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IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 970941

**INDER CHAWLA and
VERA B. CHAWLA,**

Appellants,

v.

BURGER BUSTERS, INC.,

Appellee.

**JOINT APPENDIX
Volume I**

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Inder Chawla et al

VIRGINIA: IN THE CIRCUIT COURT FOR THE

Filed 12/12/96

BURGERBUSTERS INC.,

Petitioner,

v.

INDER CHAWLA,
t/a SONINA PROPERTIES,

VERA V. CHAWLA,
t/a SONINA PROPERTIES,

and

SOUTHERN FINANCIAL FEDERAL SAVINGS BANK

SERVE: Georgia Derrico, Managing Officer
Southern Financial Federal Savings Bank
37 East Main Street
Warrenton, Virginia 22186

Respondents.

CHANCERY NO. CH93-266

PLTff Exhibit 8
WMC Judge

AMENDED BILL OF COMPLAINT

NOW COMES the Petitioner, BurgerBusters Inc. ("BurgerBusters"), by counsel, and as and for its Amended Bill of Complaint against the respondents, Inder Chawla and Vera V. Chawla, trading as Sonina Properties, (collectively, the "Chawlas"), and Southern Financial Federal Savings Bank (the "Bank") states as follows:

1. BurgerBusters is a Virginia corporation with its principal place of business in Charlottesville, Virginia.
2. Upon information and belief, the Chawlas are residents of the state of Maryland and own property located in Warrenton, Virginia, which is the subject of this action.

3. Upon information and belief, the Bank is a federal savings bank existing pursuant to the law of the United States of America and having a principal office in Warrenton, Virginia.

4. On or about January 22, 1992, BurgerBusters and the Chawlas entered into that certain Lease Agreement (the "Lease"). A copy of the Lease is attached hereto as Exhibit A and incorporated herein by this reference.

5. A Memorandum of Lease, dated September 23, 1992, evidencing the terms of the Lease, was recorded in the Clerk's Office of the Circuit Court of Fauquier County on May 6, 1993 in Deed Book 693 at Page 1349. A copy of the Memorandum of Lease is attached hereto as Exhibit B and incorporated herein by this reference.

6. Pursuant to the terms of the Lease, the Chawlas were obligated to, inter alia, develop and lease to Petitioner a Taco Bell Restaurant (the "Demised Premises") on a portion of the property owned by the Chawlas and referred to in the Lease as the "Shopping Center."

Count I

(Construction of Bank Building)

7. BurgerBusters hereby incorporates the allegations contained in paragraphs 1 through 6 as if set forth fully herein.

8. Under the terms of the Lease, the Chawlas agreed, inter alia, that there would be no other development in the Shopping Center except as substantially shown on the site plan attached to the Lease as Exhibit D (the "Site Plan").

9. Contrary to the terms of the Lease, the Chawlas initiated construction of a building (the "Bank Building") adjacent to the Demised Premises which Bank Building constitutes development other than as substantially shown on the Site Plan.

10. Under the terms of the Lease, the Chawlas also granted an easement (the "Easement") to BurgerBusters permitting BurgerBusters, its invitees, guests, employees and agents and their successors and assignees to use all parking areas, parking spaces, driveways, sidewalks, entrances and exits located on the Shopping Center throughout the entire term of the lease and any extension thereof and covenanting that the parking areas, parking spaces, driveways, sidewalks, entrances and exits would not be obstructed in any manner or in any way altered, reduced, relocated or modified in size without the prior written consent of BurgerBusters.

11. The Easement is further evidenced by that certain Deed of Easement, dated January 8, 1993, recorded in the Clerk's Office of Fauquier County in Deed Book 693 at Page 1366 (the "Deed of Easement"). A copy of the Deed of Easement is attached hereto as Exhibit C and incorporated herein by this reference.

12. The Chawlas' construction of the Bank Building has, and will continue to, obstruct and/or alter the parking areas, parking spaces and driveways in the Shopping Center contrary to the terms of and in violation of the Easement. The Chawlas have neither requested nor obtained BurgerBusters' written consent to said obstruction and/or alteration.

13. The Chawlas' construction of the Bank Building is an encroachment and trespass on the interests of BurgerBusters as granted by the Lease and Easement.

14. If the Chawlas are permitted to construct the Bank Building and lease it to the Bank and/or obstruct and/or alter the parking areas, parking spaces and driveways in the Shopping Center, BurgerBusters will be irreparably harmed and will have no adequate remedy at law.

Count II

(Bank Lease)

15. BurgerBusters hereby incorporates the allegations contained in paragraphs 1 through 14 as if set forth fully herein.

16. Upon information and belief, the Chawlas and the Bank have entered into or intend to enter into a lease (the "Bank Lease") for the Bank Building.

17. The Bank Lease is contrary to BurgerBusters' interests in the Demised Property and the Shopping Center as evidenced by the Lease and the Deed of Easement.

18. If the Bank is not enjoined from entering into the Bank Lease and from using the Bank Building in a manner contrary to the Lease and the Deed of Easement, BurgerBusters will be irreparably harmed and will have no adequate remedy at law.

COUNT III

(Parking Spaces)

19. BurgerBusters hereby incorporates the allegations contained in paragraphs 1 through 18 as if set forth fully herein.

20. Pursuant to the terms of the Lease, the improvements constructed by the Chawlas on the Demised Premises were to include at least thirty-three (33) parking spaces.

21. There are fewer than thirty-three parking spaces on the Demised Premises.

22. The Chawlas have breached the Lease by failing to construct the minimum number of parking spaces on the Demised Premises.

WHEREFORE, BurgerBusters respectfully requests that this Court enter an Order: (i) permanently enjoining the Chawlas from further development and construction at the Shopping Center other than in accordance with the terms of the Lease, (ii) permanently enjoining the Chawlas from further development and construction at the Shopping Center contrary to the Easement; (iii) permanently enjoining the Chawlas from constructing the Bank Building; (iv) permanently enjoining the Bank from using and/or leasing the Bank Building in a manner contrary to the Lease and the Easement; and (v) awarding BurgerBusters its damages for breach of contract, trespass and encroachment, together with attorney's fees and costs expended in this matter, and such other and further relief as this Court may deem appropriate.

BURGERBUSTERS INC.

By: Annemarie Cleary
Of Counsel

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Faggert & Frieden, P.C.
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(804) 424-3232

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing Amended Bill of Complaint was mailed to Daniel M. O'Connell, Jr., Esquire, 82 Main Street, Warrenton, Virginia 22186, and Georgia Derrico, Managing Officer, Southern Financial Federal Savings Bank, 37 East Main Street, Warrenton, Virginia 22186, on December 17th, 1993.

Annemarie Cleary

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAUQUIER
BURGERBUSTERS, INC.

Petitioner,

v.

CHANCERY NO. CH93-266

INDER CHAWLA, et al.

Respondents.

FILED FEB 10 1994

RESPONDENTS' ANSWER TO AMENDED BILL OF COMPLAINT
AND CROSS-BILL

COME NOW, INDER CHAWLA and VERA V. CHAWLA, trading as Sonina Properties (collectively, the Respondents), in response to the Amended Bill of Complaint filed herein by the Petitioner answer and respond as follows:

1. The allegations contained in paragraphs 1, 2, 3, 4 and 5 of the Amended Bill of Complaint are admitted.

2. As to paragraph 6 of the Amended Bill of Complaint, the Respondents aver that the Lease speaks for itself and deny any allegation inconsistent therewith. Respondents admit that they constructed and leased to Petitioner a Taco Bell restaurant as described in the lease between the parties.

3. As to paragraph 7 of the Amended Bill of Complaint, the Respondents reallege their responses to paragraphs 1 through 6 of the Amended Bill of Complaint as if set forth herein.

4. As to paragraph 8 of the Amended Bill of Complaint, the Respondents aver that the Lease speaks for itself and deny any allegations inconsistent therewith. Respondents admit that

paragraph 8 of the Amended Bill of Complaint paraphrases a portion of paragraph 7 of the Lease.

5. As to paragraph 9 of the Amended Bill of Complaint, the Respondents admit that they initiated construction of a building to be leased as a bank. Respondents deny that said building constitutes development other than as substantially shown on the Site Plan and deny that said building is contrary to the lease terms.

6. As to paragraph 10 of the Amended Bill of Complaint, the Respondents aver that the lease speaks for itself and deny any allegation inconsistent therewith. Respondents admit that paragraph 10 paraphrases a portion of the lease and they aver that the lease further provides that the tenant (BurgerBusters) will not unreasonably withhold consent to any alteration, reduction, relocation or modification in the size of the referenced areas.

7. The allegations of paragraph 11 of the Amended Bill of Complaint are admitted.

8. As to paragraph 12 of the Amended Bill of Complaint, the Respondents admit that BurgerBusters has withheld consent to any alteration of the parking area and aver that such consent is being unreasonably withheld. The Respondents aver that the lease contemplates further construction in the shopping center involving the parking area; neither the planned alteration of the parking lot nor any temporary obstruction of a portion of the existing parking lot in order to complete construction are contrary to the lease or easement and; that the Petitioner has not and will not suffer any

damage or irreparable injury as a result of said alteration or construction.

9. The allegations contained in paragraph 13 of the Amended Bill of Complaint are denied and strict proof thereof requested.

10. The allegations contained in paragraph 14 of the Amended Bill of Complaint are denied and strict proof thereof requested.

11. As to paragraph 15 of the Amended Bill of Complaint, the Respondents reallege their responses to paragraphs 1 through 14 of the Amended Bill of Complaint as if set forth herein.

12. As to paragraph 16 of the Amended Bill of Complaint the Respondents admit that they have executed a Lease Agreement with the Bank for a term of seven (7) years commencing on the day of issuance of a certificate of occupancy by the Town of Warrenton, Virginia, or on February 1, 1994, which ever happens later. The Lease Agreement becomes null and void if a certificate of occupancy is not delivered to the Bank by May 31, 1994.

13. The allegations contained in paragraph 17 of the Amended Bill of Complaint are denied and strict proof thereof requested.

14. The allegations contained in paragraph 18 of the Amended Bill of Complaint are denied and strict proof thereof requested.

15. As to paragraph 19 of the Amended Bill of Complaint, the Respondents reallege their responses to paragraphs 1 through 18 of the Amended Bill of Complaint as if set forth herein.

16. As to the allegations contained in paragraph 20 of the Amended Bill of Complaint the Respondents aver that a total of more than 33 parking spaces were constructed either on or adjacent to

the Demised Premises as described by metes and bounds and that Petitioner has satisfactory parking so that it can use the Demised Premises for its intended purpose.

17. As to the allegations contained in paragraph 21 of the Amended Bill of Complaint the Respondents admit that there are less than 33 parking spaces contained within the metes and bounds description of the demised premises attached as Exhibit A to the lease.

18. The allegations contained in paragraph 22 of the Amended Bill of Complaint are denied and strict proof thereof requested.

19. Respondents deny that their acts have violated the lease or any applicable restrictive covenants or easements.

20. All other allegations not previously admitted are denied.

21. Petitioner has an adequate remedy at law.

22. Petitioner's objection to construction of the bank building is barred by the doctrine of waiver.

23. Petitioner's objection to construction of the bank building is barred by the doctrine of estoppel.

24. Respondents have not breached the lease agreement by constructing a building which is "substantially" as shown as Exhibit D to said agreement.

25. Respondents have not breached the lease agreement by altering and/or temporarily obstructing the parking lot in that tenant's consent thereto has been unreasonably withheld.

26. Petitioner has breached the lease agreement by unreasonably withholding consent to alteration and temporary obstruction of the parking lot.

WHEREFORE, now having fully responded to the Amended Bill of Complaint the Respondents pray that the Amended Bill of Complaint be dismissed and that they may recover their costs expended in this action.

CROSS-BILL

COMES NOW the Respondents/Cross-Complainants INDER CHAWLA and VERA CHAWLA t/a Sonina Properties (the Chawlas), by counsel, and for their cross-bill state as follows:

1. The Chawlas are the owners of certain real property located in the town of Warrenton, Fauquier County, Virginia.

2. The Chawlas lease a portion of the aforesaid property to the petitioner BURGERBUSTERS, INC. t/a Taco Bell (BurgerBusters) pursuant to a Lease Agreement dated January 22, 1992, a copy of which is attached as Exhibit "A" to the Petitioner's Bill of Complaint.

3. Paragraph 8 of the aforesaid lease provides in relevant part that "... parking areas, parking spaces, driveways, sidewalks, entrances and exits shall not be obstructed in any manner or in any way altered, reduced, or modified in size without the prior written consent of Tenant which consent shall not be unreasonably withheld."

4. At the time they entered into the aforesaid Lease Agreement the parties anticipated the further development of the

remaining property owned by the Chawlas (the Shopping Center). Specifically, the parties anticipated two additional phases of construction or development shown as Phase II and Phase III on Exhibit "D" to the Lease Agreement.

5. By letter dated April 3, 1993, attached hereto as Exhibit "A", the Chawlas informed BurgerBusters in writing of their plan to construct Building II of the Shopping Center and as part of that construction to complete the entire parking lot of the Shopping Center.

6. In the aforesaid letter the Chawlas requested BurgerBusters' written approval of their plan to construct a 2,000 square foot bank building as shown on the drawing attached as part of said letter.

7. In response to the April 3, 1993 letter, Tassos Paphites president of BurgerBusters, Inc. replied in writing, as shown on the bottom of the aforesaid letter, approving the drawing provided that the parking lot shown on the Shopping Center site plan dated July 16, 1990, (Exhibit "D" to the Lease Agreement) is completed at the same time. Mr. Paphites also indicated that final approval would be given upon submission of a site plan to BurgerBusters.

8. In August 1993, the Chawlas forwarded a copy of the site plan for Phase II to Tassos Paphites. Mr. Paphites refused to review and approve the plan.

9. Construction of Phase II involves some alteration of the parking configuration shown on Exhibit "D" to the Lease Agreement. In no event will BurgerBusters have less than 33 parking spaces

available to it during construction and on completion of construction the entire shopping center parking lot will be finished and available to BurgerBusters' customers.

10. In or about October 1993, site work on Phase II of the Shopping Center was commenced by R. Edward Daffan, Inc., the construction company retained by the Chawlas, and shortly thereafter BurgerBusters filed suit in the Circuit Court of Fauquier County (CH93-266) seeking to permanently enjoin the construction of a bank building and obstruction or alteration of the parking lot.

11. Since construction began BurgerBusters has unreasonably withheld consent to any obstruction or alteration of the parking configuration which is necessary to the construction of Phase II of the Shopping Center.

12. BurgerBusters' unreasonable refusal to consent to the alteration is a breach of Paragraph 8 of the Lease Agreement.

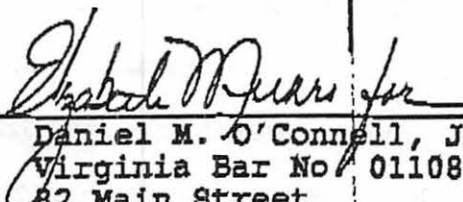
13. If BurgerBusters is permitted to withhold consent to any obstruction or alteration of the parking lot the Chawlas will be irreparably harmed and will have no adequate remedy at law.

WHEREFORE, respondents/cross-complainants respectfully request that this Court enter an order (i) enjoining petitioner from continuing to unreasonably withhold consent to the alteration of the parking lot; (ii) awarding respondents/cross-complainants their damages for breach of the lease terms including attorneys' fees and costs expended in this matter, and granting such other and further relief as this Court may deem appropriate.

INDER CHAWLA and
VERA V. CHAWLA
t/a SONINA PROPERTIES
By Counsel

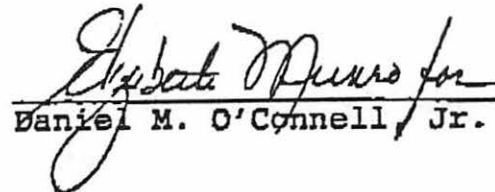
O'CONNELL & MAYHUGH, P.C.

By:


Daniel M. O'Connell, Jr.
Virginia Bar No. 01108
82 Main Street
Warrenton, Virginia 22186
Telephone: (703) 347-2424
Counsel for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February, 1994, a true and correct copy of Respondents' Answer to Amended Bill of Complaint and Cross-Bill has been furnished by first class, postage prepaid U.S. Mail and by Facsimile to: Robin C. Gulick, Esq., GULICK, CARSON & PEARSON, 9 Culpeper Street, Warrenton, VA 22186, Counsel for Petitioner; and to Alan M. Frieden, Esq., FAGGERT & FRIEDEN, P.C., 870 Greenbrier Circle, Suite 300, Chesapeake, VA 23320, Co-Counsel for Petitioner.


Daniel M. O'Connell, Jr.

82 MAIN STREET
WARRENTON, VIRGINIA 22186
703-347-2424
Telecopier 703-349-1705

FILED (Chawla) 2/10/94

Exhibit
A

Sonina Properties
P. O. Box 59236
Potomac, MD 20859

(301) 469-6573

April 3, 1993

Mr. Tassos Paphites
BurgerBusters, Inc.
355 West Rio Road, Suite 204
Charlottesville, VA 22901

Dear Mr. Paphites:

Enclosed, please find a concept plan of Building II for use of a Bank, as we discussed on April 1, 1993. I have reduced the size of the Building to 2000 sq. ft. and will be built on Lot 2 of the Piedmont Square Center. The location of the Building is the same as on the site and will not alter the visibility or operation of Taco Bell, whatsoever. As part of construction of this Bank building the entire parking lot of the center will be paved to service Taco Bell and Bank operation.

I am hoping that the Bank and your Restaurant will compliment each other and attract other tenants for Building III of the center.

If you are agreeable, with this concept plan, please sign on this letter and fax it back to me in the interest of time. If you have any questions, please do not hesitate to call.

Sincerely yours,

I. Chawla

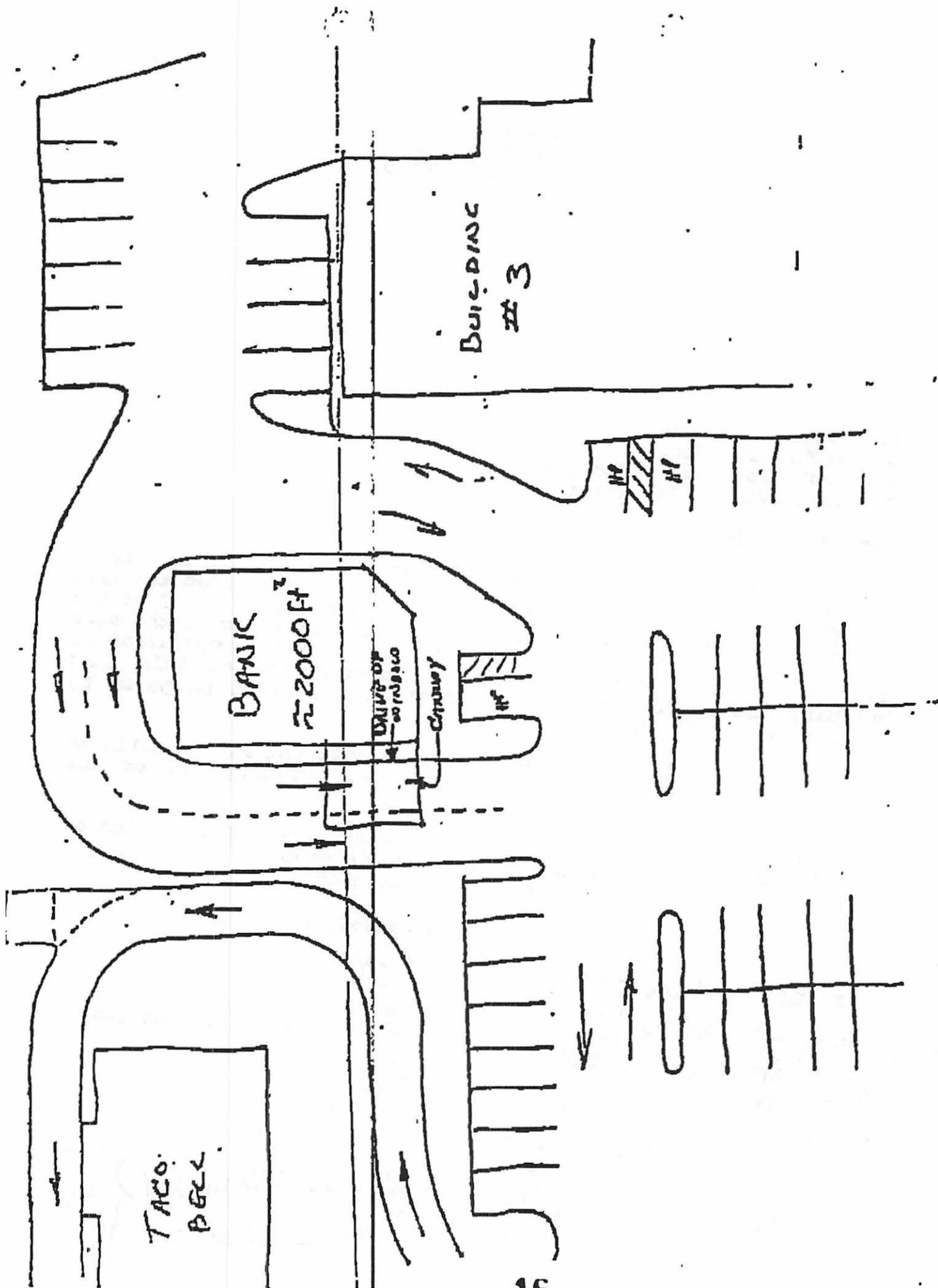
Inder Chawla, M.D.
President Sonina Properties

Preliminary Sketch is approved
pending all parking lot on site
plan dated July 16, 1990 is
IC/ajn completed at the same time

Enclosure

and Final Approval will be given
once a complete site plan is submitted
to BurgerBusters Inc. Thank you

Tassos Paphites



VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAUQUIER
BURGERBUSTERS, INC.

