact, we used his
8 instruction. He invited the Court both to instruct
9 on the definition and the finding for conversion.

10 Now, all along Mr. Tolchin has been trying
11 to characterize this case as a breach of contract
12 case and it has not been from the very beginning.
13 My purpose of my discussion of Universal CIT in the
14 brief was to draw the distinction between what
15 really happened and what the evidence was in this
16 case and what Mr. Tolchin is suggesting to the
17 Court.

18 In Universal CIT, Mr. Kaplan -- excuse
19 me -- Mr. Bailey purchased a car from Universal CIT
20 or from actually an auto dealer. Universal CIT was
21 assigned the installment sales contract.
22 Mr. Bailey's rights in that vehicle flow from that

1 contractual relationship with Universal CIT.

2 Mr. Bailey, thereafter, failed to pay the
3 amounts owed under that installment sales contract
4 and sold his car and the Court found not only did
5 Mr. Bailey convert Universal CIT's property, but
6 also the subsequent purchaser. Universal CIT's
7 rights in that channel are solely based on the
8 installment sales contract, both as to Bailey and
9 both as to the subsequent purchaser.

10 Now, I illustrate that not to suggest that
11 this is a breach of contract case because it is
12 not, but to rebut, dispel this illusory suggestion
13 that somehow rights and property, which are enjoyed
14 by virtue of contract, cannot by definition be
15 subject to conversion. They can.

16 But in this case, Your Honor, there is
17 more than the contract between PGI and Rathe and
18 the Smithsonian. PGI did not sue on the contract
19 between the Smithsonian and PGI and Rathe. PGI
20 sued for the conversion of the settlement proceeds
21 Rathe received, secretly retained, and wrongly
22 failed to pay over to PGI.

1 We did not sue on the contract. We sued
2 for the retention of money that is ours.

3 Now, our brief, and I will briefly
4 highlight it for the Court, sets out how the
5 evidence in this case satisfies each and every
6 element. And although PGI contends the standard of
7 proof to be applied is preponderance of the
8 evidence, the court instructed to clear and
9 convincing evidence, and the jury so found that
10 Rathe had wrongly converted property that rightly
11 belonged to PGI at a specific point in time.

12 And that point in time, Your Honor, as the
13 evidence showed at trial was the retention of the
14 settlement proceeds that belonged to PGI at the
15 time of its receipt by Rathe and the failure
16 thereafter to pay over, upon demand, constituted a
17 wrongful retention of property belonging to PGI.

18 We heard evidence, rather troubling
19 evidence, that Rathe negotiated and executed a
20 settlement agreement with the Smithsonian to waive
21 not only Rathe's claims but PGI's claims, claims
22 that were made in excess of the \$250,000 that was

1 described in the contract, which would tend to
2 suggest that Mr. Tolchin's argument is not entirely
3 correct, and that after negotiating and executing
4 that agreement, all without telling PGI, they
5 received \$250,000.

6 And then they thereafter did not tell PGI,
7 nor Odell Simms, that they received that \$250,000.
8 That is direct evidence of wrongful conduct. And
9 it certainly is evidence which would allow a
10 reasonable jury to infer that they were acting with
11 a guilty conscience, that that conduct is wrongful.

12 PGI's right to the possession of the
13 amount that the jury awarded was clear from the
14 evidence. Mr. Tolchin is focusing on the amount of
15 \$100,000 and the fact that there were discussions
16 between the parties on that figure. But recall,
17 Your Honor, the evidence at trial was that number
18 could have been anywhere between \$52,000 and
19 \$120,000.

20 PGI Trial Exhibit 14 and Trial Exhibit 19
21 were the letters to the Smithsonian where Rathe
22 represented the distribution between PGI and Rathe

1 of whatever amount was recovered. There were
2 figures in the amount of \$192,000, \$250,000, and
3 \$323,000, all discussed with the Smithsonian. And
4 no matter what that amount of money was, the
5 division between the joint venturers was 50/50.

6 Again, Mr. Tolchin's suggestion that this
7 is solely based on the representation between PGI
8 and Rathe or discussions concerning the
9 distribution of the money, that this is the
10 contract that is at issue is false because a
11 contract has a definite price, a definite amount of
12 money that is owed for services performed.

13 In this case the evidence could have led a
14 reasonable jury to conclude that PGI was entitled
15 to \$100,000 or, excuse me, \$120,000 and Rathe was
16 entitled only to eight or that PGI was only
17 entitled to 50 and Rathe was entitled to some sum
18 in excess of that.

19 The evidence of the discussions between
20 the parties confirms PGI's right to the
21 distribution of half whatever that amount is. And
22 that is not based in contract. That is based by

1 the special relationship between the parties, which
2 brings me to my third point, Your Honor.

3 Mr. Tolchin would urge that PGI's right to
4 the portion of the settlement proceeds that it was
5 entitled to receive is based solely on a contract.
6 It is not. And there was substantial evidence
7 introduced for a jury to conclude that there were
8 reasons other than the contract that Mr. Tolchin
9 alleges exists.

10 The Court instructed, without objection
11 from either PGI or Rathe Productions, on the rights
12 and responsibilities of joint venturers. And those
13 rights and responsibilities are independent of
14 whatever contract may be at issue.

15 PGI also introduced evidence that it
16 appointed Rathe as its agent to try and secure
17 money from the Smithsonian, not that that evidence
18 is necessarily required for the Court to find or
19 for the jury to find that there was a conversion,
20 but it illustrates the fallacy of the argument
21 being made by Rathe Productions that this is solely
22 and exclusively a contract case. It is not.

1 There is a special relationship between
2 the parties based in partnership or joint venture,
3 based in agency, and based on a contractual
4 arrangement with the Smithsonian, but, again, Your
5 Honor, we are not suing on the agreement with the
6 Smithsonian, which was introduced as PGI Exhibit 1.
7 We are suing on their retention of moneys that
8 belongs rightfully to PGI.

9 And, lastly, as to Mr. Tolchin's point as
10 to whether or not PGI demonstrated a right to
11 possession, I only point the Court to PGI Trial
12 Exhibit 19, which establishes an admission of Rathe
13 that PGI is entitled to half of whatever they
14 recover.

15 The evidence before the Court is clear,
16 Your Honor, that there was a wrongful retention of
17 a sum of money that belonged to PGI and that right
18 arose immediately upon the receipt of those funds
19 from the Smithsonian.

20 So in sum, Your Honor, we would urge the
21 Court to consider that Mr. Tolchin and Rathe
22 Productions has waived their right to complain at

1 this point that the Court committed error by
2 failing to rule that conversion was not available
3 to PGI as a matter of law.

4 Number 2, certainly, that rights in
5 property, which arise solely on the basis of
6 contract, may, in fact, be converted, but the Court
7 has to look at the circumstances under which the
8 claim arose and where it is based solely and
9 exclusively in contract, then you have an action in
10 contract. Where it is based in contract in part
11 and in other duties between the parties rooted in
12 common law, that being joint venture, partnership,
13 and/or agency, the conversion is proper.

14 And lastly, Your Honor, the evidence
15 clearly supports a jury verdict. The jury was
16 instructed to consider all the evidence. It was
17 instructed as to the standard to be applied. It
18 was instructed as to the law to be applied and
19 found that PGI is entitled to recover \$100,000 as a
20 result of Rathe's conversion of its portion of that
21 settlement agreement.

22 The jury necessarily found that there was

1 that special relationship between the parties
2 because if you will recall Rathe's defense to Odell
3 Simms' contract claim was we did not have a
4 contractual relationship with Odell.

5 The only way liability flows to Rathe
6 Productions is through its joint venturer, PGI. As
7 a result, the jury clearly understood and
8 considered that relationship between the parties
9 and found that conversion was proper.

10 For those reasons we would ask that the
11 motion to strike be denied.

12 MR. TOLCHIN: The Court should be asking
13 itself: What's the difference between this case
14 and every other breach of contract case? Why is
15 this case a conversion case and every other breach
16 of contract case not a conversion case?

17 And I think the Court would have to answer
18 and say that there is no difference. And the Court
19 knows that every breach of contract case is not a
20 conversion case, and because there is no
21 difference, this is also not a conversion case.
22 Every time somebody --

1 JUDGE NEWMAN: What about the point that's
2 been raised that you have waived any right to argue
3 this at this point because of the instructions
4 given by the Court?

5 MR. TOLCHIN: The Wright case clearly says
6 that's not true. State Farm, which I have also
7 cited to you, says that's not true. The Stewart's
8 case, decided April 2000, says that's not true.
9 That's 251 Va. 483. Their argument has been
10 explicitly rejected by the Supreme Court. Their
11 argument is based upon Spitzli, Godsley, and
12 Hilton.

13 Wright, in a case which Mr. Jenkins had in
14 his file but didn't cite to the Court, says that,
15 through Spitzli, Godsley, and Hilton, and he quotes
16 them and says that doesn't make any sense. You
17 would have to -- the only way you could find
18 waiver, Your Honor, is if you would find that you
19 were fooled and you didn't know this was our
20 argument. And I don't think the Court has any
21 doubt that that has been our argument from day one,
22 day one, yeah, that this was a contract case. And

1 I don't think the Court was fooled.

2 We don't have to object and, indeed, in
3 the Stewart's case, again, the identical thing, the
4 identical language. And the court said in
5 Stewart's case we reject the seller's suggestion
6 that the buyer's failure to object to jury
7 instructions on the breach of warranty issue made
8 it a jury question. The buyers' several motions
9 made before, during, and after the trial clearly
10 preserved this issue for appeal. Thus see 8.01384.

11 Thus under the circumstances in the case
12 the buyer could not have stated these objections
13 again when the jury instructions were discussed or
14 given. The case law is absolutely clear.

15 JUDGE NEWMAN: All right.

16 MR. TOLCHIN: There is no waiver here. So
17 we come back to the real issue. The real issue is
18 how can an agreement, how can a withholding of
19 money based upon our retention of the money
20 constitute a conversion?

21 Mr. Jenkins argued to you -- this is a
22 quote from him -- retention of money that is ours.

1 That's what he just said. Why is it PGI's? Is it
2 PGI's because Rathe wrote a letter to the
3 Smithsonian that said \$250,000, 323, whatever these
4 numbers were? That doesn't make it PGI's. Is it
5 PGI's because there was a partnership agreement
6 that the jury found didn't exist because that's the
7 only way that is consistent that PGI is not also
8 liable for the same amount of money? Does that
9 make it theirs? That's not what the evidence was.

10 And, indeed, if that was their theory,
11 they should have pled it in the motion for
12 judgment. We would have put in jury instructions
13 on that theory, and we would have kept out all the
14 evidence of the contract that they put in before
15 the jury. That was their case and that is their
16 entire case.

17 The only reason why this money is theirs
18 is because this agreement to split it, the way that
19 the evidence came out that it should be split, but
20 that is a contract claim. And the case law is
21 absolutely clear in this jurisdiction that you
22 can't turn a contract claim into a conversion claim

1 or into any tort claim.

2 And McDevitt, for example, in determining
3 whether a cause of action is a contract or tort,
4 the source of the duty violated must be
5 ascertained. We have acknowledged that the party
6 can in certain circumstances show breach and
7 tortious breach. However, the duty tortiously and
8 negligently breached must be a common law duty, not
9 one existing between the parties solely by virtue
10 of the contract.