Petitioner,

v.

CHANCERY NO. CH93-266

INDER CHAWLA, et al.

Respondents.

AMENDED CROSS-BILL

COME NOW, the Respondents/Cross-Complainants INDER CHAWLA and VERA CHAWLA t/a Sonina Properties (the Chawlas), by counsel, and for their amended cross-bill state as follows:

1. The Chawlas are the owners of certain real property located in the town of Warrenton, Fauquier County, Virginia.

2. The Chawlas lease a portion of the aforesaid property to the petitioner BURGERBUSTERS, INC. t/a Taco Bell (BurgerBusters) pursuant to a Lease Agreement dated January 22, 1992, a copy of which is attached as Exhibit "A" to the Petitioner's Bill of Complaint.

3. At the time they entered into the aforesaid Lease Agreement the parties anticipated the further development of the remaining property owned by the Chawlas (the Shopping Center). Specifically, the parties anticipated two additional phases of construction or development shown as Building II and Building III on Exhibit "D" to the Lease Agreement.

4. Exhibit "D" to the Lease Agreement is a copy of the site plan for the Shopping Center as it existed on March 18, 1992, and

shows three (3) entrances/exits to the Shopping Center, namely Lee Highway, Roebling Street and Jackson Street.

5. In July, 1992, after revisions were made which were required by the Town of Warrenton Planning & Zoning Department, the Shopping Center site plan was approved by the Town for Phase I construction of the Taco Bell restaurant.

6. The approved site plan, as with the March 18, 1992 version appended to the Lease as Exhibit "D", showed the same three (3) entrances/exits aforesaid.

7. Access to the Shopping Center from Lee Highway is over the portion of the Shopping Center leased by the Chawlas to BurgerBusters.

8. BurgerBusters denies that the Chawlas, their tenants or invitees have a right to enter and/or exit the Shopping Center via Lee Highway and have in the past installed a chain across the parking lot in an apparent effort to prevent traffic from crossing the portion of the Shopping Center leased to BurgerBusters.

9 At the same time that they deny access to the Shopping Center over the portion leased to them, BurgerBusters claims various rights to the rest of the Shopping Center not leased to them in part by virtue of paragraph 8 of the Lease.

10. Paragraph 8 of the aforesaid lease provides in relevant part that "... parking areas, parking spaces, driveways, sidewalks, entrances and exits shall not be obstructed in any manner or in any way altered, reduced, or modified in size without the prior written

consent of Tenant which consent shall not be unreasonably withheld."

11. BurgerBusters misrepresented to Chawla that the reason for including Paragraph 8 in the Lease was so that BurgerBusters' customers would have the use of the parking spaces subsequently constructed in the Shopping Center as well as access to the Taco Bell through and over the remainder of the Shopping Center.

12. BurgerBusters actual intention and reason for including paragraph 8 in the Lease was to refuse to consent to any alteration of the parking lot when Chawla was to undertake construction of Building II and/or Building III for the purpose of renegotiating rent terms more favorable to BurgerBusters.

13. In January 1993, BurgerBusters requested that Chawla execute the Deed of Easement attached to the Amended Bill of Complaint as Exhibit C.

14. BurgerBusters misrepresented to Chawla that the purpose for asking Chawla to execute the Deed of Easement was to assure BurgerBusters' customers access to the Taco Bell restaurant over and through the remainder of the Shopping Center in the event of a change of ownership of the property.

15. BurgerBusters' actual intention was to attempt to strengthen its position in refusing to give Chawla consent to any alteration of the parking spaces in conjunction with further development of the property in order to be able to renegotiate rent terms more favorable to BurgerBusters.

16. By letter dated April 3, 1993, attached hereto as Exhibit "A", the Chawlas informed BurgerBusters in writing of their plan to construct Building II of the Shopping Center and as part of that construction to complete all of the parking lot associated with Building II and a portion of the parking lot associated with Building III.

17. In the aforesaid letter the Chawlas requested BurgerBusters' written approval of their plan to construct a 2,000 square foot bank building with a drive-thru window as shown on the drawing attached as part of said letter, including the removal of 3-4 parking spaces in conjunction with the drive-thru window.

18. In response to the April 3, 1993 letter, Tassos Paphites president of BurgerBusters, Inc. replied in writing, as shown on the bottom of the aforesaid letter, approving the construction of the bank provided that the parking lot shown on the Shopping Center site plan dated July 16, 1990, (Exhibit "D" to the Lease Agreement) is completed at the same time. Mr. Paphites also indicated that final approval would be given upon submission of a site plan to BurgerBusters.

19. In August 1993, the Chawlas t/a Sonina Properties entered into a Lease Agreement with Southern Financial Federal Savings Bank (SFFSB) and forwarded a copy of the site plan for bank building to Tassos Paphites. Mr. Paphites refused to review and approve the plan.

20. BurgerBusters had no less than 33 parking spaces available to it during construction of the bank building and on

completion of the building and associated site work there were significantly more parking spaces finished and available to BurgerBusters' customers.

21. In or about October 1993, site work associated with Building II of the Shopping Center was commenced by R. Edward Daffan, Inc., the construction company retained by the Chawlas, and shortly thereafter BurgerBusters filed suit in the Circuit Court of Fauquier County (CH93-266) seeking to permanently enjoin the construction of a bank building and obstruction or alteration of the parking lot.

22. BurgerBusters has intentionally and unreasonably withheld consent to any obstruction or alteration of the parking configuration necessary to the construction of Building II of the Shopping Center.

COUNT I

23. The Chawlas reallege and incorporate paragraphs 1 through 22 of the Amended Cross Bill as if fully incorporated herein.

24. BurgerBusters' unreasonable refusal to consent to the alteration of the parking lot is a breach of Paragraph 8 of the Lease Agreement.

25. If BurgerBusters is permitted to withhold consent to any obstruction or alteration of the parking lot the Chawlas will be irreparably harmed and will have no adequate remedy at law.

WHEREFORE, respondents/cross-complainants respectfully request that this Court enter an order (i) enjoining petitioner from continuing to unreasonably withhold consent to the alteration of

the parking lot; (ii) awarding respondents/cross-complainants their damages for breach of the lease terms including attorneys' fees and costs expended in this matter, and granting such other and further relief as this Court may deem appropriate.

COUNT II

26. The Chawlas reallege and incorporate paragraphs 1 through 22 of the Amended Cross Bill as if fully incorporated herein.

27. BurgerBusters, its officers or agents intentionally misrepresented the reason for including Paragraph 8 in the lease.

28. BurgerBusters was aware of the Chawlas plan to develop the remainder of the Shopping Center and the misrepresentation was a material and important fact on which the Chawlas relied in agreeing to include Paragraph 8 in the lease.

29. As a result of BurgerBusters' fraudulent misrepresentation the Chawlas are entitled to reformation of the lease such that Paragraph 8 cannot be used by BurgerBusters to preclude changes to the parking lot or other areas of the Shopping Center necessary for its full use and development.

WHEREFORE, Respondents/Cross-Complainants pray that they be granted reformation of the lease as set forth above and for such other relief as equity may require.

COUNT III

30. The Chawlas reallege and incorporate paragraphs 1 through 22 of the Amended Cross Bill as if fully incorporated herein.

31. The Deed of Easement executed in January, 1993, is not supported by any consideration and therefore fails for lack of consideration.

32. BurgerBusters, its officers or agents intentionally misrepresented BurgerBusters' reason for wanting the Chawlas to execute the Deed of Easement.

33. The misrepresentation was a material and important fact on which the Chawlas relied in agreeing to execute the Deed of Easement.

34. The Chawlas are entitled to rescission of the Deed of Easement for fraud and lack of consideration.

WHEREFORE, Respondent/Cross-Complainants pray that they be granted rescission of the Deed of Easement aforesaid and such other relief as equity may require.

COUNT IV

35. The Chawlas reallege and incorporate paragraphs 1 through 22 of the Amended Cross Bill as if fully incorporated herein.

36. The use of the Lee Highway entrance for access to the Shopping Center over and through the premises demised to BurgerBusters was intended by the parties when the lease was entered into and the burden of that use is and was apparent, continuous and necessary for the enjoyment of the land owned by the Chawlas and not leased to BurgerBusters.

37. By its execution of the lease appending the site plan showing access to the Shopping Center over the demised premises

BurgerBusters agreed to the reservation of an easement for ingress and egress in favor of the land owned by Dr. Chawla.

38. BurgerBusters is estopped to deny the existence of an easement in favor of the Chawlas in that it approved the site plan showing access to the Shopping Center over the demised premises and actually and/or constructively represented to the Chawlas that the Lee Highway entrance would be a means of access to the Shopping Center.

39. The Chawlas enjoy an easement by estoppel and/or implied reservation over the premises demised to BurgerBusters.

WHEREFORE, the Chawlas pray for an order of this Court establishing an easement for ingress and egress to the Shopping Center over and through the premises leased to BurgerBusters.

INDER CHAWLA and
VERA V. CHAWLA
t/a SONINA PROPERTIES
By Counsel

O'CONNELL & MAYHUGH, P.C.

By: 

Daniel M. O'Connell, Jr.
Virginia Bar No. 01108
82 Main Street
Warrenton, Virginia 22186
Telephone: (703) 347-2424
Counsel for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 1994, a true and correct copy of Respondents' Amended Cross-Bill has been furnished by first class, postage prepaid U.S. Mail to: Stewart J. Sacks, Esq., FAGGERT & FRIEDEN, P.C., 870 Greenbrier Circle, Suite 300, Chesapeake, VA 23320, Counsel for Petitioner; Gary M. Pearson, Esq., PEARSON & PEARSON, 9 Culpeper Street, Warrenton, VA 22186, Counsel for Petitioner; and to Eric V. Zimmerman, Esq., PRICE & ZIMMERMAN, 305 Harrison Street, S.E., 3rd Floor, Leesburg, VA 22075, Counsel for Southern Financial F.S.B.


Daniel M. O'Connell, Jr.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAUQUIER

BURGERBUSTERS, INC.

Petitioner,

v.

CHANCERY NO. CH93-266

INDER CHAWLA, et al.

Respondents.

PRETRIAL ORDER

THIS CAUSE came on April 24, 1995, for a pretrial conference to determine the issues to be tried and was argued by counsel whereupon it is hereby

ADJUDGED, ORDERED and DECREED that the following issues are before the Court on the Petitioner's Amended Bill of Complaint:

1. Whether the development now existing on the Respondents' property is development substantially as shown on the site plan appended to the lease agreement as Exhibit D.

2. Did the parties intend there to be thirty-three (33) spaces on the demised premises or, in other words, is the fact that there are less than thirty-three (33) spaces on the demised premises a breach of the lease agreement?

3. If the development as constructed on the Respondents' property is not development substantially as shown on the site plan appended to the lease agreement as Exhibit D, is the Petitioner entitled to injunctive relief and what is the appropriate scope of that relief?

4. If the Petitioner should not be granted injunctive relief requiring the removal of the building and the restoration of the site to the condition it was in prior to the construction of the bank and related improvements, what damages, if any, have been suffered by the Petitioner?

5. If the lack of thirty-three (33) spaces on the demised premises constitutes a breach of the lease, what damages, if any, has the Petitioner suffered as a result?

6. The issues to be tried on Count IV of the Respondents' Amended Cross-Bill are (1) *and outcome can be altered to show* whether the parties intended an easement for ingress and egress to the remainder of the property from the Route 29/Lee Highway entrance over the demised premises; and (2) *if* Has Mr. Paphites, on behalf of the Petitioner, made statements or admissions which preclude him from now arguing that no access to the rest of the site from Route 29/Lee Highway was intended over the demised premises under the rule in Massie v. Firmstone, 134 Va.

450. *The amount of attorney's fees for which the Petitioner may be*
ENTERED this 25th day of April, 1995. *entitled to is unavailing*




Circuit Judge - William Shore Robertson

SEEN AND AGREED:




Stewart J. Sacks
FAGGERT & FRIEDEN, P.C.
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Telephone: (804) 424-3232
Co-Counsel for Petitioner



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HOWELL, DAUGHERTY, BROWN & LAWRENCE
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P.O. Box 3929
Norfolk, Virginia 23514
Telephone: (804) 623-7334
Co-Counsel for Petitioner

Rule 1.11

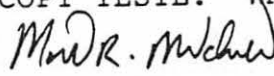
Gary M. Pearson, Esq.
PEARSON & PEARSON
9 Culpeper Street
Warrenton, Virginia 22186
Co-Counsel for Petitioner



Daniel M. O'Connell, Jr.
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Telephone: (703) 347-2424
Counsel for Respondents Chawla



Eric V. Zimmerman, Esq.
PRICE & ZIMMERMAN
305 Harrison Street, S.E., Third Floor
Leesburg, Virginia 22075
Counsel for Southern Financial F.S.B.

A COPY TESTED: WM. D. HARRIS, CLERK
BY  DEPUTY CLERK
FAUQUIER COUNTY CIRCUIT COURT, VA.

Burgerbusters, Inc.

V. CH93-266

Inder Chawla et al

Filed 12/13/96

TWE

Deft.

Exhibit 3

Judge

RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
POST OFFICE BOX 985
WARRENTON, VIRGINIA 22186

FAUQUIER, LOUDOUN AND
RAPPAHANNOCK COUNTIES

IAS D. HORNE, JR.
ST OFFICE BOX 7.
BURG, VIRGINIA 22

JAMES H. CHAMBLIN, J
POST OFFICE BOX 12
LEESBURG, VIRGINIA 22

August 14, 1995

Gary M. Pearson, Esq.
9 Culpeper Street
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Manassas, VA 22110 (Mailed)

Eric V. Zimmerman, Esq.
305 Harrison Bldg., Third Floor
Leesburg, VA 22075 (Mailed)

Re: Burgerbusters, Inc. v. Chawla, et al.
Circuit Court of Fauquier County
In Chancery No: CH93-266

*rec'd 8/14/95
faxed 8/14/95
@ 2.0*

CPA 15

Gary M. Pearson, Esq., et al.
August 14, 1995
Page 2

Gentlemen/Ladies:

On August 7, 1995, the Court heard argument on the defendants' Motion to Strike the Petitioner's claim for damages for loss of parking spaces, and this matter was taken under advisement. After considering the evidence and argument of counsel, the Court will sustain the defendants' demurrer.

When ruling on a Motion to Strike, the Court must give the party against whom the motion is made all the inferences which can be fairly drawn from the evidence. As stated in Williams v. Chesapeake Bay Bridge, 208 Va. 714, 717 (1968):

We have repeatedly said in ruling on a Motion to Strike plaintiff's evidence all inferences which may be favorably drawn from the evidence must be considered most favorably to the plaintiff, and where there are several inferences which may be drawn, though they may differ in degree of probability, the Court must adopt those most favorable to the party whose evidence it is sought to have struck out, unless the inferences be strained, forced, or contrary to reason.

In the context of all the evidence, Messrs. Reith and Kimball, and especially Mr. Garvin were called as experts to render opinion as to the impact of the loss of parking places to the petitioner's Taco Bell Restaurant on the demised site.

Upon their motion to strike, the defendants assert that this evidence is speculative, that it is improperly based upon gross sales, and that it is improperly based upon the loss profit rule which is uncertain. They also argue that the petitioners have failed to establish proximate cause between the breach and the damages claimed and that even if damages can be shown, the operational expenses must be deducted. Last, they argue that the petitioner has failed to mitigate its damages.

As noted, the primary evidence of the damages allegedly suffered by the petitioner was shown by the testimony of Mr. Garvin, a commercial real estate broker, who testified as an expert on the development of Taco Bell franchise sites. As such, he was asked to value the missing parking spaces and to project their loss over the lease term. In doing so, he calculated the average ticket space per year from the average parking space per year at \$15,592.74 and projecting an annual average growth per year

of one and a half per cent, he calculated the lease term damages per space at \$311,179.46 or total damages of \$2,814,285.60. His methodology is set out in his testimony and will not be restated here. Essentially he took ticket sales from three high volume days each in July 1993 and 1994 and three low volume days in March of 1995. By eliminating the drive thru sales, he derived a per ticket sale and projected it upon the missing parking spaces to establish a per year gross sale loss. He then multiplied that sum over the lease term using an inflation factor to establish the total damages. Mr. Garvin acknowledges that there are other parking spaces available to the Taco Bell Restaurant although they are less desirable and off of the demised premises. He offers no evidence regarding the deduction of costs and expenses from the gross sale estimates nor does he negate other market factors over the term of his calculated damages.

In Dupont v. Universal Moulded Prod., 191 Va. 525, 572-573 (1950), the Court held:

Proof of absolute certainty as to the amount of loss or damage is not essential when the existence of loss is established and the facts and circumstances proved are such as to permit of(sic.) intelligent and probable estimate of the amount of damage or loss sustained.

* * * *

The above cases and authorities lay down and emphasize the following fundamental requirements for the recovery of loss of profits:

- (1) The damages must be established with reasonable certainty. If remote, speculative, contingent or uncertain, they are not recoverable.
- (2) The breach of contract must be the direct and proximate cause of the damage, which must be naturally and directly traceable to the act of the wrongdoer.
- (3) The consequences of the wrongful act must have been reasonably foreseeable by the parties at the time of the execution of the contract.

While Mr. Garvin's methods may be adequate in a site selection process, the Court concludes that they are too remote, speculative, contingent or uncertain to award the sums he has calculated as damages. Further while there may be some damages to the

Gary M. Pearson, Esq., et al.

August 14, 1995

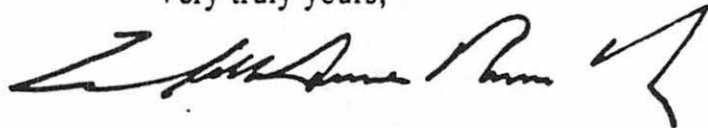
Page 4

petitioner for the loss of these spaces, the Court has no evidence upon which it can make this calculation. For an example of how damages might be set for an established business, as alleged here, see Krikorian v. Dailey, 171 Va. 16 (1938). The Court is also concerned about the lack of reasonable causation of these damages. Last, gross receipts, not net profit, is inappropriately used in this calculation. Bristol Belt Line Railway Co. v. Bullock Co., 101 Va. 652 (1903).

In conclusion, giving the Petitioner all favorable inferences, the Court concludes that its evidence is strained, forced, and contrary to reason. Williams, supra.

Mr. O'Connell is requested to prepare an appropriate decree according to this letter opinion to which all counsel may note their exceptions. In view of the Court's rulings here and previously in this case, counsel is requested to prepare a revised pretrial order to be entered not later than August 23, 1995. This order should frame the remaining issues in this case. The Court also requests that counsel advise it if all three days beginning August 28, 1995 will be needed to conclude this case.

Very truly yours,

A handwritten signature in black ink, appearing to read 'William Shore Robertson', with a stylized flourish at the end.

William Shore Robertson

WSR/mkb

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAUQUIER
BURGERBUSTERS, INC.

Petitioner,

v.

CHANCERY NO. CH93-266

INDER CHAWLA, et al.

Respondents.

O R D E R

THIS CAUSE came on for hearing the 7th day of August, 1994, on the Respondents' Motion to Strike the Petitioner's claims for injunctive relief and damages and was argued by counsel and it appearing to the Court that the Respondents' Motion should be sustained in part and overruled in part it is now, therefore

ADJUDGED, ORDERED and DECREED that the Respondents' Motion to Strike the Petitioner's claim for injunctive relief on the grounds that the Petitioner consented to the construction of the bank building and removal of the parking spaces is overruled, and it is further

ADJUDGED, ORDERED and DECREED that the Respondents' Motion to Strike the Petitioner's claim for damages allegedly caused by: a) the removal of 3½ to 4 existing parking spaces outside the demised premises and within the easement to allow for construction of the bank drive-through lanes and b) the existence of less than 33 spaces within the boundary lines of the demises premises, is sustained for the reasons stated in the Court's letter opinion dated August 14, 1995, which is incorporated herein and made a part hereof by reference, and it is further

ADJUDGED, ORDERED and DECREED that the issues remaining to be tried on the Petitioner's Amended Bill of Complaint are:

1) Whether the bank as constructed violates Paragraph 7 or Paragraph 8 of the lease between the parties;

2) Whether the use of the premises for a bank constitutes a retail use of the premises;

3) Whether the bank as constructed materially detracts from the performance expected by Petitioner; and

The issues to be tried on Count IV of the Respondents' Amended Cross Bill are:

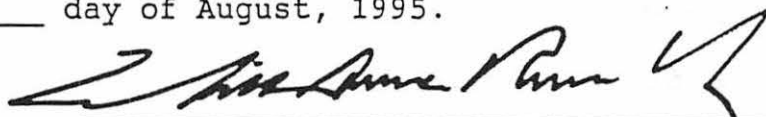
1) Whether parol evidence can be allowed to show that the parties intended an easement for ingress and egress to the remainder of the property from the Route 29/Lee Highway entrance over the demised premises; and

2) If so, has Mr. Paphites, on behalf of the Petitioner, made statements or admissions which preclude him from now arguing that no access to the rest of the site from Route 29/Lee Highway was intended over the demises premises under the rule in Massie v. Firmstone, 134 Va. 450.

The amount of attorneys' fees, if any, to which the Petitioner may be entitled to is reserved.

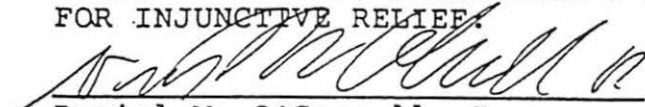
AND THIS CAUSE IS CONTINUED.

ENTERED this 18th day of August, 1995.

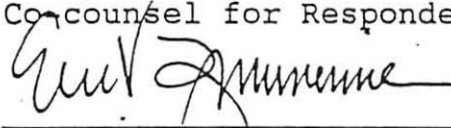


Circuit Judge - William Shore Robertson

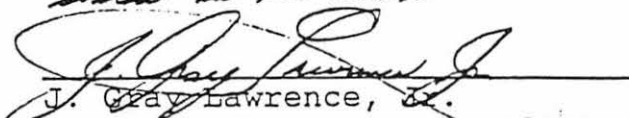
REQUESTED BY AND EXCEPTION TO RULING
WITH RESPECT TO DENIAL OF RESPONDENTS'
MOTION TO STRIKE PETITIONER'S CLAIM
FOR INJUNCTIVE RELIEF.


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Counsel for Southern Financial F.S.B.

SEEN AND OBJECTED TO *for the reasons
stated in the record*


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Copy furnished:

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Co-Counsel for Petitioner

TWENTIETH JU Inder Chawla et al
OF VI Filed 12/17/96

RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
40 CULPEPER STREET
WARRENTON, VIRGINIA 22186

FAUQUIER, LOUDOUN AND
RAPPAHANNOCK COUNTIES
January 29, 1996

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 22075

PLTff Exhibit 2
Judge

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Annmarie DiNardo Cleary, Esq.
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Daniel M. O'Connell, Jr., Esq.
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Warrenton, VA 22186

Eric V. Zimmerman, Esq.
305 Harrison Bldg., Third Floor
Leesburg, VA 22075

Re: Burgerbusters, Inc. v. Chawla, et al.
Circuit Court of Fauquier County
In Chancery No: CH93-266

Gentlemen & Ms. Cleary:

By an order entered on August 28, 1995, the Court set the remaining issues to be tried upon the petitioners' Amended Bill of Complaint and the issues to be tried upon Count IV of the respondents' Amended Cross-Bill. The trial of these issues was held on August 28, 29, & 30, 1995, and the Court again took this case under advisement. In addition, a post-trial telephone conference was held on October 30, 1995 directing additional briefing. After considering the evidence and argument of counsel, the Court will grant the Petitioners' injunctive relief by ordering the removal of the bank building or alternatively allowing the respondent to conform it to the size

and shape of the agreed development plan. The Court will deny the respondents relief upon their Amended Cross-Bill. The Court's opinion will be briefly summarized here.

1. Does the bank as constituted violate paragraphs 7 & 8 of the parties' lease?

Because this issue can be decided under paragraph 7 in a way which is dispositive, only the development restriction there will be discussed. Paragraph 7 provides in part that "landlord agrees that no other development shall occur in the Shopping Center other than as shown on the Shopping Center site plan." That plan shows a Building No. 2 of 4500 square feet designated retail. In lieu of that development, the landlord constructed a Building No. 2 of 1953 square feet designated and used as a bank. That structure as designated and used also has a drive thru canopy and windows with a related traffic flow not shown on the site plan referenced by paragraph 7.

Burgerbusters is entitled to have Chawla substantially comply with paragraph 7. In Akers v. Barnes, 227 Va. 367, 371 (1984) substantial compliance is defined as follows:

Substantial compliance with reference to contracts means that, although the conditions of the contract have been deviated from in trifling particulars not materially detracting from the benefit the other party would derive from a literal performance, he has received substantially the benefit he expected, and is, therefore, bound to pay.

The question is then whether the constructed 1953 square foot bank with a drive thru deviates in more than trifling particulars materially detracting from the benefit Burgerbusters would derive from a literal performance of the requirement that a 4500 square foot retail building be constructed. In terms of size and structure, the Court concludes that the deviation is more than trifling. The structure built is only 43.4% of the one promised and its construction with a drive thru does not even schematically conform to the structure to be constructed.

The more difficult issue is the descriptive term "retail." Earlier the Court suggested to counsel that the term would lie within common knowledge or usage. Nevertheless, the Court allowed each party without objection to offer evidence on its meaning. A Court may take judicial notice of words if a matter of common knowledge. McWhorter v. Commonwealth, 191 Va. 857 (1951). The Court may also

consult authoritative sources, such as dictionaries to refresh its memory as to meaning, but such facts must lie within common knowledge. Lassen v. Lassen, 8 Va.App. 502 (1989).

After consulting Black's Law Dictionary, 6th Ed. (West, 1990); Merriam Webster's Collegiate Dictionary, 10th Ed. (Merriam Webster, 1994); The Oxford English Dictionary (Clarendon Press, Oxford, 1970), Webster's New World Dictionary, 3d College Ed. (Simon & Schuster, 1988); and the American Heritage Dictionary, 3d Ed. (Houghton, Mifflin Co., 1992), the Court concludes that in common usage the term retail means the sale of goods or articles individually and in small quantities directly to the consumer. This definition does not include a bank as defined in this case. However, such a definition may not be as clear as the Court may wish it to be. As the word expert, Bill Bryson has noted, "The fact is that the real meanings are far more complex than the simple dictionary definitions would lead us to suppose." See Bryson, The Mother Tongue (Morrow) pg. 150. Thus in the case of U.S. v. Manufacturers Hanover Trust Company, 240 F.Supp. 367 (1965), the Court defines the term "retail bank" and the Town of Warrenton Zoning & Subdivision Ordinances, pg. 23, in evidence, define the term "retail stores and shops" as including buildings for the rendering of personal services which could include a bank. The Court also finds the evidence hopelessly conflicting on this term. For this reason, the Court is unable to conclude that the lease term does or does not encompass a bank.

Having concluded that the bank building constructed by size and structure, if not by use, does not comply with the development plan, the Court must decide what remedy is appropriate to rectify the violation of paragraph 7. Where, as here, the parties entered into an agreement with the development restriction in paragraph 7, the Court in issuing an injunction does not balance the equities. The Court must enforce the parties' bargain. Traylor v. Holloway, 206, Va. 257 (1965). As noted,

"If parties, for valuable consideration with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that which the parties have already said by way of covenant, that the thing shall not be done, and in such the case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not, then, a question of convenience or inconvenience, or of the amount of damage or injury - it is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes

open, between themselves.'"
Id., pg. 261.

While the covenant here is affirmative and not negative as in Traylor, the principle is the same. In Traylor the Court ordered structural removal. Here the Court will order structural removal or modification to bring the building in compliance as to size and structure.

2. Can Parole Evidence be allowed to show that the parties intended an easement for ingress and egress to the remainder of the property from Route 29/Lee Highway entrance over the demised premises and if so had Mr. Paphites on behalf of the petitioners, made statements or admissions which preclude him now from arguing that no such access was intended under the rule in Massie v. Firmstone, 134 Va. 450 (1922)?

In the letter opinion of April 18, 1995, the Court held that there was no reserved or implied easement over the demised premises. The Court also held that while an easement can be created by estoppel, the requisite facts to create such an easement are not present here. The Court has found no authority which would allow parole evidence to show what the parties intended contrary to their agreement and deed which would create such an easement. Indeed such evidence would seem to violate the parole evidence rule. Friend, The Law of Evidence in Virginia, 4th Ed. (Michie, 1993) Section 20-1. However, this issue is subsumed in the second inquiry regarding the alleged statements and admissions of Mr. Paphites. Dr. Chawla asserts that Burgerbusters may not argue that no such access was intended under the rule of Massie v. Firmstone, 134 Va. 450, 462 (1922) where the Court said:

No litigant can successfully ask a court or jury to believe he has not told the truth. His statements of fact and the necessary inferences therefrom are binding upon him. He cannot be heard to ask that his case be made stronger than he makes it. Where, as here, it depends upon facts within his own knowledge and as to which he has testified.

At the November 1, 1993 injunction hearing, the Court asks Mr. Paphites questions to orient it regarding the site plan offered as Exhibit D. On pg. 25 of the November 1, 1993 transcript, this exchange was reported:

THE COURT: And it would be from that location that the bank under the original drawing was to be serviced also; right?

THE WITNESS: They would be serviced from the same two entrances as we are.

THE COURT: Either way. All right. All right. I am oriented.

It is the Court's judgment that in this exchange, Mr. Paphites expresses only his opinion which is at best a misimpression as to Burgerbusters' legal obligations regarding this issue. As such, the Massie doctrine does not apply. Ravenwood Towers, Inc. v. Woodyard, 244 Va. 51 (1992).

3. Waiver.

The last questions raised by the Court at the post-trial telephone conference and briefed by counsel are:

(1) Is waiver an issue in view of the Court's August 28, 1995 pretrial order; and

(2) Was the development restriction (paragraph 7 of the lease) waived by virtue of the April 3, 1993 letter and the written statements thereon, which is joint trial exhibit No. 7?

By a pretrial order entered on August 28, 1995, the Court framed the issues to be tried. Although waiver was argued at trial, it was in derogation of this order and not appropriately considered. Rule 4:13 provides that such an order "controls the subsequent course of the action unless modified at trial to prevent manifest injustice." No such modification occurred at trial. Further it is argued that a Court should consider evidence at the hearing on April 23, 1994 conducted upon the Petitioners' Motion for Injunction. That evidence was not offered at trial and indeed it could not have been properly offered at trial because Dr. Chawla was available to testify. Gray v. Graham, 231 Va. 1 (1986).

However, even if the Court is in error regarding the procedural posture of this issue, the Court must conclude that Chawla has not carried his burden of proof as to the elements of waiver by clear, precise, and unequivocal evidence. Utica Mutual v. National Indemnity, 210 Va. 769 (1970). "Waiver is the intentional relinquishment of a known right, with both knowledge of its existence and an intention to relinquish it." May v. Martin, 205 Va. 397 (1964). Here the Court finds that at best any alleged waiver found in the letter of April 3, 1993 is conditional and not unequivocal. It does

Gary M. Pearson, Esq., et al.
January 29, 1996
Page 6

not meet the burden to show Mr. Paphites' intent to relinquish Burgerbusters' development rights regarding the bank building.

Ms. Cleary and Mr. Lawrence are requested to prepare an appropriate decree according to this letter opinion to which all counsels' exceptions may be noted. Respecting the injunctive relief granted here, the Court will appoint a Special Commissioner to superintend the execution and compliance of the Court's decree. Counsel is further requested to set by praecipe from the next civil Motion's Day a date upon which attorneys' fees, if any, are to be awarded to the petitioners pursuant to the parties' lease agreement.

Very truly yours,

A handwritten signature in black ink, appearing to read "William Shore Robertson", with a large, stylized flourish at the end.

William Shore Robertson

WSR/mkb

V I R G I N I A

IN THE CIRCUIT COURT OF FAUQUIER COUNTY

BURGERBUSTERS, INC.

Petitioner

-vs-

INDER CHAWLA, ET AL.

Respondents.

Filed at	3:20 P. M.
MAR 24 1997	
BY	<i>Paul J. S.</i>
In Chancery No. 93-266	
CLERK	
SUPREME COURT OF VIRGINIA	
RECEIVED	
MAY - 2 1997	
RICHMOND, VIRGINIA	

Warrenton, Virginia

Friday, March 29, 1996

The above-entitled matter came on to be heard before the HONORABLE WILLIAM SHORE ROBERTSON, Judge, in and for the Circuit Court of Fauquier County, in Judge's Chambers, in the Courthouse, Warrenton, Virginia, beginning at 9:06 o'clock a.m.

APPEARANCES:

On Behalf of the Petitioner:

Annemarie Cleary, Attorney at Law
J. Gray Lawrence, Esquire

On Behalf of the Respondents:

Daniel O'Connell, Esquire
Eric Zimmerman, Esquire



MR. O'CONNELL: The next one would be -- let's do the motion for permission for the Chawla's to file an application for fees.

I think this is fairly straight forward, Your Honor, --

THE COURT: All right.

MR. O'CONNELL: -- and it keys in on the language of paragraph twenty-seven of the lease agreement and which is, I would submit, unique in attorney's fee clause language and it is what I would call a level playing field type of attorney's fee clause.

It says, "Tenant shall pay landlord and landlord shall pay the tenant all costs and expenses including attorney's fees incurred by landlord or tenant exercising any of their rights or remedies hereunder or in enforcing any of the terms, conditions or provisions hereof."

1 Now, in the motion I've identified at least
2 three theories upon which the complainant went forward.
3 The issue over compensation for parking which they elected
4 not to seek injunctive relief for but just merely to seek
5 relief in damages; that evidence was struck and thereby
6 that portion of the case was dismissed.

7 The issue over what's retail was basically not
8 decided and the Court said he couldn't make a decision so
9 basically, in my client and exercising its rights under
10 the lease defended its right to have a bank there
11 successfully and defended its right to have the parking
12 spaces removed and the drive-ins put in place where they
13 are successfully.

14 The portion in the third theory regarding the
15 size and the structure of the building was, at least at
16 this stage the portion of the case that the Complainant
17 was successful on.

18 So, when you read the language of the expense
19 reimbursement paragraph in the two portions of the case
20 where my client was successful in basically turning back a
21 challenge to the lease, they incurred expenses in
22 attorney's fees in exercising their rights and remedies
23 under the lease and enforcing any of the terms or

1 conditions or provisions of the lease.

2 So, when this unique clause is a two way
3 clause, I submit. I believe that the proper way to go at
4 the attorney's fee situation in this case would be that
5 BurgerBusters would have to prove their application for
6 attorney's fees on the portion of the case that they were
7 successful.

8 They should not be allowed to claim any
9 attorney's fees on the portions of the case that they were
10 unsuccessful. And under this clause the Doctor Chawla,
11 the Chawla's should be able to apply for attorney's fees
12 for the portions of the case that they successfully
13 defended.

14 This is reasonable based on the clause in the
15 lease but I think the principles behind it are supported
16 by, let me just find it here if I may, it's in another
17 section.

18 (Brief Pause)

19 MR. LAWRENCE: Judge, while Mr. O'Connell is
20 looking Mrs. Cleary will be discussing some cases with you
21 and we've prepared copies for the Court and we have copies
22 for counsel as well.

23 MR. O'CONNELL: This is a Fourth Circuit case,

1 Your Honor, a 1993 Fourth Circuit case; the Fair Housing
2 Counsel of Greater Washington.

3 This case stands for the principle that in
4 your basic garden variety loser pays situation for
5 application for attorney's fees, it's really a case that
6 supports my motion to dismiss without analysis. But what
7 it stands for is it is an exhausting examination of what
8 is appropriate to ask for in an attorney's fee application
9 and what is not appropriate to ask for.

10 It clearly points out that the state of the
11 law is that you cannot ask for attorney's fees in
12 prosecuting the unsuccessful portion of your case. So,
13 when you read the law and you compare the language in
14 paragraph twenty-seven it certainly, to me, provides that
15 the Chawla's should be able to seek attorney's fees for
16 defending the portion of the case, successfully defending
17 the portions of the Plaintiff's side of the case that were
18 unsuccessful.

19 As I said, the attorney's fee clause is
20 somewhat unique but it is definitely a two way street and
21 I would submit that any fair reading of it would allow the
22 Chawla's to make their own application for successfully
23 defending the portions of the Complainant's case that were

1 unsuccessful.

2 That's the argument.

3 THE COURT: All right; fine.

4 Ms. Cleary, are you arguing this?

5 MS. CLEARY: I am, Your Honor.

6 I think Mr. O'Connell's argument demonstrates
7 to the Court precisely why they shouldn't be permitted to
8 recover fees under this provision.

9 This provision talks about the party
10 exercising rights or remedies and enforcing any of the
11 terms or conditions or provisions of the lease. And as
12 Mr. O'Connell said again and again and again throughout
13 his argument, they defended, they defended.

14 They did not seek to enforce, they weren't
15 exercising rights or remedies. The only rights or
16 remedies they sought to enforce were in the context of
17 their cross bill and that was entirely dismissed by the
18 Court.

19 But, even setting that aside, a more
20 fundamental problem in their attempt at this point in
21 these proceedings to file an application for attorney's
22 fees is they never asked for it in their Answer and
23 Grounds of Defense. Having fully responded the Amended

35

1 Bill of Complaint the respondents pray that the Amended
2 Bill of Complaint be dismissed and that they may recover
3 their costs expended in this matter.

4 As contrasted with their plea at the
5 conclusion of their cross bill in which they ask that the
6 Court award Respondent's, their damages for breach of the
7 lease term including attorney's fees and costs expended in
8 this matter.

9 THE COURT: Tell me what that latter clause
10 was in again.

11 MS. CLEARY: Their cross bill.

12 THE COURT: Cross bill; all right.

13 MS. CLEARY: And that, as the Court knows, has
14 been dismissed.

15 Secondly, as argued in the course of the
16 waiver discussions, they failed to put it in any of the
17 final pre-trial orders. In both of the final pre-trial
18 orders the phrase, "The amount of attorney's fees to which
19 the petitioner may be entitled is reserved"; "The amount
20 of attorney's fees, if any, to which the petitioner may be
21 entitled is reserved."

22 This is in both of the final pre-trial orders;
23 the one entered on April 25th, 1995 and the one entered on

1 August 28th, 1995 and nowhere does it say that the issue
2 is reserved for the Respondent's attorney's fees.

3 Now, I find it interesting Mr. O'Connell seeks
4 to rely on Fourth Circuit Federal opinions when there are
5 Virginia State opinions on the issue of whether or not we
6 can recover for claims on which we were not successful.



22 MS. CLEARY: Judge Harris went on to say that
23 "In these circumstances the fee award should not be

1 reduced simply because the plaintiff failed to prevail on
2 every contention raised in the lawsuit. Litigants in good
3 faith may raise alternative legal grounds for desired
4 outcome and the Court's rejection or failure to reach
5 certain grounds is not sufficient reason for reducing the
6 fee. The result is what matters."

7 The Virginia Supreme Court has also touched on
8 this issue; if you'll look at tab six. In the appeal of
9 this case Judge Harris' decision was affirmed --

10 THE COURT: Which tab; I'm sorry.

11 MS. CLEARY: Six, Your Honor.

12 MR. O'CONNELL: What's the name of that case?

13 MS. CLEARY: The same case.

14 It's the Virginia Supreme Court's decision;
15 RF&P versus Little.

16 MR. LAWRENCE: The order was transposed.

17 MS. CLEARY: Page 323 of that decision, in
18 footnote five the Court notes, "Our decision is not
19 altered by the fact that Little did not prevail in each
20 theory he advanced to the trial court."

21 Clearly, whatever the Fourth Circuit considers
22 on this issue, the Virginia Supreme Court thinks and has
23 in fact affirmed Judge Harris' decision that failing to

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would ask that the Court deny their motion.

MR. O'CONNELL: Your Honor, my response to that is that that argument is irrelevant; it goes to the severability of an attorney's fee clause in the contract. Obviously, it was intended by the parties that the application for attorney's fee would be a post-trial matter.

Whether we ask for attorney's fees or not is, we asked for costs and certainly that's broad enough to include attorney's fees. The pre-trial order was aimed at the issues that were going to be tried at pre-trial.

The fact that it said the issue of attorney's

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Well, I think procedurally it is unlikely we
have this issue reserved given the orders and the state of
the pleadings but I do not choose to decide this issue at

40

1 this time on the procedural posture of the case because of
2 the amendment authority the Court does have even in the
3 midst of trials to allow amendments, I think that that
4 could easily be corrected.

5 I think the substantive issue of whether or
6 not paragraph twenty-seven of the lease agreement on the
7 facts of this case and the actions taken by Doctor and
8 Mrs. Chawla with respect to the issues in this case as to
9 whether this clause gives them an affirm to recover
10 expenses including attorney's fees and I do not think it
11 does.

12 It is true that Doctor and Mrs. Chawla
13 prevailed on a number of the substantive issues in the
14 case but their prevailing was in the defensive nature and
15 not in the exercising of rights or remedies or enforcing
16 terms.



Burgerbusters, Inc.

V. CH93-266

Inder Chawla et al

Filed 12/11/96

PLTff Exhibit 3
WCR Judge

In Chancery No. CH93-266

VIRGINIA :

IN THE CIRCUIT COURT FOR

BURGERBUSTERS, INC.

Petitioner

v.

INDER CHAWLA, et al

Respondents

ORDER

This day came the parties, by Counsel, upon their respective Motions, and was argued by Counsel, and in consideration whereof, it is hereby

ORDERED that the Motion to sever the issue of the reimbursement and transfer to the law side of this Court filed by the Respondents Inder Chawla and Vera Chawla (the "Chawlas") is denied in that this Court is without statutory authority to do the same; and it is further

ORDERED that the Chawlas' Motion to dismiss, without analysis, the fee application was withdrawn by the Chawlas.

It further appearing to this Court that the issue of the amount of the fees and costs to be awarded to the Petitioner is a factual issue which is appropriate to be addressed by a jury as an issue out of chancery, it is

ORDERED that the issue of the amount of the fees and costs to be awarded to the Petitioner be and it hereby is set down for argument before a jury on December 11, 12 and 13, 1996.