11 Their only right here to this money is
12 based upon the contract. That is their motion.
13 Read their motion for judgment. That's exactly
14 what they plead in the motion for judgment. It is
15 precisely what they plead. There was an agreement
16 to split. That's what went to the jury. That's
17 what the evidence was.

18 There simply is no basis to turn this into
19 a conversion claim. It shouldn't have been in
20 front of the jury, it should have been stricken.
21 We ask the Court to strike it now and we ask that
22 the Court find that there is no basis for

1 conversion.

2 And let me just add one more thing here.

3 And, again, it gets down to the issue of the
4 contract. The third element of conversion is the
5 right to immediate possession. There is nothing in
6 the record that says when they had the right to
7 that \$100,000. Was it the moment that Rathe cashed
8 the check? Was it a week later or two weeks later
9 or four weeks later or eight weeks later or two
10 months later or was it three days later?

11 You can't put in evidence when they had a
12 right to this money that it was immediate because
13 this was a contract claim. They tie together.
14 Because it was a contract claim, you don't have the
15 first element, but you also don't have the third
16 element either because you can't prove an immediate
17 right, you can't prove something happening.

18 A conversion is when I take something and
19 make it disappear or when I take something and
20 change its status or when I move it from one area
21 to another. When I do something to an item, that
22 is what a conversion is. And the Court has got to

1 understand that is the basis of conversion from
2 time in memorial.

3 But a failure to pay money that's owed
4 because of this agreement between the parties or
5 even because of a partnership or whatever reason is
6 not a conversion. It may be a breach of contract,
7 it may be a thousand other things, but it can't be
8 a conversion because it doesn't meet the elements
9 of conversion.

10 And that's why we ask that the Court grant
11 our motion.

12 JUDGE NEWMAN: All right. I am going to
13 review the papers a little further and I will give
14 you an opinion within the week.

15 MR. CRAIG: Your Honor, we are here on my
16 motion to enter an order. Obviously this order is
17 going to read depending on how you rule on this
18 particular one. I have three alternatives, one of
19 which is Odell Simms obviously against Rathe -- all
20 of them have Odell Simms against Rathe. The second
21 one would be actually following on that the jury
22 found in favor of Odell Simms against PGI but order

1 no damages, and that's the way the jury form reads,
2 they put zero, but they did find for Odell Simms
3 against PGI with zero damages, that's the way the
4 second one reads, and that's the one that I would
5 like for the Court to enter. The third one simply,
6 it is actually Mr. Jenkins' order, which would be
7 in favor of PGI against Odell Simms. Obviously
8 this will all flow from your decision.

9 JUDGE NEWMAN: I understand.

10 MR. CRAIG: I would hand up the three
11 alternatives.

12 MR. TOLCHIN: Your Honor --

13 MR. CRAIG: I have not made copies
14 available to co-counsel, so I will make copies
15 available to them afterwards.

16 MR. TOLCHIN: As I explained to Mr. Craig,
17 my objection with respect to the \$50,000 is simply
18 that, as to the date that he has interest running,
19 I believe.

20 MR. CRAIG: I have pulled that out,
21 though. They are not in the orders.

22 MR. TOLCHIN: Okay.

1 JUDGE NEWMAN: All right.

2 MR. JENKINS: Your Honor, we are also on
3 for my motion, my conditional motion, if you will,
4 to set aside the court's or the jury's verdict as
5 to the award on the issue of punitive damages. I
6 am only making that motion to preserve in the event
7 that --

8 JUDGE NEWMAN: I understand. I am denying
9 it. There is no punitive, no. So that's done.
10 That's ripe to go up as soon as we make the other
11 decision. I am sure it will all go up. Thank you.

12 (Whereupon, at 12:07 p.m., the motion was
13 adjourned.)
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22

SMITHSONIAN INSTITUTION

Office of Contracting

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May 12, 1997

Mr. Richard Rathe
Executive Vice President
Rathe Productions Incorporated
555 West 23rd Street
New York, NY 10011

Mr. Mark N. Sirangelo
Chairman and CEO
Production Group International, Inc.
2200 Wilson Boulevard
Arlington, VA 22201-3324

RE: Notice to Proceed

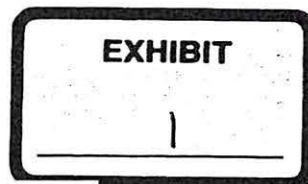
Gentlemen:

The Smithsonian is excited at the prospect of bringing more efficiency, and therefore greater access, to the *America's Smithsonian Exhibition* ("ASE"), both in the United States and potentially internationally. Based upon Rathe/PGI's proposal, dated January 30, 1997, in response to Smithsonian's December 19, 1996 Request for Proposals, and Rathe's best and final offer dated February 21, 1997, the Smithsonian is confident that Rathe/PGI, together with its proposed team, will provide the management and production expertise needed to bring new levels of success to ASE and to launch a similar and even more successful international exhibition.

This letter serves to formally notify Rathe/PGI that it has been chosen as the exclusive contractor of the Smithsonian Institution for management and production of the remainder of ASE, as detailed in Section 1. below, subject to negotiation and execution of a final agreement. This letter also authorizes Rathe/PGI, in anticipation of an executed agreement, as the exclusive producer of a similar international tour, provided that Rathe/PGI recommends taking such an exhibition outside of the U.S. as set forth in Section 3. below. The following outlines the general structure of our new relationship:

1. Management and Production of U.S. Tour:

- a. Portland, Oregon Venue: Beginning with the opening of the Portland, Oregon venue and in preparation for Rathe/PGI's assumption of the management and production of the remainder of the U.S. tour, Rathe/PGI shall assist the Smithsonian in review and



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analysis of all aspects of ASE, with the goals of creating a more efficient exhibition design and identifying potential time and cost saving measures, both for the Portland venue, where possible, and for all future U.S. venues. We accept Rathe/PGI's offer to provide these services to the Smithsonian at no cost, subject to Smithsonian's authorization of Rathe/PGI as the exclusive producer of the international tour, which authorization is set forth in Section 3. below.

- i. Transition: Initial meetings were held in Portland on April 2nd and 3rd with Smithsonian staff and Rathe/PGI to familiarize Rathe/PGI with the details of the exhibition and to discuss how the transition from Smithsonian to Rathe/PGI will be handled at the end of the exhibition's run in Portland. The Smithsonian will provide contract summaries for each contractor currently involved with ASE to Rathe/PGI and shall additionally forward all relevant budget and financial data related to ASE to Rathe/PGI.
- ii. Agreement: An agreement between Smithsonian and Rathe/PGI, outlining the details for Rathe/PGI to assume the production and management of ASE is being drafted by the Smithsonian's Office of Contracting ("SIOC") and will be forwarded to you for review. In the event that Smithsonian and Rathe/PGI are unable to enter into an agreement for production and management of ASE, Smithsonian shall compensate Rathe/PGI on a time and materials basis for work performed by its staff in conjunction with the Portland venue, including other reasonable direct costs such as travel, including meals, lodging and transportation.
- b. Future U.S. Venues: Provided an agreement has been entered into between Rathe/PGI and Smithsonian, Rathe/PGI shall assume full responsibility as exclusive contractor for ASE beginning with the de-installation of the exhibition in Portland and transport to the Birmingham, Alabama venue (provided full funding is acquired for that venue). If the Birmingham venue is canceled, Smithsonian shall be responsible for de-installation in Portland and transport of the exhibition to storage. Rathe/PGI's responsibility shall then begin with the subsequent move from storage to the next approved venue. Rathe/PGI as contractor shall provide full management and production services for the remainder of the U.S. Tour, which shall include up to five venues after the Portland venue.
- i. Selection of Future Venues: While selection of venues shall be made in consultation with Rathe/PGI, final determination to take ASE to any venue shall be at the sole discretion of the Smithsonian.
 - (1) Funding Statement: In evaluating potential future U.S. venues, Rathe/PGI shall forward to Smithsonian for its approval a schedule setting forth the dates on which Rathe/PGI shall provide a funding statement, comprehensive business plan, and proposed budget to the Smithsonian for its review and approval, including the last date on which Rathe/PGI will have obtained the requisite funding, which date

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shall be no later than sixty (60) days prior to the anticipated opening for that venue.

- (2) **Business Plan/Budget:** The comprehensive business plan and proposed budget for the venue will include income projections (including fund-raising, concessions, and so forth), the management fee and reasonable estimate of travel-related out-of-pocket expenses (as set forth in Section 1.b.vi. below), and all costs related to the venue, which do not exceed the stated income requirements. Smithsonian shall have ten (10) business days to review the budget and request clarifications. Should Smithsonian approve the budget, such approval shall be contingent on the receipt of all necessary funding for that venue. The Smithsonian shall move forward with a particular venue, including the Birmingham, Alabama venue, only after confirmed commitments for the requisite funding have been received.
 - (3) **Rejection of Budget:** If Smithsonian does not approve the budget and the parties cannot timely resolve the matter, Rathe/PGI's obligations with respect to that particular venue shall terminate. Rathe/PGI shall be reimbursed for all approved expenses incurred up to the date of termination.
 - (4) **Fundraising:** Rathe/PGI shall raise all funds with respect to each venue and instruct donors that such funds be provided to the Smithsonian. Rathe/PGI will provide Smithsonian with a list of potential funding sources as those sources are identified, for Smithsonian approval. In conjunction with Smithsonian's obligation not to move forward with a venue until the requisite funding is obtained (or confirmed commitments have been received), Rathe/PGI's communications with potential venues and contributors must make that known at the outset. Rathe/PGI shall submit a preliminary report of potential venue and exploratory costs to the Smithsonian for its prior, written approval.
 - (5) **Failure to Raise Required Funds:** If Rathe/PGI does not raise the requisite funds within the specified time frame, the venue shall be canceled, and only those expenses approved shall be reimbursed, including Rathe/PGI's approved expenses. Rathe/PGI shall not be entitled to any portion of the management fee.
- ii. Accounting: ~~Upon Smithsonian approval of the budget,~~ All funds raised by Rathe/PGI's subcontractor shall be placed into a Smithsonian account and shall remain under Smithsonian's control. During the exhibition, Rathe/PGI shall promptly send invoices to the Smithsonian fund manager for review and approval. Smithsonian shall reimburse Rathe/PGI for all invoices within the Smithsonian-approved budget and all invoices which are the result of budget

overruns and which have been approved in advance by the Smithsonian in accordance with Paragraph 1.b.iii. below. Smithsonian shall use best efforts to reimburse Rathe/PGI within ten (10) business days of receipt of such invoices. Rathe/PGI shall provide to Smithsonian written reports of cash usage as necessary.