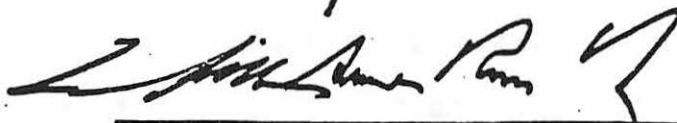
Further, this Court having previously ruled in its letter

opinion of January 29, 1996, that the Respondents have violated the development restriction in paragraph 7 of the Lease between the Petitioner and the Chawlas and directed that the Respondent shall remove the Bank Building or, in the alternative, alter the Bank Building, it is

ORDERED that (a) within sixty (60) days from March 29, 1996, the Respondents shall with due diligence prepare and file with the court a written proposal, including appropriate engineer-prepared drawings, to demolish the Bank Building or bring its size, shape and structure into conformity with Exhibit D to the Lease, as more fully detailed in the Court's written opinion, ~~which proposal shall include specifically the date by which the demolition or renovation shall be completed;~~ (b) thereafter, Petitioner shall file its objections, if any, to the proposal within ^{thirty (30)} ~~fifteen (15)~~ days of receipt of the proposal by Petitioner; and (c) if the Petitioner should file objections, a hearing shall be ^{held on July 1, 1996, at 3:00p} ~~scheduled with the Court~~ for resolution of the same.

And this matter is continued.


Entered this 20th day of May, 1996.




Judge, Circuit Court


Seen and agreed as to part
and objected as to part:


*Objection noted in Transcript of
Hearing of March 29, 1996, and
May 20, 1996*


~~Annemarie DiNardo Cleary, Esquire~~
J. Gray Lawrence, Jr., Esquire
FAGGERT & FRIEDEN
1435 Crossways Boulevard
Suite 300
Chesapeake, Virginia 23320
Counsel for BurgerBusters, Inc.


Daniel M. O'Connell, Jr., Esquire
O'CONNELL & MAYHUGH, P. C.
82 Main Street
Warrenton, Virginia 22186
Counsel for Inder Chawla, et al

*Exemptions on p w
Ex. A. attached
huc to. -*


Eric V. Zimmerman, Esquire
PRICE & ZIMMERMAN
305 Harrison Street, S. E.
Leesburg, Virginia 22075
Counsel for Southern Financial Bank

A COPY TESTE: WM. D. HARRIS, CLERK
BY  DEPUTY CLERK
GAIL I. KING
FAUQUIER COUNTY CIRCUIT COURT, VA.

VIRGINIA:

IN THE CIRCUIT COURT FOR FAUQUIER COUNTY

BURGERBUSTERS, INC.

Petitioner,

v.

CHANCERY NO. CH93-266

INDER CHAWLA, et al.

Respondents.

RESPONDENTS' CHAWLAS' EXCEPTIONS

The respondents, INDER CHAWLA and VERA V. CHAWLA, note their exceptions to the Court's letter opinion dated January 29, 1996 as follows:

1. Exception is taken to the letter opinion with respect to the Court's finding that the bank building by size and structure violates paragraph 7 of the lease. The evidence at trial showed compliance with paragraph 7 in that there is at least 4,000 square feet of retail space with the bank building as presently constructed.

2. Exception is taken with respect to the Court's finding on the issue of waiver. For the reasons set forth in co-respondents' post-trial Memoranda of Law, the Court should have found that the petitioner had waived any right to object to the construction of the bank building.

EXHIBIT "A"

3. Exception is taken with respect to the Court's finding on the issue of parol evidence. The Court should have applied the rule in Massie v. Firmstone, 134 Va. 450, that parol evidence should have been allowed to preclude the petitioner from arguing that no access was intended to the balance of the property through the Route 29 entrance.

4. Exception is taken with respect to not allowing co-respondents Chawla to submit a fee application. A substantial part of the fees spent by the Chawlas in this case were to enforce their rights under the lease and for this reason the Chawlas come within the terms of the fee reimbursement clause in the lease.

INDER CHAWLA and
VERA V. CHAWLA
t/a SONINA PROPERTIES
By Counsel

O'CONNELL & MAYHUGH, P.C.

By: _____
Daniel M. O'Connell, Jr.
Virginia Bar No. 01108
82 Main Street
Warrenton, Virginia 22186
Telephone: (540) 347-2424
Counsel for Respondents

h:_chawla\exceptions
5/2/86

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA



RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
POST OFFICE BOX 985
WARRENTON, VIRGINIA 22186

FAUQUIER, LOUDOUN AND
RAIPAHANNOCK COUNTIES

THOMAS D. HORNE, JUDGE
POST OFFICE BOX 727
LEESBURG, VIRGINIA 22075

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 22075

June 12, 1996

Gary M. Pearson, Esq.
9 Culpeper Street
Warrenton, VA 22186 (Hand-delivered)

J. Gray Lawrence, Esq.
Alan M. Frieden, Esq.
Annemarie DiNardo Cleary, Esq.
870 Greenbriar Circle, Suite 300
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Daniel M. O'Connell, Jr., Esq.
82 Main Street
Warrenton, VA 22186 (Hand-delivered)

Eric V. Zimmerman, Esq.
305 Harrison Bldg., Third Floor
Leesburg, VA 22075 (Mailed)

Re: Burgerbusters, Inc. v. Chawla, et al.
Circuit Court of Fauquier County
In Chancery No: CH93-266

Gentlemen & Ms. Cleary:

On May 20, 1996, the Court heard argument as to who would have the burden of proof as to what amount of attorney's fees should be awarded to the plaintiff and this matter was taken under advisement upon the authorities submitted by counsel. After consideration of the argument of counsel and their authorities, the Court concludes that

the defendant has the burden of proof on whether the plaintiffs' costs and expenses are excessive or unreasonable.

Paragraph 27 of the parties' lease agreement of January 22, 1992 provides:

" . . . Tenant shall pay to Landlord and Landlord shall pay to Tenant all costs and expenses, including attorney fees, incurred by Landlord or Tenant in exercising any of their rights or remedies hereunder or in enforcing any of the terms, conditions or provisions hereof.

Where such a contract provides for attorney's fees, the fact finder must determine whether these fees are reasonable. Mullins v. Richlands National Bank, 241 Va. 447 (1991). In Conway v. Amer. Nat. Bank, 146 Va. 357 (1926), the Court discussed the burden of proof in Virginia where a defendant failed to pay a note placed in the hands of an attorney for collection which provided for 10 percent attorney's fees. Unlike Conway, the case here does not establish a 10 percent attorney fee or any sum, but rather payment is to be made of "all costs and expenses, including attorney fees, incurred . . ." Under Conway, the plaintiff would be prima facie entitled to recover all such costs and expenses incurred but "the burden [would be upon the defendant] to prove that it did not incur that amount of expense or that the fee agreed upon . . . was excessive or unreasonable . . ." *Id.* pg. 366.

In summary, the plaintiff must offer its authenticated claim for costs and expenses incurred by it to establish its prima facie entitlement to recover. The defendant must then seek to carry the burden to prove that these costs and fees were not incurred by the plaintiff or that they were excessive or unreasonable. To this evidence, the plaintiff may then offer evidence in response.

Ms. Cleary is requested to prepare an appropriate order according to this letter to which all counsel may note their exceptions. For your information, the Court has recently rendered an opinion dated May 30, 1996 respecting the award of attorney's fees in the case of Kmonk v. Ajani, at Law No: CL95-358 now pending in this Court. Please note that the "result obtained" factor is but one used by the Court in reaching its judgment. It may also be helpful to note that a "result secured" analysis used by the Court in Co. of Campbell v. Howard, 133 Va. (1922), a quantum meruit case, is distinguishable from both Ajani and this case.

Subsequent to writing this letter, the Court received a letter from Mr. Lawrence dated June 6, 1996 relating to the renovation proposals made by the defendant. It

Gary M. Pearson, Esq., et al.
June 12, 1996
Page 3

would not be proper to consider this matter ex parte until we can meet again under proper notice.

Very truly yours,

A handwritten signature in black ink, appearing to read "William Shore Robertson", with a stylized flourish at the end.

William Shore Robertson

WSR/mkb
Enclosure

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA



RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
POST OFFICE BOX 885
WARRENTON, VIRGINIA 22186

FAUQUIER, LOUDOUN AND
RAPPAHANNOCK COUNTIES

THOMAS D. HORNE, JUDGE
POST OFFICE BOX 727
LEEBSBURG, VIRGINIA 22075

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEEBSBURG, VIRGINIA 22075

May 30, 1996

Merle W. Fallon, Esq.
Jodi Hitt Nash, Esq.
24 Ashby Street
Warrenton, VA 22186

Edward M. MacMahon, Jr., Esq.
P. O. Box 903
Middleburg, VA 22117

Re: Kmonk v. Aiani
Circuit Court of Fauquier County
At Law No: CL95-358 (formerly Chy.No: CH95-1)

Gentlemen & Ms. Nash:

On May 6, 1996, the Court heard evidence and argument on the amount of attorney's fees, if any, which should be awarded to the plaintiffs, Jeffrey P. Kmonk and Diane L. Kmonk (Kmonk) against the defendants, Ronald J. Aiani and Elizabeth M. Aiani (Aiani) and this Motion was taken under advisement. After considering the evidence and argument of counsel, the Court will award Kmonk attorney's fees in the amount of \$5,133.00.

In this case, Kmonk filed a suit in equity seeking specific performance, damages, costs, and attorney's fees due to the alleged failure of Aiani to convey unto them Lot 20 of Mosby Woods, Section One (revised) pursuant to their real estate contract. By an ordered entered October 10, 1995, the Court granted Kmonk leave to transfer this case from equity to law and to file a Motion for Judgment seeking only damages in the amount of \$35,000.00 with costs and attorney's fees for alleged breach of contract. The case was tried on November 6, 1995, and by letter opinion dated January 26, 1996, the Court awarded Kmonk damages in the amount of \$5,513.00 with interest from date of judgment and costs. The Court reserved the issue of the award of attorney's fees which was heard as noted above.

Merle W. Fallon, Esq.
Edward M. MacMahon, Esq.
May 30, 1996
Page 2

At trial Kmonk's counsel filed an affidavit (plaintiffs' Exhibit No. 2) seeking attorney's fees for services rendered through January 1996 (less an allowed credit) totaling \$18,674.50 plus services for February and March 1996 and an estimate for April and May 1996 for a total claim of \$22,945.75. An additional sum of \$8,175.00 for collection costs was added for a grand total claim of \$32,697.25.

Under paragraph 24 of the parties' agreement, Kmonk, as the prevailing party, is entitled to an award from Aiani, the other party, of reasonable attorney's fees to be determined by the Court. The evidence including the testimony of the experts called by the parties is conflicting and less than clear as to the reasonableness of the sums claimed and the necessity of all of the work to be done. More critically, the law in Virginia offers less than clear guidance as to all of the factors which must be considered by the Court in making such an award. However, there are some general principles which have guided this Court in making an award here.

In Mullins v. Richlands National Bank, 241 Va. 447, 449 (1991), the Court said:

Where, as here, the contracts provided for attorney's fees, but did not fix the amount thereof, a fact finder is required to determine from the evidence what are reasonable fees under the facts and circumstances of the particular case . . . In determining a reasonable fee, the fact finder should consider such circumstances as the time consumed, the effort expended, the nature of the services rendered, and other attending circumstances

If future services of an attorney are required in connection with a case, the fact finder should make a reasonable estimate of their value. In so doing, the fact finder should estimate the time to be consumed, the effort expended, the nature of the services to be rendered, and any other relevant circumstances.
(Citations omitted and emphasis added).

By the use of the phrase, "such circumstances" before listing the factors to be considered and by the use of the phrase "other attending circumstances" respecting accrued fees and "other relevant circumstances" respecting future services, the Court implies that there are other factors not expressly stated which may be considered.

Merle W. Fallon, Esq.
Edward M. MacMahon, Esq.
May 30, 1996
Page 3

In Talb. Inc. v. Dot Dot Corp., 559 So.2d 1054, 23 A.L.R.5th 905 (1990) the Supreme Court of Alabama discussed the factors to be considered in setting the award of a reasonable attorney's fee. In doing so, the Court noted that it had previously adopted among its factors to be considered those stated in DR2-106(B) of the American Bar Associations' Model Code of Professional Responsibility (1982). While the Virginia State Bar's Code of Professional Responsibility does not follow the ABA Code approved in Alabama, the Virginia Code does contain an ethical consideration which speaks to the issue of the reasonableness of a fee which can be charged to a client by an attorney:

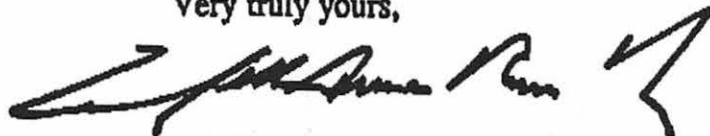
EC 2-20

The determination of the reasonableness of a fee requires consideration of all relevant circumstances. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the result obtained. (Emphasis added).

While this lodestar standard governs the charging of a reasonable fee to his own client by an attorney, this standard has not been specifically applied in Virginia by a court as factors to set forth a reasonable fee to be awarded against a third party. However, the implication in Mullins that other factors may be considered and the clarity of the Alabama Court's opinion in adopting a lodestar analysis there make such an analysis appropriate here. Thus, after considering the factors specifically stated in Mullins and those contained in EC 2-20, the Court has set the fee stated above.

Mr. Fallon is requested to prepare a final order pursuant to the Court's letter opinion of January 26, 1996 and this letter opinion to which both counsel may note their exceptions.

Very truly yours,



William Shore Robertson

WSR/mkb

*rec'd 7/2/96
J.C.C.*

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF FAUQUIER

BURGERBUSTERS INC.,

Petitioner,

v.

CHANCERY NO. CH93-266

INDER CHAWLA, et al,

Respondents.

ORDER

THIS DAY came the parties on the Petitioner's motion for a determination of which party shall bear the burden of proof on the amount of fees and costs to be awarded the Petitioner under the parties' lease. Upon consideration of the arguments of counsel, the authorities submitted by the parties and for the reasons set forth in the Court's letter opinion of June 12, 1996,

It is hereby ADJUDGED, ORDERED and DECREED that the Respondents shall bear the burden of proof on the issue of whether Petitioner's costs and expenses are excessive or unreasonable.

ENTERED this 1st day of July, 1996.



William Shore Robertson
Circuit Court Judge

WE ASK FOR THIS:

Annemarie Cleary
Counsel for BurgerBusters Inc.

Annemarie DiNardo Cleary, Esquire
J. Gray Lawrence, Jr., Esquire
FAGGERT & FRIEDEN, P.C.
1435 Crossways Blvd., Suite 200
Chesapeake, Virginia 23320-2840
(804) 424-3232

SEEN AND OBJECTED TO FOR THE
REASONS STATED ON THE RECORD
ON MAY 20, 1996, and also for the reasons set forth in Respondent's

Exemption attached hereto.

[Signature]
Counsel for Inder Chawla and
Vera V. Chawla

Daniel M. O'Connell, Jr., Esquire
O'CONNELL & MAYHEUGH, P.C.
82 Main Street
Warrenton, Virginia 22186
(703) 347-2424

COPY PROVIDED TO:

Eric V. Zimmerman, Esquire
PRICE & ZIMMERMAN
Third Floor
305 Harrison Street, S.E.
Leesburg, Virginia 22075
(703) 777-8850

0143\026\VF-04000, 34

VIRGINIA:

IN THE CIRCUIT COURT FOR FAUQUIER COUNTY

BURGERBUSTERS, INC.

Petitioner,

V.

CHANCERY NO. CH93-266

INDER CHAWLA, et al.

Respondents.

RESPONDENTS' EXCEPTIONS TO COURT'S RULING
ON BURDEN OF PROOF ON FEE ISSUE

The respondents, INDER CHAWLA and VERA CHAWLA, file their further exceptions (in addition to those exceptions stated on the record on May 20, 1995) to the Court's ruling on the burden of proof on fee issue as follows:

1. The Court's ruling by letter opinion dated June 12, 1996, is excepted to on the basis that the burden of proof on the establishing reasonable attorneys' fees where no specific amount or percentage is set forth in the agreement is upon the fee applicant to prove the reasonableness of the fee and not upon the party opposing the fee application to show that it is unreasonable in the first instance. The clause in the lease that refers to fees contains no specific amount of fees and does not contain a percentage or a set amount of attorneys' fees. The fact that it says "all fees" is not the equivalent of stating that the opposing party will pay all of the attorneys' fees no matter what they may

be. This language does not have the effect of shifting the burden of proof as the Court has decided in its letter opinion.

None of the authority cited in support of the position taken by the Court provide for the burden of proof to be on the party opposing a fee application when there is no specific dollar amount set forth in the fee agreement or a specific percentage. Further, the Chawlas adopt the objections stated on the record at the hearings on the fee issue conducted on March 29, 1996 and May 20, 1996.

INDER CHAWLA and
VERA V. CHAWLA
t/a SONINA PROPERTIES
By Counsel

O'CONNELL & MAYHUGH, P.C.

By: 

Daniel M. O'Connell, Jr.
Virginia Bar No. 01108
82 Main Street
Warrenton, Virginia 22186
Telephone: (540) 347-2424
Counsel for Respondents

VIRGINIA:

IN THE CIRCUIT COURT FOR FAUQUIER COUNTY

BURGERBUSTERS, INC.

Petitioner,

v.

CHANCERY NO. CH93-266

INDER CHAWLA, et al.

Respondents.

O R D E R

THIS CAUSE came on for hearing on the 21st day of August, 1996, upon the respondents' motion to compel the petitioner to respond to interrogatories and request for production of documents dated April 9, 1996, and supplemental interrogatories and requests for production of documents dated May 1, 1996.

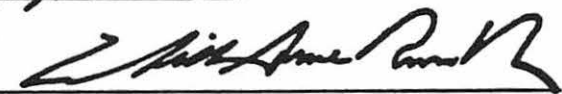
The Court considers, with respect to the interrogatories and request for production of documents filed April 9, 1996, no response or objections were filed within the twenty-four (24) day period required by Rule 1:7, Rule 4:8 and Rule 4:9. No objections or response were filed until May 14, 1996. The required response date was May 3, 1996.

The Court considers, with respect to the supplemental interrogatories and requests for production of documents filed on May 1, 1996, no response or objections were filed within the twenty-four (24) day period provided by Rule 1:7, Rule 4:8 and Rule 4:9. No objections or responses were filed until May 29, 1996. The required response date was May 28, 1996.

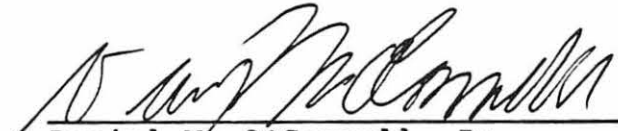
The Court is of the opinion that since no objections or responses were filed pursuant to Rule 4:8 or Rule 4:9, both sets of interrogatories and production of documents should be answered fully and completely.

ACCORDINGLY, IT IS HEREBY ADJUDGED, ORDERED and DECREED that the complainants shall have until September 11, 1996, to respond fully and completely, and without objection, to the respondents' first set of interrogatories and requests for production of documents and second set of interrogatories and request for production of documents.

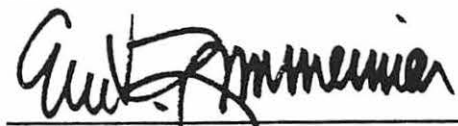
ENTERED this 25th day of Sept, 1996.


Circuit Court Judge

I ASK FOR THIS:


Daniel M. O'Connell, Jr.
Virginia Bar No. 01108
O'CONNELL & MAYHUGH, P.C.
82 Main Street
Warrenton, Virginia 20186
Telephone: (540) 347-2424
Counsel for respondents, Chawla

SEEN:


Eric V. Zimmerman
PRICE & ZIMMERMAN
305 Harrison Street, S.E.
Leesburg, Virginia 22075
Counsel for Southern Financial
Federal Savings Bank

SEEN AND OBJECTIONS NOTED FOR
THE REASONS STATED IN THE RECORD:

Annemarie Cleary

Annemarie DiNardo Cleary
J. Gray Lawrence, Jr.
FAGGERT & FRIEDEN, P.C.
1435 Crossways Boulevard
Suite 300
Chesapeake, Virginia 23320
Telephone: (804) 424-3232

Copy to:
O. Connell Jr.
Zimmerman
Cleary
9-26-96 *[initials]*

LAW OFFICES
**Brault, Palmer, Grove,
Zimmerman, White & Mims**

STREET ADDRESS
8557-D SUDLEY ROAD
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MAILING ADDRESS
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MANASSAS, VA 20108

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(METRO 631-9727)
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Burgerbusters, Inc.

V. CH93-266

Inder Chawla et al

Filed 12/13/96

Exhibit 2

Judge

October 30, 1996

VIA FAX (540-349-1705)

Daniel M. O'Connell, Jr., Esquire
O'CONNELL & MAYHUGH, P.C.
82 Main Street
Warrenton, Virginia 22186

RE: Burgerbusters, Inc. v. Chawla, et al.

Dear Dan:

This will confirm that I have completely reviewed a very substantial amount of material which you sent to me over the last several months about the matter involving your clients, the Chawlas. I also took the opportunity to come to your office to review testimony of some of the witnesses at the hearings on the case, and to see what the nature of the testimony was that was presented.

Let me comment upon the Petitioner's Fee Application, and also let you have my opinion with regard to what a reasonable fee would be considering the nature of the case upon which the plaintiff prevailed. I intend to speak in general terms about fees, but also to be somewhat more specific with regard to the Application for an Award of Attorney's Fees and Costs that was filed with the court.

I. With regard to an hourly rate for handling matters of this nature, I am of the opinion that a reasonable would be in the \$125.00 to \$175.00 per hour range. There are not many folks in this area who charge more than \$175.00 per hour. This case does not appear to me to involve any issue that would tax the average trial lawyer, and while it may involve issues that are not addressed on a daily basis, they are not overly technical, nor do they necessitate the employment of someone who may be considered an expert who could demand a higher hourly rate.

FAIRFAX OFFICE
10533 MAIN STREET
P. O. BOX 1010
FAIRFAX, VIRGINIA 22030-1010
(703) 273-6400
FAX (703) 273-3514

DISTRICT OF COLUMBIA OFFICE
801 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, DC 20004
(202) 639-8925

One aspect to be considered in this is also the specific lawyers involved in the litigation. In reviewing the backgrounds of the lawyers involved in this case, on behalf of the Petitioner, I find that the primary firm is B rated, and none of the lawyers are rated A in Martindale-Hubbell. Accordingly, I find it a little hard to justify any hourly rate in excess of \$175.00, which is pushing it even for that.

II. I have taken the opportunity to review the monthly submissions from the Petitioner. I am somewhat surprised that in this day and age, they continue to bill their clients for what I consider to be duplication of effort. I do not believe there is a page of their billing which goes by without a significant entry for conferences within the office. We find that any piece of correspondence, or a proposed Order, is being discussed by everyone who is associated with the case before any response, or a suggested amendment is made. We find that every step is being conferenced within this office, and obviously each person is billing for the time during this conference. I do not believe that is reasonable.

I think as lawyers we have to be aware that the duplicative billing of this nature is something that is not permitted by sophisticated clients, and I do not believe that we should be passing it on to our clients who are any less sophisticated. As lawyers we have an obligation to submit reasonable and customary fees to our clients. I do not believe that group billing of this nature fits that mold.

III. Obviously, one of the aspects to be considered in this case is the tremendous amount of travel time for which the Petitioner is billing. In the Petitioner's Application for Fees they point out that there were in excess of 45 Motions that were filed. I have counted a number of appearances that were made for one reason or another before the court. Based on my count, including the appearances for the trial, there were 33 appearances. I must say that this is a relatively rough count, but that is what I came up with in my initial review of the materials. I cannot imagine that a lot of these appearances could not have been handled by Mr. Pearson, who was local counsel. I cannot imagine that counsel had to drive from the Tidewater area in order to argue motions regarding discovery.

Additionally, I find many of these appearances had to do with the entry of an Order encompassing the rulings of the court. Oftentimes these were rulings made by letter opinion. I find it a little difficult to believe that when the court writes a letter opinion that we then have an appearance to have the court enter an Order somehow interpreting that letter opinion. Since there were court reporters at most of these hearings, a mere recitation of the fact that there was a hearing, that the court rendered a letter opinion, is really all that is necessary to be placed in an Order. The Order should merely recite the fact that one side or the other wins or loses that particular point for the reasons stated in the letter opinion. Instead, what we end up with is a considerable amount of correspondence and proposed changes to various Orders with the ultimate appearance before the court.

Once again, if there is an issue of that nature, it seems to me that Mr. Pearson could have appeared to argue the position of the Petitioner without the necessity for a 7-hour round trip.

IV. Let me address some other specific costs in Exhibit A to the Petitioner's Application:

A. Mr. Pearson has an item of \$18,432.50, apparently for filing the Motion for Temporary Injunction, and for his appearance at the hearing on that injunction. That matter was heard on November 1, 1993. Based upon my review of the materials, including all of the pleadings, this was Mr. Pearson's major activity, and thereafter, the only thing I see that was done were some 4:9(c) subpoena requests. I find it difficult to believe that he incurred fees in excess of \$18,000.00 for performing these activities. The Petition for Injunction that was originally filed is not very complicated at all, and the hearing that was held was not very lengthy. I cannot imagine that there was any significant preparation that was done in preparation for that matter, which was lost.

B. Included in the expenses claimed as costs by the Petitioner is some \$25,028.48 for Blue Ridge Security. How can that be an aspect of this litigation? There was no provision in any of the Orders of the Court that any security guards be placed, and I would submit to you that there is absolutely no basis to have that as a cost in this case.

C. There is a charge for \$4,712.76 for Powell Duggan, Esquire appearing as Taco Bell Corporation's attorney. Why are you responsible for that? Powell Duggan appeared in this case on a Motion to Quash a 4:9(c) subpoena request, most of which he lost. Taco Bell was not a party to this case, and is subject to the subpoena of records just as anyone else is. I cannot imagine that they incurred almost \$5,000.00 in attorney's fees trying to quash a subpoena. You have no responsibility for this item.

D. There is an item of \$812.50 for Plaxen and Adler, a Maryland attorney. There is no explanation for the use of this Maryland attorney, and as I understand it, I do not believe there were any depositions taken in Maryland.

E. There is a lengthy list of experts with the expenses allegedly incurred for them. I do not see where a Judge Sachs, or a Randolph D. Frostick, Esquire, testified in this case. I noticed that there is a lot of reference to Judge Sachs in the billings to the client, but I do not believe there is any indication he was ever identified as an expert to testify. With regard to Mr. Frostick, I believe he was identified as an expert on the attorney's fees. I do not believe that is something for which you are responsible.

F. There is also an item for Delta Associates in the amount of \$1,293.75. That charge was for a deposition of your experts. I would submit to you that the fact that they had to pay your expert to depose him does not require you to pay that as a part of the expenses of the case.

G. Additionally, with regard to the remaining experts who are identified, I do not believe that any of these experts testified with regard to that on which the Petitioner prevailed. I read the testimony of Mr. Kimball at the hearing. His testimony was only about parking spaces and congestion. I will refer to the general aspects on which I think the Petitioner prevailed subsequent to this, but let me just say that I do not think any of this expert testimony was about the aspects of this case on which the Petitioner did prevail.

V. With regard to those items for which the Petitioner has made a broad stroke claim of \$100,000.00 in additional fees, I would submit to you that these are not reasonable under the circumstances, and under my analysis. Once again, we have a situation where the fees are substantially in excess of what they ought to be.

VI. One of the items which must be considered in this case is that on which the Petitioner prevailed. I do not believe that the Petitioner is entitled to recover attorney's fees on aspects of the case upon which they did not prevail. My review of the pleadings and the Orders of the Court indicates that the only aspect on which the Petitioner prevailed was that the bank building did not substantially conform with the site plan that was made a part of the lease. The Court ruled that a bank with a drive-through of less than 2,000 square feet, was not the same as a 4,000 square foot building and accordingly held the Petitioner was entitled to injunctive relief in the form of the removal of the existing structure, or the conformance of the existing structure so that it would meet the Court's perceived requirement of the lease.

Based upon my review of the evidence, and the pleadings, it would appear to me that this did not require a great deal of expert testimony and, further, did not require a great deal of preparation, or presentation. It is for this reason that I point out some of these experts who testified with regard to the alleged value of a parking space, and other aspects of the parking spaces, were not testifying about something upon which the Petitioner prevailed. Accordingly, it is for that reason that I point out that I think most of the experts's fees are not items for which the Petitioner should recover.

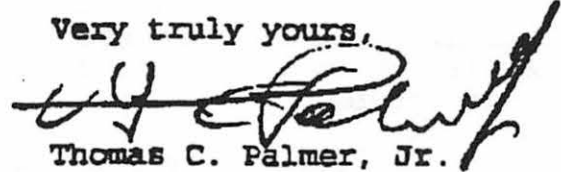
In addition to the ruling by the Court with regard to the size of the building, it seems to me that the only significant aspect was the Preliminary Injunction that was granted to the Petitioner early on in the proceedings. When they sought a permanent injunction, that was denied.

Based upon my review of the case, and in consideration of what I would consider to be a reasonable hourly rate, and considering the effort made with regard to those aspects upon which the Petitioner prevailed, I would submit to you that a reasonable fee in this case would be in the range of \$30,000.00 to \$40,000.00.

Daniel M. O'Connell, Jr., Esquire
October 30, 1996
Page 6

If there is anything further you need to hear from me, please do not hesitate to let me know. I do attach a CV for your use.

Very truly yours,

A handwritten signature in dark ink, appearing to read "T.C. Palmer, Jr.", with a stylized flourish at the end.

Thomas C. Palmer, Jr.

TCPjr/ar
Enclosure

THOMAS C. PALMER, JR.

Firm:

Brault, Palmer, Grove, Zimmerman, White & Mims

(1966 -) (Managing Partner)

Admitted to Bar: 1966 (Virginia)

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**10533 Main Street
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Education:

**College of William & Mary (A.B., 1963)
Marshall-Wythe School of Law (B.C.L., 1966)**

Professional

Organizations:

**Phi Delta Phi (Magister, 1965)
Prince William County (President, 1985)
Virginia and American Bar Associations
Virginia State Bar (Member of Council, 1978 - 1986;
Executive Committee, 1981 - 1986)
Chairman, Unauthorized Practice Committee (1981 -1984)
Virginia Law Foundation (1986 - 1992
President, 1990 - 91)
Northern Virginia Defense Lawyers Association
Virginia Association of Defense Attorneys
(President, 1991-92)
The George Mason American Inn of Court
(American Inns of Court Foundation) (Master)
Defense Research Institute (State Representative)
Fellow, American College of Trial Lawyers**

Listings:

**Martindale-Hubbell, AV Rating
The Best Lawyers in America**

Personal

Information:

**Born: Glasgow, Scotland, December 5, 1941
Marital Status: Married
Home Address: 182 Winchester Street
Warrenton, Virginia 20186
(540) 347-1887**

**Community
Service:**

**Member: Board, Blue Ridge Speech & Hearing Clinic
(1975-78)
Member: Board, The Moving Arts Center
Member: Board, Fauquier County Department
of Social Services**

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF FAUQUIER
BURGERBUSTERS INC.,

Petitioner,

v.

CHANCERY NO. CH93-266

INDER CHAWLA, et al.,

Respondents.

PRETRIAL ORDER

By letter opinion dated June 12, 1996, the Court determined that on the issue of the petitioner's fee claim, the petitioner may offer its authenticated claim for fee, costs and expenses incurred by it to establish its prima facie entitlement to recover. Petitioner may choose to offer other or further evidence in its case in chief. The respondents must then seek to carry the burden to prove that these costs and fees were not incurred by the petitioner or that they were excessive or unreasonable. Also with respect to the estimate of future fees and costs, the respondents may present evidence as to whether or not these are excessive or unreasonable. To this evidence the petitioner may then offer evidence in response.

The jury instructions and the ultimate decision of the Court will be based on the following factors from *Hensley v. Eckerhart*, 461 U.S. 424 (1983), if and to the extent shown by the evidence:

1. the time and labor required;
2. the novelty and difficulty of the questions;

3. the skill requisite to perform the legal service properly;

4. the preclusion of employment by the attorney due to acceptance of the case;

5. the customary fees;

6. whether the fee is fixed or contingent;

7. time limitations imposed by the client or the circumstances;

8. the amount involved and the results obtained;

9. the experience, reputation, and ability of the attorneys;

10. the "undesirability" of the case;

11. the nature and length of the professional relationship with the client; and

12. awards in similar cases.

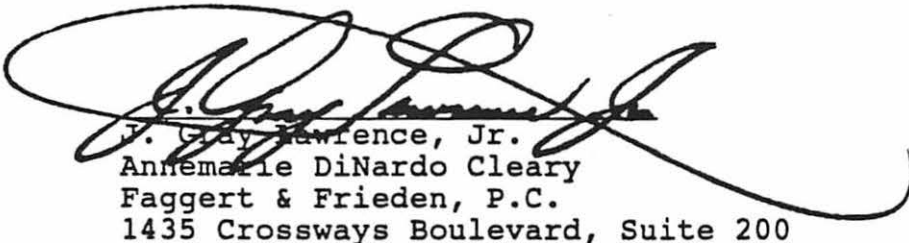
AND THIS CASE IS CONTINUED.

ENTERED this 1st day of Dec., 1996.



Circuit Judge - William Shore Robertson

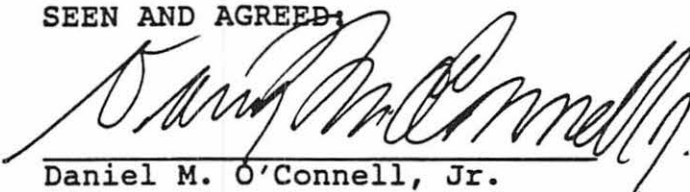
SEEN AND AGREED TO, BUT
PRESERVING AND RESTATING
OBJECTION PREVIOUSLY MADE TO
COURT'S AWARD OF AN ISSUE
OUT OF CHANCERY:




J. Gray Lawrence, Jr.
Annemarie DiNardo Cleary
Faggert & Frieden, P.C.
1435 Crossways Boulevard, Suite 200

Chesapeake, Virginia 23320-2840
Telephone: (804) 424-3232
Counsel for Petitioner

SEEN AND AGREED:


Daniel M. O'Connell, Jr.
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82 Main Street
Warrenton, Virginia 22186
Telephone: (540) 347-2424
Counsel for Respondents Chawla

Copy furnished:
Eric V. Zimmerman, Esquire
Price & Zimmerman
305 Harrison Street, S.E., 3rd Floor
Leesburg, Virginia 22075
Counsel for Southern Financial F.S.B.

Copy to:
Laurence Jr. /
Cleary
O'Connell Jr.
Zimmerman
12-2-96 

IN THE CIRCUIT COURT OF FAUQUIER

Respondent.

[illegible]

BY: Wm. D. Harris, Clerk DC

DANIEL M. O'CONNELL, ATTORNEY-AT-LAW



Having said that, and I'm sure Ms. Cleary and Mr. Lawrence will fully appreciate the concern that the Court has about the magnitude and extent of this litigation over the type of circumstance that brought the parties here, and I do not know why this case demanded so much of such able counsel and why it demanded so much of this Court, but I can tell you that the Court, as has already been intimated to counsel, felt that there was a genuine conflict between these parties on the fees generated, although there's no question that fees are due and owing and that the Court expressed the need to have its conscience informed by an issue out of chancery, perhaps because this Judge is a bit out of tune to the realities of the practice of law financially today, perhaps because the Court has puzzled over why the parties could not get together and resolve these issues more quickly or more expeditiously, why these parties could not

1 find some way to resolve what is really a typically
2 routine case in a state trial court.

3 A dispute over a lease in a shopping center is
4 not something that normally reaches the magnitude of this
5 case in terms of time, attention and fees.

6 Now, having said that, it may well be that all
7 of these monies are due and owing. It may well be that
8 the Court, after it hears the evidence, will say why did I
9 have any doubts about it, and I don't professionally, that
10 I know that these attorneys would not make a false claim.
11 I believe that, but I also am taken back by the magnitude
12 of these fees, and I want my conscience informed.





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10 This is simply stated, I think, in the motion
11 that just as whether or not a contract is ambiguous is a
12 ruling that the Court makes prior to admitting full
13 evidence, there are a host of other things that we're all
14 familiar with that the Court has to make threshold rulings
15 as a matter of law before certain things can be submitted
16 to the jury. And we believe that it is an issue of law
17 whether or not the claims are related. The Hensley
18 standard requires that determination and certain things
19 follow from that determination.

20 Part of what Mr. O'Connell quoted as the most
21 critical factor is the degree of success obtained. In
22 that context, the concluding paragraphs of the opinion, I
23 think, are the most important. They repeat that, that the

1 extent of a plaintiff's success is a crucial factor.

2 "Where the plaintiff has failed to prevail on
3 a claim that is distinct in all respects from his
4 successful claims, that hours spent on the unsuccessful
5 claim should be excluded in considering the amount of a
6 reasonable fee."

7 So that's the standard. The standard is
8 distinct in all respects, then you exclude it.

9 The next sentence says, "Where a lawsuit
10 consists of related claims, a plaintiff who has won
11 substantial relief should not have his attorney fee
12 reduced simply because the District Court did not adopt
13 each contention raised;" one standard.

14 The other standard is "but where the plaintiff
15 achieved only limited success, the District Court should
16 award only that amount of fees that is reasonable in
17 relation to the results obtained."

18 So you've got to make -- there has to be a
19 decision whether or not the claims are related. If they
20 are distinct in all respects, then you can't recover fees
21 on the unrelated claim. You don't get into any judgment
22 about the substantial relief versus limited success. You
23 get into a judgment about substantial relief versus

1 limited success when you have related claims and you
2 prevail on some but not on others.

3 So you've got a two part inquiry. Inquiry
4 number one is are they related, and if they are distinct
5 in all respects, you don't get attorney's fees and it
6 doesn't matter about the level of success you have. You
7 just don't get them.

8 However, if they are related claims, then
9 somebody has to decide whether you have substantial relief
10 or limited success and then make judgments based on that.
11 So we believe that the Court has to make a threshold legal
12 decision of whether the claims are related or not and then
13 other issues may be left to the jury, but the threshold
14 decision of are these claims in this case related or is
15 there some claim that is separate and distinct in all
16 respects for which fees would not be allowed, that's a
17 matter of law and the fees can't even be submitted if
18 that's the threshold ruling.

19 So we believe that there is a legal issue that
20 you have to decide as to whether the claims are related.

21 THE COURT: Let's talk briefly about what the
22 claims were. The first appearance was for injunctive
23 relief.

1 MR. DURRETTE: Yes, sir.

2 THE COURT: Then we had several issues
3 surrounding the covenant. One of those was the structure
4 itself, whether it was retail or not, and the size issue.

5 MR. DURRETTE: Yes, sir.

6 THE COURT: We also had an access or right-of-
7 way issue with respect to accessing over the demised
8 property, whether the residual -- what was the access to
9 and from the residual track of travel, but those all came
10 out on the adopted site plan that was used, the exhibit
11 that was in evidence, and of course, now we have the
12 attorney's fees.

13 That would be an interesting black hole on
14 this whole question, the attorney's fee issue itself.

15 Have I covered everything?

16 MR. DURRETTE: Your Honor, this is why I need
17 him here.

18 MR. LAWRENCE: Your Honor, I think we need to
19 put it in the context of two pleadings. In the amended
20 cross-bill injunctive relief was sought against the
21 Chawlas and in a separate count injunctive relief was
22 sought against the bank.

23 THE COURT: Yes.

1 MR. LAWRENCE: Then in the third count there
2 was a claim for money damages. Did I say amended cross-
3 bill? I meant to say amended bill of complaint.

4 THE COURT: Right.

5 MR. LAWRENCE: Then in the amended cross-bill
6 that the Chawlas filed, there was asserted a claim for
7 breach of contract due to what was alleged to be
8 BurgerBusters' unreasonable refusal to consent to the
9 alteration of the parking lot.

10 THE COURT: I had forgotten about the parking
11 lot. I don't know why. I should have remembered that.

12 MR. LAWRENCE: And two was a claim to reform
13 the lease based on BurgerBusters' alleged fraud. The
14 third claim was a claim to rescind the lease, again based
15 on alleged fraud, and the fourth claim was a claim for the
16 implied easement. So those are the pot full of claims.

17 THE COURT: I understand. Thank you, Mr.
18 Lawrence.

19 Mr. O'Connell?

20 MR. O'CONNELL: Your Honor, the District Court
21 -- I think you have to look at the first discussion from
22 the District Court in Hensley as to the different claims
23 that were filed seeking -- let me just find it here. Just

1 a second.

2 (Pause.)

3 It says, "In 1972 the respondents filed a
4 three count complaint in the District Court. Count one
5 challenged the constitutionality of treatment and
6 conditions at the forensic unit. Count two challenged
7 the placement of patients in the Bibbs Building without
8 procedural due process and Count Three sought compensation
9 for patients who performed institution maintaining
10 labor.

11 And then it says, "The Court found
12 constitutional violations in five of six general areas;
13 physical environment, individual treatment plans, least
14 restricted environment, visitation, telephone and mail
15 privileges and seclusion with restraint."

16 The relationship of these claims was decided
17 by the District Court without a jury, but the relationship
18 of these claims to one another had to be made from the
19 factual determination of what those claims resulted in or
20 did not result in.

21 There's no reason why these experts can't, and
22 they will and they have, argue whether or not the claim
23 for breach of the -- for loss of parking spaces for

1 millions of dollars is related to the claim that a bank
2 isn't retail or is related to a claim that the bank as
3 built doesn't conform to Exhibit D in the lease.

4 These are factual determinations as to these
5 different claims that are all part of determining the
6 reasonableness of the request for attorney's fees. So I
7 don't see how you can take a portion of this away from the
8 jury and say that this has to be decided as a matter of
9 law. It wasn't decided as a matter of law in this case.

10 The Court looked at the facts. Did they get a
11 clean telephone, did they get the forensic unit cleaned
12 up, did they get additional supervisors in the TV room.
13 Those are facts, and certainly the experts are going to
14 differ on that, but it's certainly a decision that the
15 jury is qualified to make and certainly it's not a legal
16 decision and it's not discussed in the context of Hensley
17 as a legal decision.

18 THE COURT: Mr. Durette?

19 MR. DURRETTE: In Hensley, obviously, Your
20 Honor, the Court decided everything, so it's a little
21 difficult to know what was in the Court's mind as to what
22 was or what wasn't a legal decision, but I just want to
23 emphasize, Your Honor, that the question of substantial

1 relief versus limited success is, as far as I know, what
2 the experts are going to talk about and what the witnesses
3 are going to talk about, what was sought and what was
4 successful, what was unsuccessful, but that discussion
5 occurs only in the context of related claims.

6 If you have unrelated claims, it's a different
7 inquiry; did you prevail on that separate and distinct
8 claim or didn't you. Our motion is a very limited one,
9 and it simply is that it is a legal question. I'm not
10 sure even what the evidence would be that it is a legal
11 question as to whether or not these claims are related, do
12 they arise out of the same core of operative facts?

13 So the only decision that we believe you
14 should make is whether they are or are not related. I'm
15 not asking you to pass judgment on the substantial relief
16 or limited success judgment, but whether we get to that
17 because the claims are not related.