- iii. Budget Overruns: Rathe/PGI shall notify Smithsonian in writing of any projected budget overruns as soon as such potential overruns become evident, for Smithsonian review and approval.
- iv. Convention Center Agreements: Rathe/PGI shall negotiate the license agreements with the venue convention centers, with consultation and approval of the Smithsonian, by a process to be agreed upon by the parties. Smithsonian shall be the signatory on the license agreement for Birmingham, and shall re-examine with Rathe/PGI the issue of proper signatory for license agreements for future U.S. venues.
- v. Contractors: Rathe/PGI shall contract for all aspects of the Exhibition, including but not limited to transportation (with the exception of DOE), security, installation and de-installation, galas and other special events, and concessions. Smithsonian and Rathe/PGI may agree to have Smithsonian assign certain existing contracts to Rathe/PGI, or, at Rathe/PGI's election and where permissible under existing contracts, Rathe/PGI may enter into a new contract(s), subject to Smithsonian's approval of the contractor(s) and Rathe/PGI's agreement to incorporate certain contractual provisions, including but not limited to the Smithsonian Use of Name clause, and Indemnification clause. With the submission of the proposed budget for each venue, Rathe/PGI shall forward to Smithsonian for its review and approval a listing of all subcontractors for supplies and services. Smithsonian shall communicate its approval or disapproval to Rathe/PGI within three (3) business days of Smithsonian's receipt of the listing. If the Smithsonian does not communicate its approval or disapproval to Rathe/PGI within three (3) business days after Smithsonian has received the listing, then the Smithsonian will be deemed to have given its approval. Rathe/PGI may make reasonable decisions regarding subcontractors for supplies and services, prior to receiving Smithsonian approval, only in exigent circumstances.
- vi. Compensation/Revenues: Smithsonian shall pay to Rathe/PGI a management fee of not-to-exceed one hundred twenty thousand dollars (\$120,000) per venue, plus reasonable out-of-pocket travel-related expenses. This management fee, and a reasonable estimate of the out-of-pocket expenses, shall be included in the approved budget and shall be paid to Rathe/PGI from the funds raised in accordance with each venue as described above, at the conclusion of the venue. All revenues collected for the remainder of the U.S. Tour shall be applied towards the U.S. Tour.

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- vii. Reports: Rathe/PGI shall forward monthly reports to the attention of the project manager (to be assigned by Smithsonian), with a copy to SIOC at the address listed in 2.b. below, indicating current status, anticipated and unanticipated costs, and noting any cost savings that have been achieved (as compared to the average cost of the venues prior to Birmingham).
 - viii. Insurance: Upon execution of this Notice to Proceed, Rathe/PGI shall obtain the insurance noted on page eight of the Smithsonian's "Responses to Questions Received From Prospective Offerors," dated January 15, 1997, and shall provide the insurance certificates requested therein within thirty (30) days thereafter.
 - ix. Representation: The Smithsonian represents to Rathe/PGI that Rathe/PGI shall not be held responsible by Smithsonian for outstanding debts or disputes related to the U.S. Tour, up to and including the Portland, Oregon venue, which outstanding debts and disputes are not related to any acts or omissions of Rathe Productions, Inc. or PGI.
 - x. Indemnification: Rathe/PGI agrees to indemnify and hold harmless the Smithsonian and its museums, its Regents, all Smithsonian officers, agents, contractors, and employees, the United States, the corporate partners, and the tour sites from any and all claims, liability (including final judgments or settlements), costs and expenses, or loss to any person or thing, caused by, or arising from, any act or omission of Rathe/PGI, its representatives, agents, contractors, subcontractors, employees or servants, and related directly or indirectly to any aspect of this Notice to Proceed and eventual written agreement or performance of work related thereto, including injury to, or death of, any of Rathe/PGI's contractors, employees or agents, or to a third party unless such claims, liability, costs and expenses are attributable to the sole gross negligence of the Smithsonian, its museums, Regents, officers, agents, contractors, employees, the United States, corporate partners, or the tour sites.
 - xi. Agreement: As stated in Section 1.a.ii. above, a draft agreement outlining the specific details of this arrangement is being drafted by SIOC and will be forwarded to you for review.
2. Feasibility Study: Upon receipt and acceptance of this Notice to Proceed, Rathe/PGI will commence with a study to determine the feasibility of an international tour of an exhibition similar in scope to *America's Smithsonian*.
- a. Results of Study: The feasibility study shall be submitted to Smithsonian no later than 120 days from the date of execution of this Notice, and should result in an assessment of the viability of an international tour, including recommended themes for the exhibition, recommended cities and venues, and a financing plan, and should address specifically how the proposed tour will maintain the cachet and prestige of the U.S. tour. If

Rathe/PGI needs additional time to complete the feasibility study, Rathe/PGI shall submit a written request for prior Smithsonian approval, which approval shall not be unreasonably withheld.

- b. Progress Reports/Briefings: Every thirty (30) days, Rathe/PGI shall forward a written progress report to the Smithsonian, to the attention of **Dan Stevenson, Special Assistant, Office of the Assistant Secretary for Institutional Advancement**, at the address below, describing the progress of the study. At the conclusion of the 120-day period or earlier, Rathe/PGI shall forward to the Smithsonian its final findings and its proposed business plan for the international tour. Additionally, Rathe/PGI will provide several briefings for Smithsonian officials on the progress of the study, during the 120-day period.

Progress Reports will be sent to the following address:


Smithsonian Institution
MRC 027
1000 Jefferson Drive, S.W., SI 105
Washington, D.C. 20560
Attn: Dan Stevenson

With a copy to:

Smithsonian Institution
Office of Contracting
955 L'Enfant Plaza, S.W., Suite P-114
Washington, D.C. 20560
Attn: John Cobert/Susan Marino

- c. Cost: The cost of the feasibility study shall be borne by Rathe/PGI, subject to the provisions of Section 3.a. below.
3. Management and Production of International Tour: The Smithsonian reiterates its desire to provide international access to the proposed exhibition through a "world tour" and wants to make clear its commitment to designate Rathe/PGI as the exclusive manager/producer of such a tour. Rathe/PGI is hereby authorized, in anticipation of an executed agreement, as the exclusive producer of an international tour similar to the *America's Smithsonian* Exhibition in the U.S., provided that Rathe/PGI recommends taking such an exhibition overseas at the conclusion of the feasibility study detailed above. Such recommendation must be reasonable, must document the economic feasibility to both parties, and must document how the international tour will further the vision and strategy of the Smithsonian.
- a. Acceptance of Recommendation: Smithsonian shall accept the recommendation, subject to its right to reasonably disapprove (a) the selection of any specific venue, (b) the inclusion of any specific artifacts, (c) any specific aspect of production of the Exhibition,


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(d) any specific aspect of the financing plan, (e) any activity related to licensing or use of the Smithsonian name, and/or (f) any relationship of non-sponsors to the tour. Should Rathe/PGI require additional information regarding potential sponsors or potential sponsorship industries, Rathe/PGI may contact the Smithsonian and arrangements will be made to share such information prior to the commencement of the feasibility study, provided that no written commitments are entered into between Rathe/PGI and such sponsors during the study, and provided all such communications to sponsors are subject to Smithsonian review and approval. The Smithsonian shall provide to Rathe/PGI, in writing, its specific objections regarding these aspects of the recommendation, and the parties agree to work together within an agreed-upon time frame to resolve those issues. If Smithsonian and Rathe/PGI cannot reach agreement on Rathe/PGI's recommendation for a proposed international tour within that time frame, Smithsonian shall pay to Rathe/PGI a not-to-exceed amount of \$250,000 as compensation for the feasibility study. For five (5) years thereafter, prior to Smithsonian seeking an exclusive producer of an international tour similar in size and scope to the U.S. Tour and with more than ten (10) venues, the Smithsonian shall give Rathe/PGI a first right to negotiate such international tour opportunity. If Rathe/PGI does not accept the Smithsonian's proposal within sixty (60) days of receipt thereof, the Smithsonian may negotiate with any other entity for production of such a tour.

- b. Recommendation Not to go Forward: If Rathe/PGI recommends upon the conclusion of the feasibility study that an international tour would not be feasible at this time, Rathe/PGI's obligations for the international tour as stated in this Notice to Proceed and as agreed upon by the parties shall terminate and Smithsonian may contract with another entity for the production of an international tour.
- c. Agreement: Upon Smithsonian's acceptance of Rathe/PGI's recommendation to move forward with an international tour, the parties may commence with negotiation and execution of a final agreement for the international tour, for a term of two years. Upon conclusion of the initial two-year term for the international tour, the parties may agree to extend the tour under a separate agreement.
- d. Compensation:
 - i. License Fee: In exchange for the exclusive license to represent the Smithsonian as the sole manager/producer of the international tour, Rathe/PGI shall pay five million dollars (\$5,000,000) to the Smithsonian. Such payment shall be made within thirty (30) days of execution of a written agreement for production of the international tour by wire transfer to a bank account designated by the Smithsonian.
 - ii. Royalties: As additional license fees, Rathe/PGI shall pay to Smithsonian ten percent (10%) of the aggregate gross collected revenue from Exhibition sponsorships, merchandising, and ticket sales which exceed fifty million dollars (\$50,000,000) up to and including one hundred twenty million dollars

PGI-0089



(\$120,000,000). Should the Exhibition bring in revenues of over one hundred twenty million dollars (\$120,000,000), Rathe/PGI shall pay to Smithsonian fifteen percent (15%) of the aggregate gross collected revenue in excess of one hundred twenty million dollars (\$120,000,000) from Exhibition sponsorships, merchandising, and ticket sales during the initial two-year term of the international tour.

- iii. Reimbursement: Rathe/PGI additionally shall reimburse the Smithsonian for the amount of ASE management fees paid to Rathe/PGI for the U.S. Tour which are not offset by revenue increases and cost savings realized by Rathe/PGI's management and operation of ASE, from revenues Rathe/PGI receives as exclusive manager/producer of the international tour.

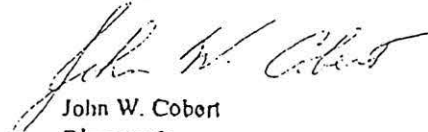
Rathe/PGI may make commitments related to ASE on behalf of the Smithsonian, with prior Smithsonian approval, until a written agreement for management and production of ASE has been executed which shall set forth a formal process for making such commitments. Additionally, all press releases or public communications shall be subject to the approval of both Smithsonian and Rathe/PGI. This Notice to Proceed is intended to reflect the contents of Rathe/PGI's response to Smithsonian's December 19, 1996 Request for Proposal, dated January 30, 1997, and Rathe's best and final letter dated February 21, 1997. If there is any conflict among the terms set forth in these documents and the Notice to Proceed, the terms of the Notice to Proceed shall take precedence.

This space intentionally left blank.

Messrs. Rathe & Sirangelo
May 9, 1997
Page 9

Please indicate your acceptance of the Notice to Proceed by signing in the space indicated below and returning one fully-executed copy to the attention of Susan Marino of this office. Please contact Ms. Marino at (202) 287-3580 or Dan Stevenson at (202) 786-2699 with any questions related to this Notice to Proceed. The Smithsonian welcomes your participation in this exciting venture, and looks forward to our successful collaboration over the remainder of the U.S. Tour and the international tour.

Sincerely,


John W. Cobert
Director &
Contracting Officer

ACCEPTED AND AGREED:
RATHE PRODUCTIONS INCORPORATED


Richard Rathe

5/12/97
Date

PRODUCTIONS GROUP, INC.