18 THE COURT: Well, I think the Hensley case is
19 a bit difficult to apply on our case at bar because the
20 Hensley case is a federal civil rights case arising under,
21 I take it, originally 1983 and subsequent sections and the
22 denial of constitutional rights arguably is more tortious
23 than contractual, and I think the Court, in its opinion,

1 respectfully, did some blending as it went through, and as
2 is typical in federal appellate decisions, verbosity
3 begins to take hold at some point and we get a great deal
4 of law than when related back to the facts, particularly
5 an application in other cases are not always easy for
6 people at this level to apply, particularly to different
7 cases.

8 So I think if we're going to rely heavily on
9 whether or not the issues in this case are distinct in all
10 respects or to take the next sentence, where a lawsuit
11 consists of related -- talking about related claims, the
12 Court doesn't really give us the kind of application
13 that's real helpful on what they mean by distinct in all
14 respects.

15 This whole case -- let me say this, digress.
16 It depends on which level you start working on. If you
17 start working at the agreement level, one has to take the
18 view that it's all the same case. There are different
19 facets of it that arise out of the same case, but it all
20 arises out of the same agreement, and while the various
21 chosen remedies, such as -- be there rescission or you're
22 talking about modification or all of these issues, they
23 all arise out of the same general milieu that the parties

1 put themselves in when they entered into this bargain.

2 And while if we were looking at it like in
3 terms of causes of action, of independent causes of
4 action, we might reach a different view, I think this case
5 all arises out of the same basic factual pattern and I
6 cannot say that these claims are distinct in all respects.

7 I can say they are distinct in some respects,
8 but I think it's all the same unhappy, distressful
9 circumstance that these people found themselves in when
10 they entered into what they must, at this point, believe
11 an unfortunate bargain contract.

12 So if it's helpful, I can find as a matter of
13 law that the various claims advanced are related in that
14 respect. So I take it I'm effectively granting that
15 number two. I'll note counsel's exception. I'm not sure
16 you're really that far apart on that one.



in

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Ladies and gentlemen, you obviously know from all of our questions and from what the Court has told you that this is a case about attorney's fees or at least it would appear to be a case about attorney's fees.

What you will see from the evidence as it unfolds is that you will be required to make judgments and you will need to understand what took place in the

1 litigation, the trials, the court appearances that have
2 already occurred out of which these fees arose.

3 So much of the evidence that will come from
4 the witnesses and the documents that will be shown to you
5 will be about the case, as we try to put the evidence on
6 to give you an understanding of what happened.

7 The other major quantity of evidence will be
8 about the reasonableness of the attorney's fees. Were
9 they reasonable, were they excessive, was the work
10 necessary, and you will hear from other attorneys, an
11 expert, that will be called by the Chawlas, an expert that
12 will be called by BurgerBusters, who are practicing
13 lawyers in this area, and they will give you differing
14 opinions about that.

15 So that's the framework under which the
16 evidence is going to unfold.

17 Now, what you will learn is that
18 BurgerBusters, as I think I indicated when I was asking
19 you some questions, is a corporation that owns Taco Bell
20 franchises, and this corporation used its law firm, a firm
21 by the name of Faggert & Frieden from Chesapeake,
22 Virginia. It had been the attorneys for BurgerBusters,
23 the evidence will be, for about ten years from now, about

1 ten years ago, approximately 1986.

2 You'll hear the president of BurgerBusters,
3 Tassos Paphites, who will take the stand, and he will tell
4 you the process that he went through to select this law
5 firm and that he has had this law firm represent him or
6 represent this corporation in everything that this
7 corporation has done basically from approximately 1986
8 forward.

9 You will hear that at the time that these
10 events unfolded he had about eighteen franchises, he has
11 more now, and wherever those franchises were, this law
12 firm went and negotiated his lease and represented him in
13 legal matters.

14 You will hear him testify that in other
15 litigation matters in Harrisonburg, in Woodstock and in
16 other places, this law firm represented him and this law
17 firm represented him here in negotiating the agreement,
18 the contract, out of which this dispute arose.

19 Now, you will hear Mr. Paphites and Mr. Sacks
20 talk about the fact that BurgerBusters or Taco Bell was
21 going to be the first business in this shopping center,
22 and as the first business in this shopping center it was
23 very important to this businessman to have a fairly good

1 idea of what else was going to go in that shopping center
2 and where it was going to go and what business it was
3 going to conduct.

4 Indeed, you will again hear evidence from Mr.
5 Paphites and Mr. Sacks that there were requirements from
6 the national owner of this franchise, that before they
7 would approve letting their name be used on a business and
8 location, they had certain requirements that had to be met
9 in terms of what was going to go in and where it was going
10 to go.

11 So there were negotiations, there was some
12 bargaining. The lawyers worked on it and the clients
13 negotiated and they ended up with an agreement, a written
14 agreement, as to what was going to transpire in this
15 shopping center after this Taco Bell franchise went in
16 there.

17 They negotiated the rights of what we call
18 ingress and egress. Those are terms that probably you're
19 familiar with, but I'm going to try, as witnesses take the
20 stand or as I speak to you in opening statement, to define
21 terms that might be familiar to lawyers. Just like you
22 use terms in your business that I wouldn't understand, you
23 may be hearing terms for the first time, and so we have to

1 try to give you some meaning of it, but ingress and egress
2 just means in and out.

3 So there was an agreement negotiated as to who
4 had the right to come in and out of this shopping center
5 over the property that BurgerBusters was leasing. They
6 also negotiated about what kind of structure, the size of
7 it and the use of it, that could go in adjacent to this
8 BurgerBusters Taco Bell facility. The agreement was that
9 it was to be a 4,000 square foot retail facility.

10 Well, in the summer or fall of 1993, the
11 evidence will show that Mr. Paphites learned that instead
12 of this 4,000 square foot retail facility going in, a
13 2,000 square foot bank was going in with a drive-through
14 and he let it be known that he objected to that and he
15 didn't think that that was consistent with the contract
16 that he had signed.

17 As you know from the fact that we're here
18 today, there was a disagreement about that and the Chawlas
19 went ahead, signed agreements and started construction or
20 indicated that they were going to.

21 Well, the evidence will be that the first
22 thing that BurgerBusters did was to go to court with a
23 complaint, which is the pleading, the paper pleading that

1 you file with the Court where you set forth what you're
2 complaining about and what you want the Court to do about
3 your complaint.

4 They filed a pleading and you will see it and
5 it asked that the judge enter what's called an injunction.
6 You'll hear that term a lot. An injunction is just an
7 order, just a directive of the Court that tells the
8 parties before the Court you will do this.

9 So the first thing that BurgerBusters did when
10 this started to happen is go to court before the building
11 was put up and say to the Court, you should enter a
12 temporary injunction directing that this not proceed until
13 we can have a full scale hearing and you can decide
14 whether or not to issue a permanent injunction.

15 The Court, after a two day hearing in November
16 of 1993, declined to issue that temporary injunction. As
17 a consequence of that, an amended bill of complaint was
18 filed, and I'm going to try to abbreviate rather than go
19 into too much detail about this, but I hope you'll bear
20 with me because it's important that you appreciate the
21 magnitude of this case.

22 I might say, by the way, that the witnesses
23 will tell you, in case you're wondering, that those boxes

1 (indicating) plus some boxes back here contain the paper
2 version of what some would say rain forest that was
3 destroyed in the process of litigating this case, but that
4 will give you some idea of what went on here.

5 An amended complaint was filed and the scope
6 of the litigation was expanded, because when the Court
7 declined to award the injunction, the testimony will be,
8 the only other relief that a litigant can seek if you
9 can't get an injunction saying don't do it, is the damages
10 that you might have as a consequence of doing it.

11 But the testimony from Mr. Paphites and from
12 Mr. Sacks will be that the damage claim was inserted only
13 because there was some doubt created as to whether or not
14 they could get the injunctive relief, and I'll talk more
15 about that in just a moment.

16 Now, here's where I'm going to have to
17 abbreviate, but the witnesses are going to tell you about
18 what took place in this case and you're going to hear that
19 there were over 300 pleadings filed in this case. There
20 were over thirty court appearances counting three day
21 trials as one appearance. There were eight full days of a
22 trial in this case on three separate occasions and there
23 were over thirty court appearances by the lawyers to argue

1 about all the things that lawyers and clients can disagree
2 about in the course of litigation.

3 In civil litigation each side has the right to
4 learn what the other side's case is about, and that's
5 called discovery. Discovery consists of several different
6 things. One of those things is called interrogatories.
7 Interrogatories are written questions that the other side
8 is required to answer.

9 Another form is called a request for
10 production of documents. The request for production of
11 documents causes the other side to have to give you the
12 documents that are relevant to this case.

13 Then there are depositions. A deposition is
14 when the lawyers and the person to be questioned convene
15 in a lawyer's office and that person is asked questions
16 and a court reporter sits and transcribes that testimony
17 and it's printed up and it becomes a transcript that looks
18 like this (indicating). This is a deposition transcript.

19 There were fifteen depositions taken in this
20 case over multiple days. There were pleadings filed by --
21 I should tell you that after the litigation got going, in
22 addition to the complaint, which is what the pleading
23 called that BurgerBusters has filed, the Chawlas filed

1 what is called a cross-bill, which means they sued
2 BurgerBusters.

3 Now, all this arises out of the lease and they
4 alleged in their lawsuit four separate things that they
5 thought were a defense, in effect, to BurgerBusters'
6 allegations.

7 They came in and said because of certain
8 things to the Court, you should reform this contract,
9 meaning you should change, you should rewrite the terms of
10 the contract, was one of the arguments, a reformation.

11 The second argument was you should rescind
12 this contract, shouldn't hold the parties to this bargain,
13 and there were other allegations. I'm probably going on
14 longer than I should, but this case involved an awful lot
15 as it went forward.

16 This case had what's called motions for
17 summary judgment, several of them, filed by both sides. A
18 motion for summary judgment is what we lawyers call a
19 pleading in which we're saying, in effect, to the Court,
20 we're saying, Your Honor, there are no important facts in
21 dispute in this case. We've done discovery now, we've
22 taken depositions, we've got the documents, here are the
23 facts, there's no disagreement about these important

1 facts, therefore there's nothing for you to ask a jury to
2 do. Juries have to -- you have to decide facts. So since
3 there are no facts in dispute, you can decide this case on
4 the law. The only issue in this case is a legal issue.

5 Now, when parties file motions for summary
6 judgment, they have to file memoranda of law, which means
7 they have to do research. They go look at cases that
8 courts have decided. They're printed in volumes that are
9 in libraries in our offices and in law school and on
10 computers, and we do research and we write these briefs
11 trying to persuade the Court that our view of the law is
12 correct and ask the Court to decide in our favor, and both
13 sides did this on several occasions.

14 All through this, BurgerBusters had a law firm
15 located here by the name of Pearson & Pearson, which is a
16 local firm that did some of the work on the case, and you
17 will see the size of their bills and you'll see what they
18 did, but the bulk of the work was done by this firm in
19 Chesapeake called Faggert & Frieden.

20 You will hear Mr. Paphites tell you that the
21 reason he chose this firm is because they had been
22 representing him for seven years, he had trust in them, he
23 had confidence in them, he had found their work product to

1 be excellent, he had found their fees to be fair and
2 reasonable. He never had any complaint and when he was in
3 serious litigation, he will say he doesn't care whether
4 it's in New Zealand or Fauquier County, this is his law
5 firm and these are the lawyers he wants representing him.

6 Now, the travel time that it takes those
7 lawyers to get up here will be an issue in this case and
8 it will be the contention of the Chawlas that they should
9 not be required to pay for this travel time, even though
10 they signed a contract that said we agree that we will pay
11 all of the expenses and costs, including attorney's fees,
12 incurred for someone to enforce their rights under this
13 agreement, but because a law firm in Northern Virginia
14 could have handled this case, and our witnesses will
15 concede that, there are plenty of capable firms up here,
16 one of the issues in this case will be whether or not
17 BurgerBusters should be awarded the cost of its attorneys
18 traveling up here, and the evidence will show you exactly
19 how much that is.

20 Another issue in this case will be the
21 interoffice conferences that attorneys have, and you will
22 hear contrary opinions from the two experts in this case
23 about the value to a client of interoffice conferences.

1 We anticipate that the expert called by the
2 Chawlas will tell you that you shouldn't bill clients for
3 interoffice conferences, that they're essentially not
4 productive, that they're duplicative and that many clients
5 won't pay for interoffice conferences.

6 You'll hear testimony from our experts and
7 from the lawyers who represented BurgerBusters that the
8 interoffice conferences were very useful. Mr. Paphites
9 will tell you that his attorney, a man by the name of Alan
10 Frieden, you'll see his entries in the bill, Mr. Paphites
11 will say I instructed my lawyers to keep Mr. Frieden
12 informed. He was my attorney. He was handling a lot of
13 things for me. I wanted him to know what was going on and
14 I instructed my lawyers to keep him informed and I
15 expected to pay for that.

16 Now, the question for you to decide is whether
17 or not that's a proper charge that the Chawlas should pay
18 as a consequence of this contract. There will be other
19 interoffice conferences of the lawyers, and as I say,
20 you'll have contrary opinions about that, but our evidence
21 will be that these conferences were useful.

22 The senior lawyers in this case billed at
23 rates as high as \$150 an hour, and you'll hear evidence

1 that Mr. Lawrence was with another firm before he joined
2 Faggert & Frieden, and he joined Faggert & Frieden in
3 about October of 1995.

4 Prior to that time he was with Howell &
5 Daugherty. When he was Howell & Daugherty his billing
6 rate was \$200 an hour. When he joined Faggert & Frieden
7 his billing rate got lowered to \$150 an hour. So for the
8 time he was at Howell & Daugherty he was billing \$150 an
9 hour. Now you may legitimately wonder why is Howell &
10 Daugherty, Mr. Lawrence's old firm, in this case.

11 Well, Mr. Skip Sacks, who will be the first
12 witness that you will hear from in this case, was the
13 leading lawyer handling this case for the firm of Faggert
14 & Frieden, representing BurgerBusters, and he began in the
15 case in 1993.

16 He handled it all the way through 1994 and up
17 until right before the first three days of the trial,
18 after the two days for the temporary injunction, but the
19 first three days of the ultimate trial in this case,
20 shortly before that Mr. Sacks left Faggert & Frieden and
21 went to work for Stewart Title.

22 Prior to that time he had begun consulting
23 with Mr. Lawrence on the case. You will learn and you

1 will see from the bills that for the several months really
2 they were talking to one another Mr. Lawrence didn't
3 charge anything.

4 Mr. Lawrence's first time entry will be in
5 March of 1994, the day before he came up here to take a
6 deposition. So his first time entry will be preparation
7 for the deposition. By that time there was a transition
8 from Mr. Sacks to Mr. Lawrence. Mr. Sacks left a short
9 time later. Mr. Lawrence was lead counsel in the three
10 day trial that took place in April.

11 Mr. Sacks, out of a sense of loyalty to
12 BurgerBusters, came here for that trial, stayed here for
13 those three days, but never charged a dime. You won't see
14 any charge in the bill for Mr. Sacks' time, just like you
15 won't see any charge for Mr. Lawrence's time for all the
16 consultation prior to March of 1994.

17 So you have Mr. Sacks, who was lead counsel in
18 the case until approximately March of '94, and you have
19 Mr. Lawrence, who took over as lead counsel in the case
20 from that point forward.

21 You have Mr. Alan Frieden, who was
22 BurgerBusters' counsel, who participated in a consulting
23 role and who kept informed, and then you have an attorney

1 by the name of Annemarie DiNardo Cleary. Annemarie is the
2 continuity in this case except for three months. She took
3 three months off from her law practice to have a child
4 about two years ago, but other than that she was here at
5 the beginning in 1993 and she attended all the trials,
6 handled some of the hearings, some of the depositions, and
7 she's not in the courtroom now because she's going to be a
8 witness in the case.

9 She will testify and she will give you part of
10 the history of the case, Mr. Sacks will give you part of
11 the history of the case, but you'll see a lot of time and
12 a lot of effort by Annemarie Cleary as a lawyer at Faggert
13 & Frieden.

14 Now, you will also see other lawyers at
15 Faggert & Frieden who worked on this case and there will
16 be another four or five or six of them and the evidence
17 from the witnesses will be that that's what law firms do
18 from our witnesses, that each case, each litigation case,
19 has discreet issues in it that need to be researched on
20 short order.

21 You'll get somebody to do it who ordinarily
22 doesn't work on the case, but you'll say go do research
23 for me on this issue. For example, one of the issues in

1 this case was the issue of waiver based upon a handwritten
2 note that Mr. Paphites wrote or a letter that he received
3 from Dr. Chawla.

4 As a consequence of that handwritten note, Dr.
5 Chawla's attorneys in this case asserted a defense of
6 waiver, meaning that BurgerBusters, you've waived your
7 rights under this agreement, you can't enforce it any
8 more. Pretty creative defense, I would say, and it was
9 pretty serious because it could have cost BurgerBusters
10 its complete ability to enforce this lease.

11 Well, research had to be done on that. You
12 didn't have to know anything about this case particularly
13 to be able to take that handwritten note and go do some
14 research on it. That's just an example.

15 So you'll see a number of other lawyers who
16 will tell you how much total time they put on the case.
17 It's a pretty small part of the overall fees, but you will
18 see a number of lawyers from Faggert & Frieden who had a
19 few hours here and there on the case.

20 Now, you will also hear testimony, quite a bit
21 of testimony, on the results achieved in this case and the
22 issues that BurgerBusters prevailed on. The evidence from
23 BurgerBusters itself, from Mr. Paphites and from the

1 lawyers that worked on the case, will be the primary
2 objective all the way back to the first letter we wrote
3 and the first pleading we filed was to prevent this
4 building from being built differently than what we will
5 call Exhibit D. And we've got some blowups here. I'm not
6 sure that you can see them, but they're right back here
7 (indicating), and when the witnesses take the stand, we'll
8 show you some of what we're talking about so that you'll
9 have an idea of what you're seeing.

10 But our evidence will be that that's what
11 BurgerBusters wanted. They wanted the Court to direct
12 that this building be built in accordance with Exhibit D,
13 no drive-through, and you'll understand why that was
14 important; 4,000 square feet, not 2,000; people parking
15 and going in instead of driving through.

16 These things were important to BurgerBusters
17 and that is what they wanted. That's what they sought in
18 the first pleading they filed and ultimately that is what
19 they got. That was the order that Judge Robertson entered
20 in this case ultimately, that that building had to be
21 built in accordance with Exhibit D.

22 That order was not entered until January --
23 let us say January 19th, but I might be wrong on that, but

1 1996. That's how long it took, from 1993 in November when
2 the first TRO hearing was held, until the final order was
3 entered in this case through six days of trial in 1995,
4 post-trial briefs and a number of other things that we've
5 talked about.

6 Since that time there's been additional work
7 because it's been -- and you will hear from the witnesses,
8 there's been even continuing differences about compliance
9 with that order, that it required additional court
10 appearances and additional arguments, and indeed that's
11 going to go on into the future.

12 Now, as I mentioned to you, BurgerBusters,
13 after the TRO wasn't granted, went forward with the claim
14 for damages. You will hear from the lawyers in this case
15 that that was something that they advanced because they
16 didn't get the injunction and they couldn't be sure that
17 they were going to get the injunction, but that was not
18 what they wanted primarily.

19 They knew that it might be difficult to prove
20 these damages going into the future, but they filed this
21 claim for damages and indeed they didn't win that fight,
22 but, ladies and gentlemen, when they get the injunction
23 the damages are eliminated. There's no damages going

1 forward in the future when the Court orders that the
2 agreement be complied with.

3 Now, you will hear testimony again as to some
4 of the things that BurgerBusters tried to do to shorten
5 this litigation. For example, BurgerBusters filed a
6 motion before the first three days of trial that took
7 place in this case. Mr. Sacks wrote a letter, and he'll
8 tell you about it and you'll see the letter. And his
9 proposal was let's what we call bifurcate this trial,
10 which just means separate.

11 He asked the judge, said, look, let's try this
12 case on what we call liability. Let's determine who is
13 right under this contract and whether or not they're
14 entitled to an injunction, and if we lose that, then we'll
15 try damages, but let's don't try damages until liability
16 is determined because what we really want is the
17 injunction and we're not interested in the damages if we
18 get the injunction.

19 Well, for reasons that relate to attorneys'
20 tactics and strategy in the case, -- and let me just
21 digress to say that Mr. O'Connell and Beth Munro, who was
22 with his firm, and Eric Zimmerman, who represented the
23 bank who's also a party in this case, but Mr. O'Connell

1 was the lead counsel in this case, they vigorously
2 contested this case, as you undoubtedly know from what
3 I've said.

4 The evidence from our expert, from the witness
5 stand, will be that they came up with any number of
6 defenses and ideas and concepts as to why BurgerBusters
7 couldn't prevail. They advanced an issue called res
8 judicata, collateral estoppel. I say it and my tongue
9 gets tied up, but what it essentially means is that when
10 the trial of this case finally came around in 1995, they
11 advanced the legal position that the judge's rulings back
12 in the TRO stage in 1993 were a bar, that case had been
13 decided and therefore couldn't be relitigated.

14 Well, that required research and argument,
15 that the idea of waiver, the idea of rescission, the idea of
16 reforming the contract. They even advanced -- I forget
17 now whether it was the Chawlas or the bank, but somebody
18 advanced the pleading that because this was a nationally
19 chartered bank that the doctrine of federal preemption
20 applied and the state court didn't have jurisdiction to
21 hear the case.

22 I mean those are the kinds of things that went
23 on in this case, just issue after issue, defense after

1 defense. This was important to these people, and the
2 evidence of that is all you're going to hear and all you
3 can see about the magnitude of this litigation.