Mark N. Sirangelo

5/12/97
Date

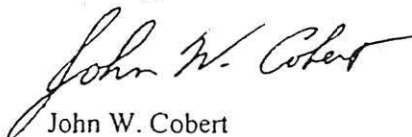
cc: Constance Berry Newman, OUS
Dan Stevenson, OASIA
Marsha Shaines, OGC
John Huerta, OGC
Susan Marino, SIOC

PGI-0091

Messrs. Rathe & Sirangelo
May 9, 1997
Page 9

Please indicate your acceptance of the ~~Notice to Proceed~~ by signing in the space indicated below and returning one fully-executed copy to the attention of Susan Marino of this office. Please contact Ms. Marino at (202) 287-3580 or Dan Stevenson at (202) 786-2699 with any questions related to this Notice to Proceed. The Smithsonian welcomes your participation in this exciting venture, and looks forward to our successful collaboration over the remainder of the U.S. Tour and the international tour.

Sincerely,



John W. Cobert
Director &
Contracting Officer

ACCEPTED AND AGREED:
RATHE PRODUCTIONS INCORPORATED



Richard Rathe

5/12/97

Date

PGI, Inc.
~~PRODUCTIONS GROUP, INC.~~



Mark N. Sirangelo

5/12/97

Date

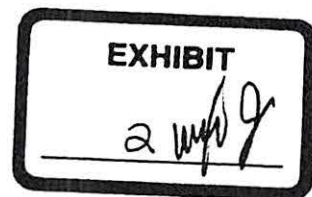
cc: Constance Berry Newman, OUS
Dan Stevenson, OASIA
Marsha Shaines, OGC
John Huerta, OGC
Susan Marino, SIOC

PGI-0092





Production Group International
2200 Wilson Blvd.
Arlington, VA 22201-3114
tel 703-526-5454
fax 703-526-1734



2ND NOTICE

Mr. John Cobert, Director, Office of Contracting
Smithsonian
955 L'Enfant Plaza, S.W.
Suite P-114
Washington, DC 20024

September 9, 1998

Dear Mr. Cobert:

In keeping with the agreement between the Smithsonian Institution and Rathe/PGI for an in-depth study of the feasibility of a global tour similar in scope to the "America's Smithsonian" exhibition, Rathe/PGI, with support of O'Dell & Simms, have undertaken a worldwide research project.

The findings and conclusions of that project have been presented to the Smithsonian in written and verbal presentations on several occasions and the ensuing discussions (both internal to the Smithsonian and with Rathe/PGI) have led to the conclusion that a similar program will not be feasible within the guidelines established – self-funded, self-sustaining and profitable – even with the questionable support of the Board of Regents and museum Directors. The most recent conversation with Mr. Marc Pachter, and Mr. Dan Stevenson presented a quite divergent prospective on an international venture – one built around the "festival" concept similar to the American Folklife Festival held annually on the National Mall. Mr. Pachter was quite convincing in his view that the Board of Regents, the various museum Directors and the United States Congress would not be interested in an artifact-based international tour similar in scope and theme to "America's Smithsonian". He also questioned whether a festival tour would have the attraction and generate the interest that would allow it to be self-funding and self-sustaining.

Although intriguing, the concept of a festival is quite different than the original basis of the Rathe/PGI study. With that in focus, we have engaged in further feasibility exploration on the viability of the festival and have reached the conclusion that the risks do not justify the potential rewards and that the value to the Smithsonian as well as Rathe/PGI is minimal.

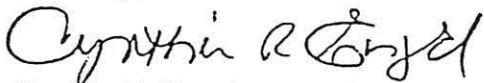
With this as background, we are focused to conclude that an international festival tour "branded" as a Smithsonian venture which would be made possible through significant corporate sponsorship and local funding is not feasible. In keeping with the Smithsonian/Rathe/PGI agreement dated May 9, 1997, we are therefore presenting the enclosed invoice in the amount of \$250,000, payment of which will conclude this feasibility study and will transfer all rights to research information and findings to the Smithsonian Institution for any additional right and use.

Also enclosed are copies of previously submitted invoices for reimbursement in connection with tour stops in Birmingham, Portland, San Jose, and prospective stops in Charlotte and Honolulu.

We have greatly valued our involvement with the Smithsonian through the conclusion of the "America's Smithsonian" exhibition tour and the ensuing research and evaluation of possible international ventures.

Should you have any questions or concerns, please feel free to contact me at (703)312-9148.

Sincerely,

A handwritten signature in cursive script, reading "Cynthia R. Engel".

Cynthia R. Engel
President and Chief Operating Officer

cc: Connie Newman



Production Group International
2200 Wilson Blvd.
Arlington, VA 22201-3324
tel 703.538.8464
fax 703.538.1724

Bill to:
Smithsonian
955 L'Enfant Plaza, S.W.
Suite P-114
Washington, DC 20024
Attn: John Cobert, Director

Invoice Number: 0007657H-IN
Invoice Date: 8/7/98
2ND REQUEST
DUE: September 19, 1998

CODE	DESCRIPTION	AMOUNT
<u>FEASIBILITY STUDY</u>		
EXPO	Management fee due in connection with completion of feasibility study	\$ 250,000.00
TOTAL DUE		<u>\$ 250,000.00</u>

cc: Connie Newman



Production Group International
2500 Wilson Blvd.
Arlington, VA 22201-3534
tel 703.526.8484
fax 703.526.1724

Bill to:
Smithsonian
955 L'Enfant Plaza, S.W.
Suite P-114
Washington, DC 20024
Attn: John Cobert, Director

Invoice Number: 0007657G-IN
Invoice Date: 3/5/98
3RD REQUEST
DUE: September 19, 1998

CODE	DESCRIPTION	AMOUNT
<u>SAN JOSE</u>		
EXPO	Staff expenses - Ruder Finn	\$ 557.46
	Staff expenses - Ruder Finn	<u>4,551.39</u>
	Subtotal	\$ 5,108.85
<u>NEW DESTINATIONS</u>		
EXPO	Staff expenses - Ruder Finn (Scottsdale)	\$ 815.00
	Gary Lindberg (Scottsdale)	<u>15,000.00</u>
	Subtotal	15,815.00
TOTAL DUE		<u><u>\$ 20,923.85</u></u>

cc: Connie Newman



Production Group International
2100 Wilson Blvd.
Arlington, VA 22201-3324
tel 703 528.8454
fax 703 528.1724

Bill to:
Smithsonian
955 L'Enfant Plaza, S.W.
Suite P-114
Washington, DC 20024
Attn: John Cobert, Director

Invoice Number: 0007657E-IN
Invoice Date: 3/5/98
3RD REQUEST
DUE: September 19, 1998

CODE	DESCRIPTION	AMOUNT
<u>SAN JOSE</u>		
EXPO	Judy Ducate--travel expenses	\$ 685.71
	Odell & Simms, Inc.--phone expense	53.37
	Payroll Expenses (Company Taxes)	17,077.41
	Subtotal	\$ 17,816.49
<u>BIRMINGHAM</u>		
EXPO	Payroll Expenses (Company Taxes)	\$ 4,961.67
<u>NEW DESTINATIONS</u>		
EXPO	Odell & Simms, Inc.--travel expenses Honolulu	\$ 2,571.72
	Odell & Simms, Inc.--travel expenses Dallas	1,667.45
	Odell & Simms, Inc.--travel expenses Dallas	1,610.39
	Odell & Simms, Inc.--Phone Expense	618.04
	Odell & Simms, Inc.--travel expenses Milwaukee & Dallas	2,177.23
	Odell & Simms, Inc.--travel expenses Charlotte	718.00
	Odell & Simms, Inc.--travel expenses Charlotte	708.00
	Odell & Simms, Inc.--travel expenses Charlotte	1,956.67
	Doug Ducate -Travel Expenses Milwaukee & Dallas	51.00
	Doug Ducate -Travel Expenses Charlotte	44.00
	Doug Ducate -Travel Expenses Honolulu	63.35
	Subtotal	\$ 12,185.85
TOTAL DUE		<u>\$ 34,964.01</u>

cc: Connie Newman



Production Group International
2200 Wilson Blvd.
Arlington, VA 22201-3324
tel 703.528.8484
fax 703.528.1724

FINAL NOTICE BEFORE LEGAL ACTION

Mr. John Cobert, Director, Office of Contracting
Smithsonian
955 L'Enfant Plaza, S.W.
Suite P-114
Washington, DC 20024

October 9, 1998

Dear Mr. Cobert:

We have repeatedly requested payment of \$323,924.91 to satisfy expenses incurred on your behalf for "America's Smithsonian" as well as for services rendered for an in-depth study of the feasibility of an international tour. Demands for payment have resulted in payment of \$37,956.16 only.

I have enclosed copies of invoices submitted previously for your review.

Accordingly, we shall seek legal action unless payment is received by Friday, October 16, 1998.

Sincerely,

Nancy L. Owens
Senior Vice President and Chief Financial Officer

cc: Connie Newman





Smithsonian Institution

Office of Contracting

October 22, 1998

Ms. Nancy L. Owens
Senior Vice President and
Chief Financial Officer
Production Group International
2200 Wilson Boulevard
Arlington, VA 22201-3324

Dear Ms. Owens:

This letter responds to your October 9, 1998 Final Notice Before Legal Action, requesting payment for additional expenses related to *America's Smithsonian* and for the Feasibility Study. The Smithsonian is eager to resolve this issue. As you know, both Production Group International (PGI) and Rathe Productions signed the Notice to Proceed with management of the *America's Smithsonian* Exhibition and the Feasibility Study, in anticipation of forming a joint venture which subsequently was not formed.

Pursuant to your phone conversation with Susan Marino of this office earlier today, in order to negotiate an appropriate final payment the Institution will first need written confirmation from both Rathe Productions and PGI as to who will be authorized to represent the companies. In addition, in order to fully evaluate PGI's claim for the full \$250,000 in payment for the Feasibility Study, the Smithsonian requests that you provide this office with the necessary back-up documentation showing the actual costs incurred.

Please provide confirmation of PGI and Rathe Productions' authorized representative to Susan Marino of this office at the address above. You may contact Ms. Marino at (202) 287-3580 if you have any questions regarding this matter.

Thank you.

Sincerely,

John W. Cobert
Director and
Contracting Officer

cc: Constance B. Newman
Richard Rathe, Rathe Productions, Inc.

955 L'Enfant Plaza SW Suite P-114
Washington DC 20560-0907
202.287.3343 Telephone
202.287.3182 Fax

EXHIBIT

4

March 9, 1999

Ms. Susan Marino
Smithsonian Institution
955 L'Enfant Plaza, S.W.
Washington, DC 20024

Suite P-114

International Tour

Dear Ms. Marino:

Pursuant to my conversation with John Cobert he asked me to supply you with the following support information for the Feasibility Study fee of \$250,000.00

As you can see by the attached documentation the total incurred by Rathe and PGI is in excess of \$559,213.10.

In addition there are unpaid amounts on PGI invoices relating to the America's Smithsonian tour of \$73,891.91.

The total due Rathe/ PGI is \$323,891.91 By agreement between PGI and ourselves the amount should be paid to Rathe Productions, Inc. Please let me know if you require any other information or Rathe Production invoices to process these payments.

Sincerely,


Richard Rathe

CC: John Cobert
C.B. Wismar
Ed Tolchin, Esq.

EXHIBIT

5

Rathe/ PGI analysis of Smithsonian International tour

PGI invoice #0007660-IN	\$	174,522.00
Odell & Simms Statement	\$	50,000.00
Rathe Productions costs, fees	\$	334,691.10
International Tour Costs		\$ 559,213.10

PGI invoice #0007657E-IN	\$	34,964.01	balance
PGI invoice #0007657F-IN	\$	18,004.05	
PGI invoice #0007657G-IN	\$	20,923.85	
Net of open invoices		\$ 73,891.91	
International Tour		\$ 250,000.00	
Amount due Rathe Productions		\$ 323,891.91	



Production Group International
2200 Wilson Blvd.
Arlington, VA 22201-3524
tel 703.528.8434
fax 703.528.1724

Bill to:
Smithsonian
955 L'Enfant Plaza, S.W.
Suite P-114
Washington, DC 20024
Attn: John Cobert, Director

Invoice Number: 0007660-IN
Invoice Date: 1/22/99

CODE	DESCRIPTION	AMOUNT
<u>INTERNATIONAL</u>		
INTL	Research phase for Feasibility Study for International Exhibition (See attached breakdown)	\$174,522.00

Previously billed in March, 1998:

<u>INVOICE # 0007657E-IN</u>	34,964.01
<u>INVOICE # 0007657F-IN</u>	18,004.05
<u>INVOICE # 0007657G-IN</u>	20,923.85
TOTAL DUE	<u>\$248,413.91</u>

Cost breakdown for Research Phase of Feasibility Study for International Exhibition for the Smithsonian Institution:

Doug Ducate	\$ 78,000.00
CB Wismar	43,269.00
Jerry Lewis	15,960.00
Maria Witko	2,640.00
Meg Little	15,000.00
Ed Doody	2,000.00
Nancy Owens	3,403.00
Rich Bartell	1,000.00
Airfare	11,250.00
Fed. Ex./Phones/Photocopying	2,000.00

Total	\$174,522.00
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Smithsonian International Tour - Rathe Productions expenses

Expenses & Third Party Costs	Cost
Staples office supplies	\$ 178.74
Travel & OOP expenses	\$ 9,145.00
Greenbaum, Row, Smith Atty.	\$ 9,994.29
Fettman, Tolchin Atty.	\$ 1,689.99
David Foster proposal preparation	\$ 4,220.00
Fedral express shipments	\$ 190.57
Fleet Messenger shipments	\$ 443.90
Sterling & Sterling Insurance	\$ 5,000.00
Petty cash, misc.	\$ 322.66
Total expenses/ material	\$ 31,185.15

Rathe Productions Personnel	Rate	Hours	Total
Robert Rathe - Principal	\$ 138.67	43	\$ 5,962.81
Richard Rathe - Principal	\$ 138.67	409	\$ 56,716.03
Richard Mavity - Project Manager	\$ 55.45	552	\$ 30,608.40
Ray Armor - Designer	\$ 57.50	224	\$ 12,880.00
Lee Haase - General Manager	\$ 46.74	210	\$ 9,815.40
Mark Berman - Controller	\$ 57.50	96	\$ 5,520.00
Mark Drucker - Asst. Project Mgr.	\$ 34.72	131	\$ 4,548.32
Guy Lingley - Production Manager	\$ 41.97	150	\$ 6,295.50
Glenn Polly - Audiovisual Manger	\$ 55.48	96	\$ 5,326.08
David Lane - Asst. project Mgr.	\$ 34.72	89	\$ 3,090.08
Sub-total - labor			\$ 140,762.62
Sub-total Labor w/G&A and Overhead			\$ 273,079.48
Total Expenses and Material			\$ 31,185.15
Sub-total Labor, Expenses and Material			\$ 304,264.63
Profit 10%			\$ 30,426.46
GRAND TOTAL			\$ 334,691.10



7704 Leesburg Pike • Falls Church, VA 22043

2200 Wilson Boulevard
Suite 200
Arlington VA 22201

Cynthia Engel

STATEMENT

DATE 07/31/98
ACCOUNT NUMBER 1701001

ODELL, SIMMS & ASSOCIATES, INC.

DATE 07/31/98
ACCOUNT NUMBER 1701001

PAGE 1 Normal Terms: Net 30 days

TO INSURE PROPER CREDIT
PLEASE CHECK THOSE ITEMS
BEING PAID IN THE "V"
COLUMN AND RETURN THIS
PORTION OF THE STATEMENT
WITH YOUR PAYMENT.

-7205-F	07/31/98	I	Final: Smithsonian Feasibility	\$50,000.00	\$50,000.00	07-7205-F	I	\$50,000.00
DES				PLEASE		TOTAL		
C.C.R MEMO D.D.R MEMO				PAY				\$50,000.00
P.PAYMENT I.INVOICE				\$50,000.00				
A.DISCOUNT ALLOWED								
F.FINANCE CHARGE								
W.WARRANTY B.BALANCE								
C.R.CASH REFUND S.SERVICE/REPAIR								
\$50,000.00				\$0.00				
				\$0.00				
				\$0.00				



PGI, Inc.
2200 Wilson Blvd, Suite 500
Arlington, VA 22201

Bill to:
Smithsonian
955 L'Enfant Plaza, S.W.
Suite P-114
Washington, DC 20024
Attn: John Cobert, Director

Invoice Number: 0007657E-IN
Invoice Date: 3/5/98

not paid

CODE DESCRIPTION AMOUNT

SAN JOSE

EXPO	Judy Ducate--travel expenses	\$ 685.71
	Odell & Simms, Inc.--phone expense	53.37
	Payroll Expenses (Company Taxes)	<u>17,077.41</u>
	Subtotal	\$ 17,816.49

BIRMINGHAM

EXPO	Payroll Expenses (Company Taxes)	\$ 4,961.67
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NEW DESTINATIONS

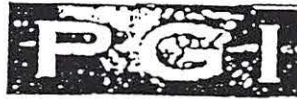
EXPO	Odell & Simms, Inc.--travel expenses Honolulu	\$ 2,571.72
	Odell & Simms, Inc.--travel expenses Dallas	1,667.45
	Odell & Simms, Inc.--travel expenses Dallas	1,610.39
	Odell & Simms, Inc.--Phone Expense	618.04
	Odell & Simms, Inc.--travel expenses Milwaukee & Dallas	2,177.23
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	Odell & Simms, Inc.--travel expenses Charlotte	1,956.67
	Doug Ducate -Travel Expenses Milwaukee & Dallas	51.00
	Doug Ducate -Travel Expenses Charlotte	44.00
	Doug Ducate -Travel Expenses Honolulu	<u>63.35</u>
	Subtotal	\$ 12,185.85

TOTAL DUE

\$ 34,964.01

Meetings & Conventions • Expositions & Conferences • Music & Entertainment • Video & Telecommunications
Publishing & Graphic Services • Destination Management • Special Events • Travel & Transportation

PGI, Inc. • 2200 Wilson Blvd, Suite 500 • Arlington, VA 22201 • FAX: 703.528.1724



PGI, Inc.
2200 Wilson Blvd, Suite 500
Arlington, VA 22201

Bill to:
Smithsonian
955 L'Enfant Plaza, S.W.
Suite P-114
Washington, DC 20024
Attn: John Cobert, Director

Invoice Number: 0007657G-IN
Invoice Date: 3/5/98

CODE	DESCRIPTION	AMOUNT
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SAN JOSE

EXPO	Staff expenses - Ruder Finn	\$ 557.46
	Staff expenses - Ruder Finn	<u>4,551.39</u>
	Subtotal	\$ 5,108.85

NEW DESTINATIONS

EXPO	Staff expenses - Ruder Finn (Scottsdale)	\$ 815.00
	Gary Lindberg (Scottsdale)	<u>15,000.00</u>
	Subtotal	15,815.00

TOTAL DUE	<u>\$ 20,923.85</u>
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Smithsonian Institution

Fax

Office of Contracting

To Richard Rathe

Fax 212-242-5676

Telephone

Date March 18, 1999

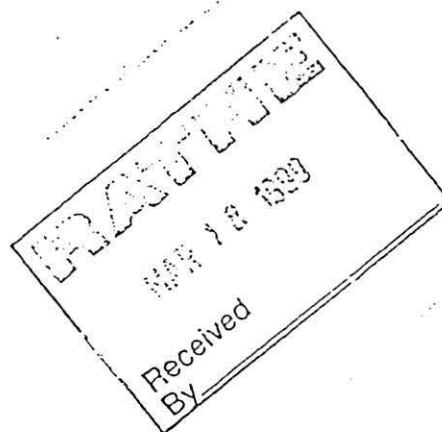
From Susan Marino *SM*

Subject Feasibility Study for International Tour

Total pages 4

Message

Original to follow by regular mail.



This message is intended only for the use of the addressee(s) named above, and may contain information that is LEGALLY PRIVILEGED, CONFIDENTIAL OR PROPRIETARY IN NATURE, AND MAY BE EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If you are not the intended recipient (or the employee or agent responsible for delivering the message to the intended recipient) please notify us immediately by telephone for instructions regarding disposition or return of the original message. Thank you.

955 L'Enfant Plaza SW Suite P-114
Washington DC 20560-0907
202.287.3343 Telephone
202.287.2008 Fax

EXHIBIT

6



Smithsonian Institution

Office of Contracting
Business Contracting Division

March 18, 1999

Mr. Richard Rathe
Executive Vice President
Rathe Productions, Inc.
555 West 23rd Street
New York, NY 10011

Re: Feasibility Study for International Tour

Dear Mr. Rathe:

Thank you for your letter of March 9th providing additional information in support of the expenses incurred by Rathe and PGI during the feasibility study. The information you provided while helpful in showing the various categories of work performed and the cost breakdown in each category, is in the form of spreadsheets created by Rathe Productions and is not sufficient for us to perform a meaningful review.

What the Smithsonian will need in order to evaluate your request for the full \$250,000 in payment for the feasibility study is documentation of the actual costs incurred. For example, the Smithsonian will need additional information on the labor expenses listed for PGI and Rathe, such as title and rate charged for PGI staff, and a description of work performed for both Rathe and PGI staff. For expenses, we will need copies of those bills for verification and, for your category labeled "third party costs," we will again need a description of the work performed.

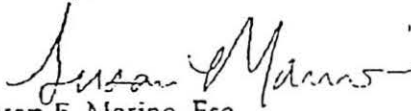
Please note that this request for documentation pertains to charges related to the feasibility study only. The Smithsonian already has copies of PGI's invoices and back-up documentation for the \$73,891.91 in expenses related to the *America's Smithsonian* Exhibition.

Also, in our letter to Nancy Owens of PGI, dated October 22, 1998 (a copy of which is attached for your reference), we requested written confirmation from both Rathe Productions and PGI as to who will be authorized to represent the companies. The Smithsonian must receive written verification of the authorized representatives of both parties before any final payment can be made.

Please provide the requested back-up documentation and confirmation of the authorized representatives for each company to my attention at the address above. If you have any questions regarding this matter, please do not hesitate to contact me at (202) 287-3580.

Thank you.