4 Well, for reasons that related to his strategy
5 and his tactics, Mr. O'Connell opposed that motion to
6 bifurcate. So when the trial was held, there was a couple
7 of days consumed on the issue of damages. Expert
8 witnesses had to testify, be examined and cross-examined,
9 briefs had to be written, the Court wrote an opinion.

10 So you're going to be asked to consider all of
11 these things based on all this evidence and come to some
12 sort of a conclusion about the reasonableness of these
13 fees.

14 But we believe that when you hear the evidence
15 and you realize what was done in this case and what relief
16 was obtained, what relief wasn't obtained, the scope of
17 the effort, the hourly rate charged, the skill of the
18 lawyers, all the things back at the beginning, when all
19 twenty of you were in here and the Judge read through the
20 list of things that you are to consider, and you listen to
21 the testimony of the witnesses, that you will conclude
22 that this case, this case right here, the one that we're
23 on today, was a vigorously defended case requiring an

1 enormous amount of effort on the part of these lawyers,
2 that the work that they did was of good quality, their
3 hourly rates were reasonable, their fees were not
4 excessive, they substantially prevailed and got the very
5 relief that they wanted the very first day it started and
6 that you should award them, award BurgerBusters, as the
7 contract provides, the fees and expenses, including
8 attorney's fees, incurred in enforcing its rights under
9 the agreement.

10 And when all the evidence is in and we speak
11 to you again in closing statement, that's what we'll ask
12 you to do. Thank you very much.

13 THE COURT: Thank you, Mr. Durette.

14 Mr. O'Connell, any opening statement, sir?

15 MR. O'CONNELL: Thank you, Your Honor.

16 It's getting late in the day. I know you've
17 been waiting around a long time.

18 As Your Honor has said, I represent Dr. Chawla
19 and Mrs. Chawla, who purchased the property down at the
20 intersection of Shirley Avenue and Winchester Street known
21 as Piedmont Square. It's next to the Bruce McClanahan
22 Camera Store. There's the Taco Bell franchise restaurant
23 there that's owned by BurgerBusters, there's Southern

1 Financial next to it, and then there are a series of
2 stores that adjoin that, some of which are leased and some
3 of which are vacant at the present time because the
4 building has just been completed.

5 The Chawlas have owned this property for some
6 time, having purchased it from Piedmont Federal Savings &
7 Loan Association, which was one of the banks that
8 unfortunately was taken over during the downturn in the
9 late eighties, but that Dr. and Mrs. Chawla had a plan for
10 this property that was basically broken down in three
11 phases.

12 One phase was where the Taco Bell property --
13 Taco Bell restaurant is located now. The second phase is
14 where the Southern Financial building was located and the
15 third phase is where the partially leased office space is
16 at the present time.

17 Some of you have probably been by there and
18 you probably have a mental image of the property. In late
19 1993, there was a disagreement between BurgerBusters,
20 which is the name of the corporation that owns the
21 franchise, and Dr. Chawla.

22 Dr. Chawla, in good faith, thought that they
23 had approved the bank as it stands now with the drive-in,

1 based on some notations and some letters that were
2 transferred back and forth. So Dr. Chawla proceeded with
3 construction of the bank building.

4 To make a long story short, the parties got
5 into a dispute and the Chawlas were sued. The Chawlas
6 were sued by BurgerBusters. The sheriff comes and serves
7 notice and they had to respond. They had no choice but to
8 respond, and as Mr. Durette has pointed out, there was an
9 initial request for an injunction, which was denied, and
10 then BurgerBusters filed what was called an amended bill
11 of complaint, which was Draconian in size and scope and
12 what it asked for.

13 It asked that the Southern Financial lease be
14 voided, invalidated, that the bank be evicted from the
15 property. It asked for millions of dollars in lost
16 parking spaces. Three parking spaces were removed for the
17 drive-in. They asked for millions and millions of dollars
18 because they had lost those three parking spaces in a
19 specific location, not that they had lost any parking
20 spaces that they were guaranteed total under the lease,
21 but that they had lost three parking spaces that were down
22 where the drive-in windows were.

23 The third count, almost an afterthought, was

1 that the footprint of the building didn't conform to the
2 -- what you see down there now, which is the bank with the
3 drive-in lanes. The bank with the drive-in lanes had
4 roughly 2,000 square feet inside space, two drive-in
5 lanes. The footprint that was shown on the plat, that was
6 just a general drawing or schematic attached to the lease,
7 showed 4,000 square feet that could be devoted to retail
8 space.

9 In any event, the Chawlas had to defend this
10 action. They had no choice. They were sued. There were
11 three years of litigation, and I'm glad that Mr. Durrette
12 mentioned the result, because what is important here as
13 far as determining what you can award these parties who
14 want this money is the result that they achieved, what was
15 reasonable to charge for the result that they achieved.

16 They didn't get the bank lease invalidated.
17 You go down there, the bank is still there and you can
18 still do business at the bank. That was the major -- it
19 was one-third or more of their claim. They didn't get the
20 millions and millions of dollars that they asked for for
21 the lost parking spaces.

22 They did get a minor technical correction to
23 the building. The drive-in lanes are going to have to be

1 removed and replaced with inside space. That's the result
2 that this company got after three years of litigation and
3 a lot of money in legal fees that they are going to be
4 asking you to give them, award them, but it is the result
5 and the reasonableness of what they spent in time and
6 effort or should have spent that determines what they're
7 really entitled to, and I submit that won't be a fraction
8 of what they are asking for.

9 Our evidence will be that their claim is
10 totally and completely outrageous. When you see these
11 bills, you won't believe it. There will be hundreds and
12 hundreds of hours charged, thousands of entries literally
13 for one lawyer talking to another, with no task described,
14 not talking about filing this or -- all these memos that
15 Mr. Durette mentioned, you won't see any specific task
16 mentioned anywhere, and I'm talking about literally
17 hundreds and hundreds of hours and thousands and thousands
18 of dollars that they're going to be asking you to pay them
19 that they can't tell you today what they did.

20 They could have been talking about the
21 weather, the football game or some other kind of business
22 that BurgerBusters may have had with this corporation.
23 The scope, the number of pages of the bill and the lack of

1 detail, you will just be appalled.

2 They had, at one time or another, you'll see
3 from the proof, eleven lawyers working on this case,
4 eleven lawyers. They have charged, if you do the math at
5 forty hours a week and so on, for over 3,000 hours of
6 lawyer time, and you'll see this from the evidence.

7 If you divide that by a forty hour week,
8 that's the equivalent of one lawyer working on this little
9 case in Warrenton, Virginia, for a year and a half. It's
10 outrageous.

11 Was all that work necessary? Look at the
12 result. A minor technical correction to the building.
13 That's all they got. They didn't get the millions of
14 dollars in damages for lost parking, they didn't get the
15 bank lease voided, they didn't get the bank evicted.

16 I keep mentioning result. I'm glad Mr.
17 Durette mentioned it, because I think that's the key word
18 that you have to bear in mind here. When you're
19 instructed on the law and you get all the details and so
20 on, that word is going to keep coming up.

21 You go and you hire a lawyer and you go to an
22 accountant or a professional or anybody or a mechanic and
23 what result -- was your car fixed or not? What result did

1 you get?

2 Now, we'll have evidence from an experienced
3 trial lawyer in Northern Virginia, whose name is Thomas C.
4 Palmer. Mr. Palmer will testify that he has reviewed this
5 so-called fee application. He has, as I said, more than
6 thirty years experience in Northern Virginia. He has one
7 of the highest ratings in the national legal directory.
8 He's a member of the American College of Trial Lawyers,
9 which is an invitation-only organization that lawyers are
10 invited to join if they display exemplary skills in trial
11 work, which is what we're doing here, that he has been a
12 panel member for the state and national lawyers'
13 committees that looks into lawyers' fees and talks about
14 the reasonableness of lawyers' fees and what they can
15 charge and what they can't charge.

16 Mr. Palmer will tell you about his review of
17 the billing practices in Northern Virginia. He'll tell
18 you that it is not fair, it is not the practice of the
19 lawyers in Virginia, Northern Virginia, to charge for
20 conferences with other lawyers.

21 You hire a lawyer, you expect him to do the
22 work. Why does he need to conference all the time with
23 another lawyer? You will see hundreds and hundreds of

1 hours of charges in this case where various lawyers are
2 consulting with the initials AMF, Mr. Frieden that was
3 mentioned here earlier.

4 This is supposed to be the excuse for hiring
5 this law firm from Chesapeake and bringing them all the
6 way up here to Warrenton to try this case, but no
7 explanation of what he was doing, how he was advancing the
8 case, what advice was being given.

9 You'll hear from Mr. Palmer that contrary to
10 what Mr. Durette told you, the issues in this case were
11 not difficult. They were not difficult at all. Any
12 lawyer in Warrenton could have handled it, any lawyer in
13 Manassas could have handled it, any lawyer in Fairfax
14 could have handled it.

15 If Mr. Frieden was so important to this
16 corporation, he could have called up here and consulted
17 with a local firm. Yes, we are objecting to thousands and
18 thousands of dollars in travel time when a lawyer gets in
19 his car in Chesapeake and charges \$175 or \$150 an hour
20 while he's driving up and down I-95. Yes, we are going to
21 object to that vociferously.

22 You'll hear that the skill level of these
23 lawyers from Chesapeake is okay, but it's not great, it's

1 being the norm as described by Mr. Durette, you'll find
2 out from Mr. Palmer that isn't true, that isn't the way
3 law firms charge. Mr. Palmer will testify that you have
4 an obligation to charge your less sophisticated lawyers
5 and treat them in the same way -- your less sophisticated
6 clients in the same way that you treat your most
7 sophisticated clients ,and that means you don't charge for
8 duplication of effort, you don't turn the file.

9 You'll also hear some testimony about the
10 possibility that there may be future fees in this case,
11 some fees on appeal, the rest of this case, whatever it be
12 necessary to supervise conformance of the building.

13 There's already been an order entered which
14 the Judge has set out a schedule for conformance of the
15 building. Again, an excessive estimate for what fees they
16 contend will be generated as a result of that.

17 Again, Mr. Palmer will testify that the
18 reasonableness of a fee that you are trying to get
19 somebody else to pay, you can pay whatever you want,
20 BurgerBusters has been paying these people all this time,
21 but when you ask the Court to order somebody else to pay a
22 fee pursuant to a contract and you get a minor, little,
23 bitty result and you've spent thousands of hours trying to

1 not something that couldn't have been done by a local law
2 firm without all of these extra hours for travel and
3 telephone calls and conferences.

4 You'll hear from Mr. Palmer that there is a
5 tremendous amount of duplication of effort. A letter
6 comes in, a two page letter or a one page letter or one
7 paragraph letter. One lawyer conferences with another
8 lawyer about this letter and another lawyer conferences
9 with another lawyer about this letter and another lawyer
10 conferences with another lawyer about it, churning this
11 file, churning it and churning it and churning it.

12 Now, if the president of BurgerBusters and the
13 chairman of the board of BurgerBusters wants to pay that
14 kind of money and get that kind of service, then that's
15 fine, but my client shouldn't have to pay for it in a fee
16 application. When you're instructed on the law, that's
17 what you'll find out.

18 You'll see charges again where an order comes
19 -- and they're supposed to draft an order. Lawyer A talks
20 to lawyer B, lawyer B talks to lawyer C, lawyer D talks to
21 lawyer E. You can't even keep track of the people. It is
22 absolutely incredible.

23 This nice regular course of doing business as

1 get all this Draconian relief, you are only entitled to
2 charge for that result, and that's all that I submit the
3 evidence will show you they got in this case.

4 When you review the evidence, I would submit
5 that if you award anything to these people, it will be a
6 fraction of what they're asking for.



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Q Would you state your full name for the jury,
please?

A Stewart J. Sacks.

Q Do you have a nickname?

A Skip.

Q Your profession?

A I'm an attorney.

Q Would you tell the jury, please, just very
briefly, your career after you graduated from law school?

A In 1981 I went to work for a firm called
Seawell, Dalton, Hughes & Timms in Norfolk, doing
primarily litigation. In 1984 I went -- there's a brief

1 period when I was in partnership with another attorney,
2 but in '84 I went with a firm called Scanelli & Shapiro to
3 do commercial real estate transactions and litigation that
4 arose out of those transactions.

5 I stayed with that firm until 1995 when I went
6 to work for --

7 Q You said 1995?

8 A Yes, sir. 1995, April, I went to work for
9 Stewart Title and I'm now in-house counsel for that
10 company in Hampton Roads.

11 Q I take it you skipped Faggert & Frieden.

12 A Well, Scanelli & Shapiro became Faggert &
13 Frieden.

14 Q I didn't know that and neither did the jury,
15 so you need to tell us.

16 A I joined that firm in '84, and in 1987 they
17 changed the name to Faggert & Frieden and I was there
18 until '95.

19 Q What was your primary activity as a lawyer
20 during your time at Faggert & Frieden?

21 A I would say I split my time between --
22 initially between commercial transactions, putting
23 together commercial deals, leases and office buildings,

1 shopping centers and also litigating the problems that
2 came out of those transactions, and depending upon
3 different cases, I was either doing more or less of the
4 transactions or the litigation.

5 Q What do you recall as your first involvement
6 in the matter concerning BurgerBusters and the Chawlas and
7 the Taco Bell here in Warrenton?

8 A I believe sometime in the summer, late summer
9 to early fall, of 1993 I was told by Alan Frieden, who was
10 the senior partner in the firm, --

11 MR. O'CONNELL: Objection to hearsay.

12 THE COURT: Well, if not offered for the truth
13 of what Mr. Frieden said, but why Mr. Sacks took a
14 particular course of action, I'll allow it for that
15 purpose.

16 MR. O'CONNELL: Your Honor, may we approach?

17 THE COURT: Yes.

18 BENCH CONFERENCE

19 MR. O'CONNELL: I don't want to get too far
20 down the line before I raise this. It seems to me that
21 what I heard in opening statement and the way they're
22 beginning is this is a violation of the pre-trial order,
23 that they are to offer their authenticated claim for costs

1 and expense and then they may choose to offer further
2 evidence.

3 MR. DURRETTE: That's what we're choosing.

4 THE COURT: I assume that's what it is, it's a
5 combination to get him out of here.

6 MR. O'CONNELL: They intend to go into the
7 whys and the wherefores and all of the chronology of the
8 litigation? I don't think that's what the pre-trial order
9 contemplated. I think the pre-trial order contemplated
10 that they would try to identify the billings and get them
11 into evidence, but to sit here and go through an
12 exhaustive review of the chronological review of the
13 litigation, which is what they appear from opening
14 statement to intend to do, I think it's a violation of the
15 pre-trial order.

16 THE COURT: Well, I think it fits in this
17 right here. They have to make out -- they were going to
18 present the billings and they're going to authenticate the
19 claim, and I don't know --

20 MR. DURRETTE: Ms. Cleary is going to do that.

21 THE COURT: -- who is going to do that, but
22 then they have to show that they have some prima facie
23 entitlement. If you want to agree that they have a prima

1 facie entitlement and then move to phase two, but I took
2 it that they need to show what they did.

3 Now, obviously we cannot retry the cases, but
4 both counsel, in opening statement, made references to the
5 chronology of what was done, and I think this jury needs
6 that. I don't want to go so deep with it we're retrying
7 these cases, but I think we need to show a historic
8 chronology here.

9 MR. O'CONNELL: I just want to make sure I
10 understood before we got into this what -- because I don't
11 want to keep jumping up and down.

12 THE COURT: That's to establish the prima
13 facie entitlement.

14 MR. DURRETTE: In addition, Your Honor, I
15 think we may choose to offer other or further evidence in
16 the case in chief.

17 THE COURT: I understand that.

18 MR. DURRETTE: We feel like we need to tell
19 the story a little bit.

20 THE COURT: I have no problem with tracking
21 like the opening statement to get evidence in to support
22 the chronology and effort and so forth. I think that's
23 proper.

1 OPEN COURT

2 BY MR. DURRETTE:

3 Q I think there was an objection that was
4 overruled to you explaining how you got involved and what
5 Mr. Frieden said.

6 A Yes, sir. I believe it was late summer of '93
7 I was asked to start looking at some correspondence. Mr.
8 Frieden, who is a senior partner in the office, had been
9 writing, on behalf of BurgerBusters, to Dr. Chawla, trying
10 to work out a problem involving the construction of a
11 building next to the Taco Bell Restaurant.

12 As it became, at least in the thoughts of the
13 law firm, more apparent that this wasn't going to work out
14 and it was very likely to end up in litigation, I was
15 asked to start to get involved, start to draft some
16 letters, make some demands and try to solve this problem.

17 Q Did you proceed to try to do that?

18 A Yes, I did. I looked at the documentation
19 involved and wrote some letters to Dr. Chawla demanding
20 that he not construct a building next to the Taco Bell
21 that we thought was in violation of the lease and in
22 violation of our easement rights.

23 Q Now, let's digress so that the jury

1 understands what we're talking about. We have blown up a
2 paragraph of the lease, paragraph 7, called development
3 restriction. In terms of the building itself, is that
4 what you are referring to, that provision of the lease?

5 A Yes, sir.

6 Q Could you just read that to the jury? I don't
7 know if they all can read it from where they're seated or
8 not.

9 A Yes, sir. It says, "Landlord agrees that no
10 other development shall occur in the shopping center other
11 than as substantially shown on the shopping center site
12 plan attached hereto as Exhibit D and that no other parcel
13 or outlot development shall be undertaken in the shopping
14 center except as shown on Exhibit D."

15 Q I'm going to show you another blowup that I
16 think we all know is not -- it's not like Exhibit D in
17 terms of many of the site plan out here, but I only direct
18 your attention to building two, which is like Exhibit D.
19 Is that what you're talking about?

20 A Yes, sir.

21 MR. DURRETTE: Your Honor, may I read this
22 instead of having the witness come down and read it?

23 THE COURT: Yes.

1 BY MR. DURRETTE:

2 Q Is this the Taco Bell here where I'm pointing?

3 A Yes, sir.

4 Q Building two says building number two retail,
5 4500 square feet. Is that what we're talking about?

6 A Yes, sir.

7 Q What were the Chawlas contemplating building?

8 A We had learned that the Chawlas were going to
9 build a -- instead of a 4500 square foot retail facility,
10 that they were building a bank, which I believe is about
11 1900 square feet. So it's about half the size and it had
12 a drive-through that, if it were completed, was going to
13 take out some of the parking that we already had. It was
14 going to create some problems with our drive-through at
15 the Taco Bell Restaurant.

16 Q Is that the easement that you spoke of
17 earlier?

18 A Yes, sir.

19 Q We have also blown up the easement provision
20 of that, paragraph eight of the lease. Is that the
21 provision that you're talking about?

22 A Yes, sir.

23 MR. DURRETTE: That one is a little longer, it

1 will take a little longer to read. Can I ask the jury if
2 they can all read it, Your Honor?

3 Can everybody see that and read it?

4 A JUROR: No.

5 THE COURT: If you want to move it up closer
6 to them, that will be fine.

7 MR. DURRETTE: It might be quicker just to let
8 Mr. Sacks read it, I guess.

9 THE COURT: All right.

10 BY MR. DURRETTE:

11 Q Mr. Sacks, can you read that?

12 A Yes, sir. It says, "Landlord grants to
13 tenant, its invitees, guests, employees and agents and
14 their successors and assignees the right which shall run
15 with the land, to use all parking areas, parking spaces,
16 driveways, sidewalks, entrances and exits located on the
17 shopping center throughout the entire term of the lease
18 and any extension thereof.

19 "Said parking areas, parking spaces,
20 driveways, sidewalks, entrances and exits shall not be
21 obstructed in any manner or in any way altered, reduced,
22 relocated or modified in size without the prior written
23 consent of the tenant, which consent shall not be

1 unreasonably withheld.

2 "Landlord shall have the right to perform
3 routine maintenance at the demised premises, provided such
4 maintenance does not interfere with tenant's business."

5 Q The demised premises are the Taco Bell site?

6 A Yes, sir.

7 Q What action did BurgerBusters take and the law
8 firm take on BurgerBusters behalf when it was unable to
9 resolve matters with the Chawlas?

10 A Well, initially when we saw that our written
11 demands were not being complied with and we heard and
12 learned that construction was actually beginning on the
13 bank building, we felt we had to ask for an injunction to
14 stop the construction of the bank building in violation of
15 the lease and the easement.

16 Q Did you file a pleading to achieve that?

17 A Yes, sir. We hired local counsel up here,
18 Gary Pearson, and filed a motion for an injunction, which
19 I believe was heard in November of '93.

20 Q Did Mr. Pearson handle that hearing?

21 A Yes, sir.

22 Q Do you know how long that hearing took?

23 A I don't know how long it took, but I think it

1 was a matter of hours.

2 Q What was the result of that hearing?

3 A We did not get the injunction.

4 Q What action did the firm take on
5 BurgerBusters' behalf when you did not get the injunction?

6 A Well, I ordered a copy of the transcript so I
7 could try to get a sense of what happened at the hearing.
8 We then decided that if we couldn't get a temporary
9 injunction and stop the thing right then, we would have to
10 amend our pleadings, which we did.

11 We amended our bill of complaint. We were
12 still asking that the Court prevent Dr. Chawla from
13 building this bank in violation of the lease, but we were
14 also asking for damages.

15 Q What transpired after you filed the amended
16 bill of complaint with respect to the next court hearing?

17 A Well, one of the things we had done, we also
18 thought it would be appropriate, since our efforts were
19 going to affect the bank, we also amended that bill of
20 complaint to make the bank a party, because we thought if
21 they were going to occupy the bank it was appropriate to
22 name them, since what we were trying to do would affect
23 their rights.