Sincerely,


Susan F. Marino, Esq.
Contract Negotiator

Enclosure

cc: John W. Cobert
Constance B. Newman
Nancy L. Owens



Smithsonian Institution

Contract File Copy

Office of Contracting

October 22, 1998

Ms. Nancy L. Owens
Senior Vice President and
Chief Financial Officer
Production Group International
2200 Wilson Boulevard
Arlington, VA 22201-3324

Dear Ms. Owens:

This letter responds to your October 9, 1998 Final Notice Before Legal Action, requesting payment for additional expenses related to *America's Smithsonian* and for the Feasibility Study. The Smithsonian is eager to resolve this issue. As you know, both Production Group International (PGI) and Rathe Productions signed the Notice to Proceed with management of the *America's Smithsonian* Exhibition and the Feasibility Study, in anticipation of forming a joint venture which subsequently was not formed.

Pursuant to your phone conversation with Susan Marino of this office earlier today, in order to negotiate an appropriate final payment the Institution will first need written confirmation from both Rathe Productions and PGI as to who will be authorized to represent the companies. In addition, in order to fully evaluate PGI's claim for the full \$250,000 in payment for the Feasibility Study, the Smithsonian requests that you provide this office with the necessary back-up documentation showing the actual costs incurred.

Please provide confirmation of PGI and Rathe Productions' authorized representative to Susan Marino of this office at the address above. You may contact Ms. Marino at (202) 287-3580 if you have any questions regarding this matter.

Thank you.

Sincerely,

John W. Cobert
Director and
Contracting Officer

cc: Constance B. Newman
Richard Rathe, Rathe Productions, Inc.



Smithsonian Institution

Office of Contracting

December 2, 1999

Mr. Richard Rathe
Executive Vice President
Rathe Productions, Inc.
555 West 23rd Street
New York, NY 10011

Re: International Tour/America's Smithsonian

Dear Mr. Rathe:

This is in response to your request for payment on behalf of Rathe Productions and Production Group International ("PGI") for work performed on the international tour feasibility study and on the last venues of *America's Smithsonian*.

As you know, PGI first invoiced the Smithsonian over a year ago for a total amount of \$323,891.91 (\$250,000 in payment for the feasibility study and \$73,891.91 for expenses incurred by PGI related to *America's Smithsonian*). We received from you the complete back-up documentation we requested in support of these claims in August, 1999, along with a letter from C.B. Wismar of PGI authorizing you to negotiate and receive payment on behalf of PGI.

Upon reviewing the documentation you submitted, along with the RFP documents, the Notice to Proceed with the joint venture "Rathe/PGI," and the contract file, this office is prepared to offer you a final payment in the amount of \$192,750. This figure is based on the information set forth below:

1. Feasibility Study.

Total amount claimed: \$559,213.10

Amount approved: \$127,153.06

Per the terms of the Notice to Proceed executed by the parties on May 12, 1997, Smithsonian agreed to reimburse Rathe/PGI for the feasibility study up to a cap amount of \$250,000 only if Rathe/PGI recommended going forward with the international tour and the Smithsonian objected. On August 10, 1998, PGI submitted a letter to my attention concluding that an international tour was not feasible (See Attachment A). As a result, the Institution does not owe Rathe and PGI any money for work performed on the feasibility study.

Although the Smithsonian has no obligation to reimburse Rathe and PGI for work performed on the feasibility study, because you performed additional work to explore the concept of an international festival at the Smithsonian's request and

outside of the terms of the Notice to Proceed, the Smithsonian will reimburse you for that specific work. It appears from our records and from the documentation you submitted that Rathe and PGI spent approximately five months (April - August, 1998) exploring the international festival concept out of the total sixteen months that were spent on the project. Taking a percentage of your total costs consistent with the amount of time spent on the festival concept results in the approved payment amount of \$127,153.06, as further detailed in Attachment B hereto.

Please note that approximately \$100,000 of the charges Rathe invoiced are inappropriate and have been deducted, for our calculation purposes, from the total amount claimed by Rathe and PGI. They are:

- Proposal costs and work performed prior to contract award. Labor and expenses incurred prior to execution of the Notice to Proceed on May 12, 1997 total approximately \$44,600.
- Work performed subsequent to receipt of final study and invoice. Approximately \$2,658 in charges for meetings that did not involve Smithsonian staff during the months of September, October, November, and December, 1998 (after submission of the final feasibility study letter and invoice).
- Charges for Legal Representation. Charges in the amount of \$11,000 for attorneys advising you on the Notice to Proceed and on formation of the joint venture.
- Insurance Costs. \$5,000 for obtaining the insurance coverage required in the RFP in order for the joint venture to take over operation of America's Smithsonian (the joint venture was to obtain this insurance at its expense).
- Profit. A 10% profit of \$30,426.46 was included in your invoice. The potential reimbursement as set forth in the Notice to Proceed covered costs only, not any profit to Rathe or PGI.
- America's Smithsonian Charges. Charges in the approximate amount of \$8,640 for meetings in Birmingham, San Jose, and Washington, D.C. were listed on your invoice for the feasibility study and on PGI's invoice for the Birmingham and San Jose venues of America's Smithsonian.

2. America's Smithsonian.

Total amount claimed: \$73,891.91

Amount approved: \$65,588.51

PGI submitted invoices totaling \$73,891.91 for work performed in the Birmingham and San Jose venues, for work performed by Gary Lindberg and Ruder Finn in Scottsdale and for expenses related to the exploration of Charlotte,

Milwaukee, Honolulu, and Dallas as potential venues. Approximately \$8,300 in charges for meetings in Portland have not been approved, given that Rathe/PGI agreed, per the Notice to Proceed, that the services it provided during the Portland venue would be provided at no cost to the Smithsonian (See Attachment B).

I appreciate your patience as we have worked through this review process. Although *Planned* Rathe and PGI's exploration of an international tour resulted in a decision not to move forward, the project presented useful information to the Institution regarding the world's interest in, and our ability to develop, an international traveling exhibition of *America's Smithsonian's* size and scope. The Institution recognizes the significant contributions Rathe/PGI made to the last venues of *America's Smithsonian* and towards the development of an international tour, and we look forward to resolving this issue amicably.

Please contact Susan Engelhardt at (202) 287-3217 if you have any questions regarding the above and/or to discuss this matter further.

Thank you.

Sincerely,

Ronald F. Coffey for

John W. Cobert
Director and Contracting Officer

Enclosures

cc: Susan Engelhardt, Contract Negotiator-Attorney
Constance B. Newman, Under Secretary
Marsha Shaines, Deputy General Counsel

ATTACHMENT A



Production Group International

John Cobert
8/11/98

Mr. John Cobert, Director, Office of Contracting
Smithsonian
955 L'Enfant Plaza, S.W.
Suite P-114
Washington, DC 20024

August 10, 1998

Dear Mr. Cobert:

In keeping with the agreement between the Smithsonian Institution and Rathe/PGI for an in-depth study of the feasibility of a global tour similar in scope to the "America's Smithsonian" exhibition, Rathe/PGI, with support of O'Dell & Simms, have undertaken a worldwide research project.

The findings and conclusions of that project have been presented to the Smithsonian in written and verbal presentations on several occasions and the ensuing discussions (both internal to the Smithsonian and with Rathe/PGI) have led to the conclusion that a similar program will not be feasible within the guidelines established – self-funded, self-sustaining and profitable – even with the questionable support of the Board of Regents and museum Directors. The most recent conversation with Mr. Marc Pachter, and Mr. Dan Stevenson presented a quite divergent perspective on an international venture – one built around the "festival" concept similar to the American Folklife Festival held annually on the National Mall. Mr. Pachter was quite convincing in his view that the Board of Regents, the various museum Directors and the United States Congress would not be interested in an artifact-based international tour similar in scope and theme to "America's Smithsonian". He also questioned whether a festival tour would have the attraction and generate the interest that would allow it to be self-funding and self-sustaining.

Although intriguing, the concept of a festival is quite different than the original basis of the Rathe/PGI study. With that in focus, we have engaged in further feasibility exploration on the viability of the festival and have reached the conclusion that the risks do not justify the potential rewards and that the value to the Smithsonian as well as Rathe/PGI is minimal.

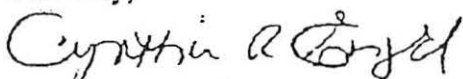
With this as background, we are focused to conclude that an international festival tour "branded" as a Smithsonian venture which would be made possible through significant corporate sponsorship and local funding is not feasible. In keeping with the Smithsonian/Rathc/PGI agreement dated May 9, 1997, we are therefore presenting the enclosed invoice in the amount of \$250,000. payment of which will conclude this feasibility study and will transfer all rights to research information and findings to the Smithsonian Institution for any additional right and use.

Also enclosed are copies of previously submitted invoices for reimbursement in connection with tour stops in Birmingham, Portland, San Jose, and prospective stops in Charlotte and Honolulu.

We have greatly valued our involvement with the Smithsonian through the conclusion of the "America's Smithsonian" exhibition tour and the ensuing research and evaluation of possible international ventures.

Should you have any questions or concerns, please feel free to contact me at (703)312-9148.

Sincerely,



Cynthia R. Engel
President and Chief Operating Officer

cc: Connie Newman

ATTACHMENT B

Total Amount Claimed: \$559,213.10

PGI: \$174,522.00;
 Rathe: \$334,691.10
 Odell: \$50,000.00¹

Total for Rathe Charges: \$334,691.10

Minus:	Pre-Award charges	\$44,600.00
	Post-contract charges	\$2,658.11
	Attorney fees	\$11,000.00
	Insurance	\$5,000.00
	Profit	\$30,426.46
	ASE Charges	\$8,638.76

Adjusted Total for Rathe Charges: \$232,367.77
 * .3125² = \$72,614.93

Total for PGI Charges: \$174,522.00
 * .3125 = \$54,538.13

Total for Festival Concept: \$127,153.06

Total for ASE Expenses \$73,891.91

Minus: Portland expenses \$8,303.40

Adjusted Total for ASE Expenses \$65,588.51

Grand Total \$192,741.57

¹ This calculation assumes the \$50,000 Odell charge was for work performed on the feasibility study.

² Rathe and PGI spent a total of five months on the international festival concept out of the total sixteen months that were spent on the feasibility study (5/16 = .3125).



Smithsonian Institution

Fax

Office of Contracting

To Richard Rathe

Fax 212-242-5676

Telephone

Date December 2, 1999

From Susan Engelhardt

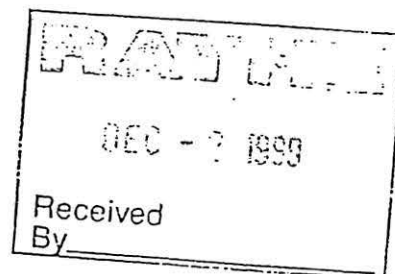
Subject International Tour/America's Smithsonian

Total pages 7

Message

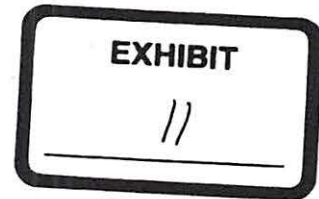
Please see attached, as discussed briefly with Richard Mavity yesterday.

Original to follow by regular mail.



This message is intended only for the use of the addressee(s) named above, and may contain information that is LEGALLY PRIVILEGED, CONFIDENTIAL OR PROPRIETARY IN NATURE, AND MAY BE EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If you are not the intended recipient (or the employee or agent responsible for delivering the message to the intended recipient) please notify us immediately by telephone for instructions regarding disposition or return of the original message. Thank you.

955 L'Enfant Plaza SW Suite P-114
Washington DC 20560-0907
202.287.3343 Telephone
202.287.2008 Fax



January 12, 2000

Ms. Susan Engelhardt
Smithsonian Institution
955 L'Enfant Plaza, S.W.
Washington, DC 20024

Suite P-114

International Tour

Dear Ms. Engelhardt:

The following is in response to your letter of December 2nd. We have been reviewing, once again, the history behind our preparation of an International Tour package to potential sponsors, that would be extremely appealing and which could prove profitable for all concerned. In that process the dominant item that kept coming up was that success would be dependent on presenting the Smithsonian collection to the world. The Smithsonian is of course many things, but it is recognized as caretaker of America's Treasures. Our intention was always to prepare a tour exhibiting artifacts from that vast collection.

In the PGI letter (Attachment A) Ms. Engel makes reference to the fact that the Board of Regents, Museum Directors, and the U.S Congress "would not be interested in an artifact-based international tour". This was a change and was contrary to the initial goal when we began our endeavor.

Throughout our Proposed International Tour Feasibility Study dated March 5, 1998, it was clear that exhibitions for cities selected would be based on artifact selection. Corporations and potential sponsors were clearly interested in supporting an artifact-based exhibition.

The consensus of RPI, PGI and Odell, Roper and Simms is that we accomplished the intended goals of initial study and that this change in thinking was the result of outside pressures. While we appreciate your recognizing our additional effort with regards to the Festival Concept, the costs we have outlined mainly pertain to the initial effort, which was impacted in great part by a change in direction by the Board of Regents.

Based on the fact that we have expended the costs shown, we feel that the analysis of recognizing 5 months of a 16-month endeavor leaves us considerably short in our attempt to recoup only our expenses. We respectfully ask for your reconsideration of the offer to reimburse only 50% of the initial \$250,000. fee which is only 23% of the entire \$559,213. We therefore ask for \$315,588.51 to cover the \$250,000. agreement fee plus the \$65,588.51 you recognize for America's Smithsonian.

Sincerely,



CC: John Cobert
C.B. Wismar
Ed Tolchin, Esq.
Bob Odell

VEN: V-132782563-000 CK NO: 4913-00266745 CK DT: 07/25/00 CK AMT \$250,000.00

INVOICE NUMBER	INV DATE	NET AMOUNT	INVOICE NUMBER	INV DATE	NET AMOUNT
17560	07/20/00	\$250,000.00			
SUSAN ENGELHARDT					



United States Treasury ¹⁵⁻⁵¹/₀₀₀

07/25/00

SMITHSONIAN INSTITUTION
WASHINGTON, DC

4913-00266745

Check No.

Pay to TWO HUNDRED FIFTY THOUSAND AND 00/100
the order of

RATHS PRODUCTIONS, INC
555 WEST 23RD
NEW YORK

NY 10011

\$250,000.00

VOID AFTER ONE YEAR

Rich Johnson

⑈49137⑈

⑈000000518⑈ 002667456⑈

EXHIBIT

14

Smithsonian Institution Contract # J0036CC10487
Amount: \$250,000.00

SETTLEMENT AGREEMENT

THIS AGREEMENT is made and entered into this 20th day of July, 2000, by and between the SMITHSONIAN INSTITUTION, a non-profit trust instrumentality established by the Act of Congress of the United States approved August 10, 1846 (20 U.S.C. 41 et seq.) and having its principal offices at 1000 Jefferson Drive, S.W., Washington, D.C. 20560 (herein "Smithsonian") and RATHÉ PRODUCTIONS, INC., a New York corporation having its principal offices at 555 West 23rd Street, New York, NY 10011 (herein "Rathé"), for the purposes of amicably settling a payment dispute.

WHEREAS, pursuant to a Request for Proposals (RFP #R97-023) issued December 11, 1996, the Smithsonian executed a Notice to Proceed with Rathé and Production Group International Inc. (herein "PGI") on May 12, 1997 to manage the last venues of the *America's Smithsonian Exhibition* and to conduct a feasibility study for an international tour similar in size and scope to the *America's Smithsonian Exhibition* (herein the "Work");

WHEREAS, although Rathé and PGI agreed to perform the Work as a joint venture and the Smithsonian executed the Notice to Proceed in anticipation of the joint venture being formed, the joint venture was never formed; however, Rathé and PGI did complete various tasks under the Notice to Proceed individually;

WHEREAS, Rathé and PGI submitted the feasibility study to the Smithsonian in 1998 and invoiced the Smithsonian for a total of \$323,891.91 for work performed on the feasibility study and certain expenses related to *America's Smithsonian*;

WHEREAS, the Smithsonian disputed the amount owed for work performed on the feasibility study but, upon review of additional documentation provided by Rathé and PGI, acknowledged that Rathé and PGI had performed additional work on a festival concept for the international tour at the request of the Smithsonian (such additional work hereby incorporated into the definition of "Work") and the Smithsonian has agreed to make a payment therefor;

WHEREAS, Rathé has represented to the Smithsonian that it has the authority to negotiate and execute a settlement on behalf of both Rathé and PGI;

WHEREAS, the parties wish to settle all claims and fully and completely cancel all right, title, interest and obligations which either of them has in regard to the Notice to Proceed and the Work.

NOW THEREFORE, in consideration of the mutual covenants and agreements contained herein, the Smithsonian and Rathé agree as follows:

1. Scope and Intent. It is the intent of the parties to amicably settle all claims related to the Notice to Proceed and the Work, and any and all other activities involving Rathé, PGI and the *America's Smithsonian Exhibition*. This Settlement Agreement provides for (i) the termination of all claims Smithsonian, Rathé, and/or PGI has or may have in the future related to the Notice to Proceed and the Work; (ii) the transfer to the Smithsonian of all right, title and interest, including copyright interest, in the feasibility study and all related materials prepared for or developed by Rathé and PGI for purposes of

the feasibility study; (iii) Certification by Rathe and PGI that there are no outstanding obligations, liens, or other legal claims to date based upon the Work; and (iv) payment by Smithsonian to Rathe of a fixed settlement fee.

2. Authority to Settle. Rathe warrants and represents to the Smithsonian that it has the authority to settle and release all claims and receive the fixed settlement fee on behalf of both Rathe and PGI, pursuant to a letter dated August 16, 1999 from CB Wismar, Executive Vice President, PGI to the Smithsonian, attached hereto in Appendix A. Rathe and PGI agree to indemnify and hold harmless the Smithsonian, its Regents, officers, agents and employees from and against any and all liabilities, claims, causes of action, suits, losses, damages, fines, judgments and expenses, including reasonable attorney's fees, which may be suffered by, made or incurred by Smithsonian arising out of or resulting from the breach or alleged breach by Rathe or PGI of any of the warranties, representations or agreements made by Rathe and PGI herein.

3. Assignment of Rights; Release. Rathe and PGI, for and in consideration of Smithsonian's release and payment of the settlement fee as set forth in Section 4. below, hereby (i) assign and transfer to Smithsonian all right, title and interest, including copyright interest, in the feasibility study and any other Work prepared pursuant to the Notice to Proceed (herein "Assignment of Rights"); and (ii) release and forever discharge Smithsonian from any claims, whether past, present, or future, liquidated or unliquidated, calculated or uncalculated, that Rathe and PGI may now have or may have in the future, under the Notice to Proceed and/or pursuant to the Work and any and all other activities involving Rathe, PGI and the America's Smithsonian Exhibition.

4. Settlement Fee; Release. Smithsonian, for and in consideration of Rathe's and PGI's Assignment of Rights and release as set forth in Section 3. above, hereby (i) agrees to pay Rathe the fixed sum of two hundred fifty thousand dollars (\$250,000.00); and (ii) releases and forever discharges Rathe and PGI from any claims, whether past, present, or future, liquidated or unliquidated, calculated or uncalculated, that Smithsonian may now have or may have in the future, under the Notice to Proceed and/or pursuant to the Work and any and all other activities involving Rathe, PGI and the America's Smithsonian Exhibition. The Settlement Fee shall be made payable to Rathe Productions, Inc. and will be paid by check to the address set forth below upon execution of this Agreement by both Smithsonian and Rathe:

Rathe Productions, Inc.
555 West 23rd Street
New York, NY 10011
Attn: Richard Rathe

5. Cancellation of Rights. The Smithsonian, Rathe and PGI hereby fully and completely cancel all right, title, interest and obligations which any of them may have in regard to the Notice to Proceed and the Work.

6. Use of Smithsonian Name. Rathe and PGI are hereby put on notice that the Smithsonian owns, controls, and/or has registered the trademarks/service marks "Smithsonian" and "Smithsonian Institution." Rathe and PGI shall not refer to the Smithsonian Institution or to any of its museums, programs, organizations, or facilities in any manner or through any medium, for any purpose whatsoever, including, but not limited to, advertising, marketing, promotion, publicity, solicitation, or fund-raising.

07/20/00 THU 14:58 FAX 202 287 2008

SMITHSONIAN OCon


7. Recitals. The recitals herein constitute an integral part of the Agreement reached and are to be considered as such.

8. Entire Agreement. This Settlement Agreement constitutes the entire agreement between the Smithsonian, Rathe and PGI and supersedes all previous agreements on this matter. There are no other written or oral agreements, representations or understandings with respect to the subject matter of this Settlement Agreement.

IN WITNESS WHEREOF, the parties hereto have duly executed this agreement the day and year first written above.

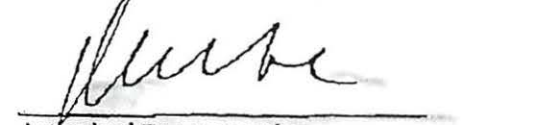
ACCEPTED AND AGREED:

SMITHSONIAN INSTITUTION


John W. Cobert
Contracting Officer

7/20/00
Date


RATHE PRODUCTIONS, INC.


Authorized Representative
Richard Rathe, Secretary/ Treasurer
Rathe Productions, Inc.
Typed Name and Title

July 20, 2000

Date

PRODUCTION GROUP INTERNATIONAL, INC.


Authorized Representative
Richard Rathe, Secretary/ Treasurer
Rathe Productions, Inc.

Typed Name and Title

July 20, 2000

Date

Appendix A: Letter from CB Wismar, dated August 16, 1999



Production Group International
2200 Wilson Blvd.
Arlington, VA 22201-4374
Tel: 703.526.5464
Fax: 703.526.1774

August 16, 1999

Ms. Susan Marino
Office of Public Affairs
Smithsonian Institution
Washington, DC 20560

Dear Ms. Marino:

This will confirm the correspondence that you have received from Rathe Productions Inc.

Rathe Productions Inc., Richard Rathe and Richard Mavity are authorized to represent our company in connection with the payment of \$250,000 for the Smithsonian International Feasibility Study. They may also represent us in collecting the balance due of \$73,891.91 for our open invoices.

Rathe Productions Inc. Will pay the \$50,000 due Odell & Sims.

Payment can be made directly to Rathe Productions Inc.

If you require anything further from me, please do not hesitate to contact me.

Sincerely,

CB Wisman

Executive Vice President

Cc Richard Rathe

SETTLEMENT AGREEMENT

THIS AGREEMENT is made and entered into this ____ day of July, 2000, by and between the SMITHSONIAN INSTITUTION, a non-profit trust instrumentality established by the Act of Congress of the United States approved August 10, 1846 (20 U.S.C. 41 et seq.) and having its principal offices at 1000 Jefferson Drive, S.W., Washington, D.C. 20560 (herein "Smithsonian"), RATHE PRODUCTIONS, INC., a New York corporation having its principal offices at 555 West 23rd Street, New York, NY 10011 (herein "Rathe"), and PRODUCTION GROUP INTERNATIONAL, INC., having its principal offices at 2200 Wilson Blvd., Arlington, VA 22201-3324, for the purposes of amicably settling a payment dispute.

WHEREAS, pursuant to a Request for Proposals (RFP #R97-023) issued December 11, 1996, the Smithsonian executed a Notice to Proceed with Rathe and Production Group International Inc. (herein "PGI") on May 12, 1997 to manage the last venues of the *America's Smithsonian* Exhibition and to conduct a feasibility study for an international tour similar in size and scope to the *America's Smithsonian* Exhibition (herein the "Work");

WHEREAS, although Rathe and PGI agreed to perform the Work as a joint venture and the Smithsonian executed the Notice to Proceed in anticipation of the joint venture being formed, the joint venture was never formed; however, Rathe and PGI did complete various tasks under the Notice to Proceed individually;

WHEREAS, Rathe and PGI submitted the feasibility study to the Smithsonian in 1998 and invoiced the Smithsonian for a total of \$323,891.91 for work performed on the feasibility study and certain expenses related to *America's Smithsonian*;

WHEREAS, the Smithsonian disputed the amount owed for work performed on the feasibility study but, upon review of additional documentation provided by Rathe and PGI, acknowledged that Rathe and PGI had performed additional work on a festival concept for the international tour at the request of the Smithsonian (such additional work hereby incorporated into the definition of "Work") and the Smithsonian has agreed to make a payment therefor;

WHEREAS, Rathe has represented to the Smithsonian that it has the authority to negotiate and execute a settlement on behalf of both Rathe and PGI;

WHEREAS, the parties wish to settle all claims and fully and completely cancel all right, title, interest and obligations which either of them has in regard to the Notice to Proceed and the Work.

NOW THEREFOR, in consideration of the mutual covenants and agreements contained herein, the Smithsonian, Rathe and PGI agree as follows:

1. **Scope and Intent.** It is the intent of the parties to amicably settle all claims related to the Notice to Proceed and the Work, and any and all other activities involving Rathe, PGI and the *America's Smithsonian* Exhibition. This Settlement Agreement provides for (i) the termination of all claims Smithsonian, Rathe, and/or PGI has or may have in the future related to the Notice to Proceed and the

Work; (ii) the transfer to the Smithsonian of all right, title and interest, including copyright interest, in the feasibility study and all related materials prepared for or developed by Rathe and PGI for purposes of the feasibility study; (iii) Certification by Rathe and PGI that there are no outstanding obligations, liens, or other legal claims to date based upon the Work; and (iv) payment by Smithsonian to Rathe of a fixed settlement fee.

2. Authority to Settle. Rathe warrants and represents to the Smithsonian that it has the authority to settle and release all claims and receive the fixed settlement fee on behalf of both Rathe and PGI, pursuant to a letter dated August 16, 1999 from CB Wismar, Executive Vice President, PGI to the Smithsonian, attached hereto in Appendix A. Rathe and PGI agree to indemnify and hold harmless the Smithsonian, its Regents, officers, agents and employees from and against any and all liabilities, claims, causes of action, suits, losses, damages, fines, judgments and expenses, including reasonable attorney's fees, which may be suffered by, made or incurred by Smithsonian arising out of or resulting from the breach or alleged breach by Rathe or PGI of any of the warranties, representations or agreements made by Rathe and PGI herein.

3. Assignment of Rights; Release. Rathe and PGI, for and in consideration of Smithsonian's release and payment of the settlement fee as set forth in Section 4. below, hereby (i) assign and transfer to Smithsonian all right, title and interest, including copyright interest, in the feasibility study and any other Work prepared pursuant to the Notice to Proceed (herein "Assignment of Rights"); and (ii) release and forever discharge Smithsonian from any claims, whether past, present, or future, liquidated or unliquidated, calculated or uncalculated, that Rathe and PGI may now have or may have in the future, under the Notice to Proceed and/or pursuant to the Work and any and all other activities involving Rathe, PGI and the *America's Smithsonian* Exhibition.

4. Settlement Fee; Release. Smithsonian, for and in consideration of Rathe's and PGI's Assignment of Rights and release as set forth in Section 3. above, hereby (i) agrees to pay Rathe the fixed sum of two hundred fifty thousand dollars (\$250,000.00); and (ii) releases and forever discharges Rathe and PGI from any claims, whether past, present, or future, liquidated or unliquidated, calculated or uncalculated, that Smithsonian may now have or may have in the future, under the Notice to Proceed and/or pursuant to the Work and any and all other activities involving Rathe, PGI and the *America's Smithsonian* Exhibition. The Settlement Fee shall be made payable to Rathe Productions, Inc. and will be paid by check to the address set forth below upon execution of this Agreement by both Smithsonian and Rathe:

Rathe Productions, Inc.
555 West 23rd Street
New York, NY 10011
Attn: Richard Rathe

5. Cancellation of Rights. The Smithsonian, Rathe and PGI hereby fully and completely cancel all right, title, interest and obligations which any of them may have in regard to the Notice to Proceed and the Work.

6. Use of Smithsonian Name. Rathe and PGI are hereby put on notice that the Smithsonian owns, controls, and/or has registered the trademarks/service marks "Smithsonian" and "Smithsonian Institution." Rathe and PGI shall not refer to the Smithsonian Institution or to any of its museums, programs, organizations, or facilities in any manner or through any medium, for any purpose whatsoever,

including, but not limited to, advertising, marketing, promotion, publicity, solicitation, or fund-raising.

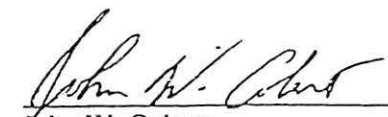
7. Recitals. The recitals herein constitute an integral part of the Agreement reached and are to be considered as such.

8. Entire Agreement. This Settlement Agreement constitutes the entire agreement between the Smithsonian, Rathe and PGI and supersedes all previous agreements on this matter. There are no other written or oral agreements, representations or understandings with respect to the subject matter of this Settlement Agreement.

IN WITNESS WHEREOF, the parties hereto have duly executed this agreement the day and year first written above.

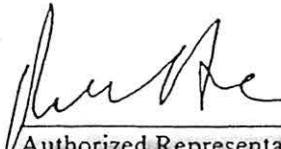
ACCEPTED AND AGREED:

SMITHSONIAN INSTITUTION


John W. Cobert
Contracting Officer


Aug 2, 2000
Date

RATHE PRODUCTIONS, INC.


Authorized Representative
Richard Rathe - Secretary/Treasurer
Rathe Productions, Inc.
Typed Name and Title

8/29/00
Date

PRODUCTION GROUP INTERNATIONAL, INC.


Authorized Representative
Richard Rathe - Secretary/Treasurer
Rathe Productions, Inc.
Typed Name and Title

8/29/00
Date

Appendix A: Letter from CB Wismar, dated August 16, 1999



Production Group International

10000
10000
10000

August 16, 1999

Ms. Susan Marino
Office of Public Affairs
Smithsonian Institution
Washington, DC 20560

Dear Ms. Marino;

This will confirm the correspondence that you have received from Rathe Productions Inc.

Rathe Productions Inc., Richard Rathe and Richard Mavity are authorized to represent our company in connection with the payment of \$250,000 for the Smithsonian International Feasibility Study. They may also represent us in collecting the balance due of \$73,891.91 for our open invoices.

Rathe Productions Inc. Will pay the \$50,000 due Odell & Sims.

Payment can be made directly to Rathe Productions Inc.

If you require anything further from me, please do not hesitate to contact me.

Sincerely,

CB-Wismar

Executive Vice President

Cc Richard Rathe

including, but not limited to, advertising, marketing, promotion, publicity, solicitation, or fund-raising.

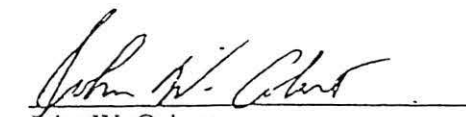
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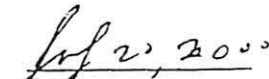
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IN WITNESS WHEREOF, the parties hereto have duly executed this agreement the day and year first written above.


ACCEPTED AND AGREED:

SMITHSONIAN INSTITUTION


John W. Cobert
Contracting Officer


Date

RATHE PRODUCTIONS, INC.


Authorized Representative
Richard Rathe-Secretary/Treasurer
Rathe Productions, Inc.
Typed Name and Title


Date

PRODUCTION GROUP INTERNATIONAL, INC.


Authorized Representative
Richard Rathe - Secretary/Treasurer
Rathe Productions, Inc.

Typed Name and Title


Date

Appendix A: Letter from CB Wismar, dated August 16, 1999



Production Group International

August 16, 1999

Ms. Susan Marino
Office of Public Affairs
Smithsonian Institution
Washington, DC 20560

Dear Ms. Marino;

This will confirm the correspondence that you have received from Rathe Productions Inc.

Rathe Productions Inc., Richard Rathe and Richard Mavity are authorized to represent our company in connection with the payment of \$250,000 for the Smithsonian International Feasibility Study. They may also represent us in collecting the balance due of \$73,891.91 for our open invoices.

Rathe Productions Inc. Will pay the \$50,000 due Odell & Sims.

Payment can be made directly to Rathe Productions Inc.

If you require anything further from me, please do not hesitate to contact me.

Sincerely,

CB Wismar

Executive Vice President

Cc Richard Rathe

April 14, 2000

Mr. John Cobert
Ms. Susan Engelhardt
Smithsonian Institution
955 L'Enfant Plaza, S.W.
Washington, DC 20024

International Tour

Dear John and Susan:

Thank you for your time earlier today regarding our position pertaining to the settlement of the International Tour payments.

In our telephone conversation you requested that we submit a comparison accounting of your last offer and our requested settlement amount.

	RPI AMOUNT		SI Last Offer
Total Amt	\$323,891		\$192,750
ASE Billings	\$73,891		\$65,588
Amt due O'dell Roper	\$50,000		\$50,000
Balance	\$200,000		\$77,162
Amount for RPI and PGI Each	\$100,000		\$38,581

Based on your last offer our share is less than 26% of the initial \$250,000 and less than 16% of our verified direct costs.

EXHIBIT

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**Rathe
Productions
International, Inc.**

555 West 23 Street
New York 10011

Teleph
212 24

As we discussed, in the interests of our long-standing relationship with the Smithsonian we would be willing to accept a settlement **not less than** the midpoint (\$258,320) of our current respective positions. This will allow PGI, RPI and O'Dell to receive a reduced final payment and recover approximately **only** 32% of our direct costs attributable to the International Study.

I appreciate your promise to present our feelings to the Undersecretary and look forward to a prompt resolution.

Sincerely,

A handwritten signature in dark ink, appearing to read 'C.B. Wismar', written in a cursive style.

CC: C.B. Wismar
Ed Tolchin, Esq.
Bob Odell