1 I believe that in response to that, Dr.
2 Chawla's counsel filed a motion asking that the bank be
3 dismissed from the litigation. That hearing was scheduled
4 for February of '94. We had a hearing on that, and I
5 believe the Court ruled that the bank was the proper
6 party.

7 Also at that February hearing we had learned
8 that the construction -- well, first of all, in the course
9 of constructing this bank building, Dr. Chawla's
10 construction crews came onto the Taco Bell Restaurant and
11 dug up some of the paving.

12 We also learned that the actual overhang of
13 the drive-through was going to be on the property that we
14 were leasing. So we asked the Court again in February of
15 '94 to stop Dr. Chawla from coming on our property and
16 tearing up the pavement anymore.

17 We also asked that he be enjoined or prevented
18 from constructing any of the bank improvements right on
19 our property. We had a hearing February 8th, I believe,
20 in '94 and an injunction was entered keeping them off our
21 property.

22 Q So the Court entered that injunction?

23 A Yes, sir.

1 Q Did the Chawlas file a cross-bill to the
2 amended complaint?

3 A Yes, sir.

4 Q Would you tell the jury as briefly as we can
5 what arguments were raised by the cross-bill and how those
6 arguments related to the relief that you were pursuing
7 here?

8 A Well, as best I can remember, one of the
9 arguments was that we were in breach of the lease or our
10 client was for not agreeing to let them build this bank
11 where the 4500 square foot retail facility was supposed to
12 be. So I think they sued us for breach of the lease or
13 sued our client.

14 They also claimed that they had an easement
15 across the property that was leased for the Taco Bell
16 Restaurant. So they filed a count asking that the Court
17 establish that they had a right to come across our
18 property, even though there was no easement or anything of
19 record.

20 Q Do you recall whether or not there were counts
21 for reformation and rescission and what they were?

22 A I believe they asked that the Court basically
23 rewrite the lease in order to allow them to build this

1 building, and I think one of them was that the -- they
2 basically alleged that they had been defrauded and that
3 therefore the lease needed to either be rewritten or
4 reformed.

5 Q And recision; what is that?

6 A Basically take the lease that we had prepared
7 and tear it up, pretend it didn't exist.

8 Q From the standpoint of the law, the legal
9 position that you were maintaining on behalf of
10 BurgerBusters, that you had the right to enforce these two
11 paragraphs, was it necessary for you to prevail on all
12 four of the counts raised in the cross-bill?

13 A In order to prevent them from building in
14 violation of the lease and using our property when they
15 didn't have an easement, we would have to have prevailed
16 on all four of those counts.

17 Q So part of what went on in this case, is it
18 correct, was your law firm's defense, successful defense,
19 of these obligations as it turned out?

20 A Yes, sir. And I believe we were successful on
21 all four counts.

22 Q You were. Now, there was a two day hearing in
23 April of 1994. Do you recall that?

1 A Yes, sir.

2 Q Would you tell the jury what that was about?

3 A Well, they got to the phase, the stage of
4 construction, where -- and I don't know if anybody has
5 actually seen this Taco Bell Restaurant, but where the
6 drive-through from the bank was being constructed, and in
7 order for the drive-through to be constructed and for cars
8 to come out of the bank drive-through, they were going to
9 dig up four parking spaces that were right next to our
10 restaurant.

11 One of the parking spaces was actually on the
12 restaurant property, the other three were next to the
13 restaurant but within the easement that we had. We had an
14 easement to use these parking spaces, and we found out
15 they were going to basically come out and tear them up,
16 dig up the parking spaces.

17 So we asked -- we filed another motion to
18 enjoin them from digging up these parking spaces because
19 they were among the closest parking spaces to the
20 restaurant. Unfortunately they accelerated their
21 demolition. By the time I got up here, the parking spaces
22 were gone, they had already dug them up.

23 So even though we were asking for an

1 injunction, most of what we were asking for at that point
2 was gone. They dug it up the day before I got here.

3 Q Mr. Sacks, after this hearing in April of
4 1994, can you just kind of briefly summarize what
5 transpired in the case up till the time that you left
6 Faggert & Frieden, which I believe was either late March
7 or early April of '95?

8 A I'll try. One of the things that -- I mean
9 basically we had to now do research and discovery in terms
10 of taking depositions and looking at documents, first to
11 prove the existence of our rights, and, secondly, to
12 defend the four counts of the cross-bill.

13 For example, they claimed that they had an
14 easement across our property. In order to determine the
15 basis for that claim, I took depositions of Dr. Chawla and
16 Dr. Chawla's wife. I took depositions of the property
17 managers, all the people who could have known something
18 about this, because as I understood, --

19 Q Let me just interrupt you and ask, what type
20 of easement -- there are two types of easements basically
21 in the law; right? Express and implied?

22 A Yes, sir.

23 Q What was this claim?

1 A They were claiming an implied easement.

2 Q What is an implied easement?

3 A Well, I guess, if I could explain it, an
4 express easement is when there's a writing that says I
5 give you a right to do something, just as we had an
6 express easement, or Vepco might have an easement to bring
7 power to somebody's house or something like that.

8 They were claiming an implied easement; that
9 is, that something had been done or said that suggested
10 that they had an easement, either because we had defrauded
11 them or something like that, and that made our job
12 difficult because it's not a matter of me just saying
13 there's no document.

14 We knew there wasn't a document that gave them
15 an easement, and I guess that's why they came up with an
16 implied easement, and that made it necessary for me to
17 basically interview everybody who had been involved in
18 negotiating the lease, constructing the restaurant.

19 We had to research implied easements,
20 prescriptive easements, easements by necessity, all kinds
21 of different theories, and then through the process of
22 motions, get all of those counts thrown out.

23 So I would say from April until October of '95

1 we were preparing to try the case and it was originally
2 scheduled to be tried in October.

3 Q Of '94?

4 A Of '94, that's correct, and at some point
5 prior to the October trial, Dr. Chawla's counsel asked
6 that the matter be continued to a later date, in part
7 because we had a two day trial scheduled and the
8 suggestion was it would take us more than two days to try
9 the case.

10 We were very opposed to having the matter
11 continued, because I felt that the more the bank was
12 constructed, the harder it was going to be really for the
13 Court to deal with the fact that it violated the lease.

14 Q Mr. Sacks, at that point in time or prior to
15 the October trial date, did you communicate with the Court
16 and make a proposal regarding what was to be tried and
17 give reasons why you wanted to proceed that way?

18 A Yes, sir.

19 Q I wanted to find out if you did. Let me show
20 you something that I would ask to be marked, for
21 identification.

22 THE COURT: We're referring to these --
23 although the style uses Petitioner because it was

1 chancery, we're referring to you as Plaintiff throughout,
2 so the record will show Plaintiff's 1, for identification
3 only.

4 (The document referred to above
5 was marked, for identification, as
6 Plaintiff's Exhibit No. 1.)

7 BY MR. DURRETTE:

8 Q Mr. Sacks, I'll show you what we marked as
9 Plaintiff's Exhibit 1, for identification, and ask if you
10 can identify it.

11 (Mr. Durette handed the document to the
12 Witness.)

13 A Yes, sir. It's a letter that I wrote August
14 23rd of '94 to Judge Robertson.

15 Q Is that your signature on the second page?

16 A Yes, sir.

17 Q Did you write it in your capacity as attorney
18 for BurgerBusters relating to the proceedings that bring
19 us here today?

20 A Yes, sir.

21 MR. DURRETTE: Your Honor, I wold move the
22 admission of Exhibit 1.

23 THE COURT: Any objection?

1 MR. O'CONNELL: No objection, Your Honor.

2 THE COURT: It will be received, Plaintiff's

3 1.

4 (The document heretofore marked,
5 for identification, as Plaintiff's
6 Exhibit No. 1, was received in
7 evidence.)

8 BY MR. DURRETTE:

9 Q Mr. Sacks, would you tell the jury, please,
10 why you wrote this letter and what it asks the Judge to do
11 and why it asks the Judge to do that?

12 A Yes, sir. We had asked the Court for two
13 kinds of relief. We wanted an injunction, and that
14 basically meant we wanted the Court to order Dr. Chawla
15 not to build something in violation of the lease.

16 As an alternative, we were asking for damages;
17 that is, don't let them build it, but if he builds it, he
18 ought to compensate our client for the effect on their
19 business caused by him not building what he had promised
20 to build.

21 My client had made it clear to me throughout
22 the process that his number one priority was to have that
23 bank building comply with the lease. He wasn't looking

1 for damages. He was looking to have the right kind of
2 building next to him.

3 And if I could explain a second, that was in
4 part because when the lease was negotiated, this was the
5 first tenant coming into the shopping center. This was
6 just an empty space. So the only way that our client
7 could make certain that he had the right kinds of other --
8 the right neighbors there, people that are going to bring
9 business to his restaurant, was for us to prepare the
10 lease with a development restriction and with an easement,
11 those documents there, that would say this is what it's
12 going to look like, because it was just an empty lot.

13 So Mr. Paphites, the president of
14 BurgerBusters, made it clear to me through the whole
15 process that although we were obligated to ask for
16 injunctive relief or damages, his goal was to see that Dr.
17 Chawla lived up to the lease, and that put me in a little
18 bit of a dilemma, because in order to get an injunction,
19 you have to show that you're damaged, you have to show
20 potentially that what's happened is going to hurt you, but
21 at the same time, if the Court were to order that the bank
22 building would not be built in the fashion that was in
23 violation of the lease, then we wouldn't have to prove our

1 damages.

2 And if you can imagine for a moment, here we
3 have a twenty-year lease, and we had the challenge of
4 proving how over twenty years, having a 1900 foot square
5 foot bank building next to us with a drive-through, would
6 affect our sales compared to having a 4,000 square foot
7 retail center and all the parking, et cetera.

8 It's very difficult to do, come into court and
9 with all the expertise and prove how that's going to
10 affect your sales, how that's going to affect your profits
11 over twenty years, and it's a very expensive process.

12 It involves using real estate experts,
13 economists, damage experts, and so knowing that my
14 client's primary goal was not to get damages but was to
15 get compliance with the lease and knowing that we would
16 spend a lot of time and a lot of money trying to prove
17 damages over twenty years, and also knowing that Dr.
18 Chawla was trying to get a continuance, because the trial
19 would take more than two days, I wrote to Judge Robertson
20 and said and proposed that we put off the issue of
21 damages, that is, we try the case, and if the Court ruled
22 that the lease had been violated and the easement had been
23 violated, --

1 Q Mr. Sacks, let me just interrupt you. That
2 paragraph I want you to read, but the first two paragraphs
3 in the letter deal with the continuance; is that correct,
4 essentially?

5 A Yes, sir. I was expressing my desire not to
6 have it continued.

7 Q The paragraph numbered second or beginning
8 with the second on the first page of the letter deals with
9 the issue that you were just talking about. While the
10 jury is going to have the letter at the end of the trial,
11 I'd like them to hear that paragraph now. So would you
12 read that paragraph, please?

13 A Second, "We may be able to save substantial
14 time at trial by deferring testimony regarding damages
15 until a later date. As we have indicated from the outset,
16 BurgerBusters' primary and ultimate goal is the removal of
17 the bank building which violates the development
18 restrictions agreed to by the parties and specific
19 performance of other obligations under the lease and
20 related easements.

21 "Although some testimony regarding the
22 damaging impact of the Respondent's acts will be
23 necessary, if the Court rules that BurgerBusters' rights

1 have been violated and orders the injunctive relief
2 sought, there will be no need for evidence of future
3 damages. This would save the parties substantial expenses
4 relating to expert witnesses and would save both the
5 parties and the Court one to two days of trial.

6 "If, on the other hand, the Court determines
7 that BurgerBusters' rights have been violated but does not
8 order injunctive relief, the trial could be recommenced at
9 a subsequent scheduled date so the parties could present
10 evidence relating to both pre-trial and post-trial
11 damages.

12 "In response to the Respondent's motion for
13 scheduling order, BurgerBusters would propose to bifurcate
14 the case, keep the October 27th and 28th trial dates and
15 schedule two subsequent trial dates for evidence on
16 damages if necessary."

17 Q That was written on August 23rd, 1994;
18 correct?

19 A Yes, sir.

20 Q And that trial, I think as we know, was
21 continued and ultimately there was the first three days of
22 trial in April of 1995; is that correct?

23 A Yes, sir.

1 Q How did it come about that Mr. Lawrence and
2 his firm of Howell, Daugherty, Brown & Lawrence, or
3 Lawrence & Brown --

4 MR. DURRETTE: Which is it, Gray?

5 MR. LAWRENCE: Brown & Lawrence.

6 BY MR. DURRETTE:

7 Q -- Howell, Daugherty, Brown & Lawrence got
8 involved in this case?

9 A I really don't remember exactly when this
10 happened. I'm guessing it would have been spring to
11 summer of '94. We had been involved in litigation. We
12 had the November hearing, the February hearing, the April
13 hearing, and frankly Mr. Paphites was asking me if I was
14 missing something, because it seemed to him that the
15 documents were clear.

16 It was pretty obvious that a 1900 square foot
17 building was not a 4,000 square foot building and yet the
18 matter kept going on and on and we were having many
19 motions and hearings and he asked me if I thought it would
20 help to speak to another attorney, somebody who I could
21 sit down and describe the case to them and see if maybe I
22 was missing something, because it seemed pretty clear to
23 me and my client what we ought to have.

1 Mr. Lawrence had recently been involved in a
2 major case involving a landlord and tenant and had gone
3 all the way, I believe, to the Supreme Court of Virginia
4 and I also knew him. So I recommended Mr. Lawrence, went
5 to see him, spent the better part of a day just laying out
6 the documents to him and what the case was about, to see
7 if he could provide me with any insight.

8 Q Did you continue to consult with him after the
9 summer or fall of 1994 up until you departed Faggert &
10 Frieden?

11 A Occasionally, and we also, when we got to the
12 point where we were -- unfortunately Mr. O'Connell, Dr.
13 Chawla's counsel, opposed my effort to bifurcate the
14 damages. He disagreed with that and the Court said we're
15 not going to do that.

16 So I knew I had to prove damages, and Mr.
17 Lawrence had worked in his prior case with a number of the
18 experts that we knew we'd have to work with to prove these
19 damages. So I began to consult with him about the names
20 of potential experts and some of the damage issues.

21 Q You did not participate as lead counsel in the
22 April trial; is that correct?

23 A Yes, sir.

1 Q But were you here in Warrenton for that trial?

2 A Yes, sir.

3 Q Did you bill for your time?

4 A No, sir.

5 Q You had left Faggert & Frieden by then; is
6 that correct?

7 A Yes, sir. I left Faggert & Frieden at the end
8 of March, and I can't remember the date, but the trial was
9 a couple days later in April, and Mr. Paphites asked if I
10 would come up and stay for the trial just in case, since I
11 had been involved for, at that point, two years, I think,
12 and I said I would. And I came, but I didn't charge them
13 for my time.

14 Q And Mr. Lawrence was lead counsel in that
15 trial; is that correct?

16 A Yes, sir.

17 Q Along with Ms. Cleary?

18 A Yes, sir.

19 Q Has Ms. Cleary been involved in this case from
20 its beginning until now, with a three month sabbatical?

21 A Yes, sir. Other than her maternity leave, she
22 was there from beginning to end.

23 Q Mr. Sacks, in the bills that will be

1 introduced when Ms. Cleary testifies at a later date,
2 there are entries for interoffice conferences. First I'd
3 like to ask you about those conferences with Mr. Alan
4 Frieden. There are a number of entries for conferences
5 between you and Mr. Frieden.

6 Why would you confer with Mr. Frieden?

7 A Well, first of all, he was the attorney who
8 represented BurgerBusters when they prepared the lease, so
9 he drafted some of the language, he negotiated the
10 language, he knew about all the discussions that had taken
11 place.

12 In addition, BurgerBusters was his client, so
13 to speak, somebody that he did a lot of -- a great deal of
14 work for, and they wanted to make sure that I got his
15 input. So I would meet with him to keep him up to date on
16 the litigation, to ask him questions about the negotiation
17 of the lease, the background, the personalities of the
18 people, the operation of the Taco Bell.

19 A lot of this also was related to the
20 franchisor, Taco Bell itself. They require some of these
21 things, and so Mr. Frieden, having represented
22 BurgerBusters for some time, was a lot more familiar with
23 what the franchisor, with Taco Bell, the national company,

1 would be willing to agree to or not agree to.

2 Q Had the client, BurgerBusters itself through
3 Mr. Paphites, given you any instructions with regard to
4 conferring with Mr. Frieden?

5 A There's really no specific instructions other
6 than BurgerBusters was very concerned that we do
7 everything possible to prevail. When that first hearing
8 had taken place in November, it became clear to everybody
9 we were going to have a real battle on our hands and Mr.
10 Paphites wanted me to make use of anything I thought would
11 be helpful.

12 Occasionally, although Mr. Paphites wouldn't
13 tell me to consult with Mr. Frieden, he might say have you
14 talked to Alan, -- that's Mr. Frieden -- what did he think
15 about it.

16 Q There other lawyers in the firm. Would you
17 briefly characterize, in your view, why you had
18 conferences with Ms. Cleary or with other attorneys in the
19 firm working on the case from time to time?

20 A Well, for example, Ms. Cleary was, I guess
21 what we would call, the second chair litigator or the
22 number two litigator, the person who is primarily
23 responsible for research, writing briefs, looking at the

1 discovery, writing questions for depositions.

2 And this was a case where Dr. Chawla's counsel
3 had come up with a lot of creative theories, a lot of
4 things that forced us to go research, chase down a lot of
5 theories, and so --

6 Q I don't want to exhaust that list of theories,
7 but let me just interrupt you. Could you tell the jury
8 some of the things that were raised that you had to deal
9 with in order to get the relief that you were seeking in
10 this case, in addition to the cross-bill that we've
11 already talked about?





1 BY MR. DURRETTE:

2 Q Now I want you to exclude the cross-bill; the
3 other kind of issues that you're talking about.

4 A Well, the implied easement is a good example.

5 Q That was in the cross-bill.

6 A That is one. Another thing that -- for
7 example, the drawing attached to the lease says there's
8 supposed to be a 4500 square foot building. One of the
9 theories put forward by Mr. O'Connell was that even though
10 the bank was only, I think, 1950 square feet, that the
11 drive-through was part of the space of the building or
12 that the sidewalks were part of the space of the building,
13 and it's the kind of thing that you can just say that's
14 ridiculous, but you can't.

15 You have to research it, you have to pursue
16 it, you've got to see whether or not there's any cases
17 where it was held that the space outside the building
18 counted.

19 He put forward the theory that a bank is just
20 like any other retail facility. We had to research what
21 does the word retail look like.

22 Q What about res judicata, collateral estoppel;
23 did you have to deal with those?

1 A One of the things that kept coming up, we
2 would -- for example, we'd have a hearing on a specific
3 injunction and then Mr. O'Connell argued that since we had
4 spoken about something at the injunction hearing we were
5 no longer allowed to put on any evidence at trial.

6 So we had to do a lot of research into those
7 areas.

8 Q That comes under what we lawyers call res
9 judicata or collateral estoppel; is that correct?

10 A Yes, sir.

11 So in a case like this where you have a lot of
12 novel theories being put forward, you have to do the
13 research, you have to have someone doing the legwork, and
14 you have to divide it up.

15 Q Now, I interrupted you because I wanted you to
16 digress and give some examples, but why would you have
17 interoffice conferences with Ms. Cleary?

18 A Well, for example, if Ms. Cleary was asked to
19 prepare a brief on a different issue or we filed a motion,
20 -- I'm trying to think of an example of a motion.

21 Q Take the res judicata, collateral estoppel.

22 A I'm trying to think of something a little
23 easier to explain. One of the motions -- we had a

1 discovery dispute, for example, where they asked for every
2 piece of paper related to the restaurant, and we objected
3 and had to do a lot of research about what -- are they
4 allowed to get our employees' personnel files, their
5 health files, a lot of things that were really brought
6 within what they were asking for.

7 I would have to get Annemarie Cleary to
8 research that. She would write either a brief or she
9 would write a memorandum of law on the point of law. We
10 would sit down, we would go over it, I would give her my
11 thoughts and she would redraft something.

12 Q And that would get filed with the Court?

13 A And that would be filed with the Court.

14 The other thing I'll mention is in a law firm
15 you've got people that charge different rates. Annemarie
16 Cleary's rate was lower than mine, so you wouldn't have an
17 attorney at a higher rate going to the law library, for
18 example. You would get her to go to the library and do
19 research. So you try to get things at the appropriate
20 level.



CROSS-EXAMINATION

BY MR. O'CONNELL:

Q Mr. Sacks, are you saying that Mr. Paphites didn't know that the bank building was being constructed?

A He did not know until Dr. Chawla told him he was going to build the bank building, and he objected to it. So at some point, yes, he knew about it, but he objected to it.

Q Isn't it true that Dr. Chawla sent Mr. Paphites a letter with a drawing of the bank building on it, showing 2,000 square foot of inside space and the drive-in; isn't that true?

A Initially Dr. Chawla sent a hand-drawn kind of a sketch that showed a bank, and if I remember correctly, Mr. Paphites said that he wanted to see some real drawings, a site plan, before he could decide anything.

Q But isn't it true -- you've seen the drawing, haven't you?

A Which drawing?

Q The drawing that was attached to Dr. Chawla's letter?

A Yes, I did.

Q As a matter of fact, there was a lot of

1 controversy and a lot of discussion about it in hearings
2 before the Court; isn't that true?

3 A Yes, sir.

4 Q That drawing had a 2,000 square foot bank and
5 two drive-in lanes, didn't it?

6 A It did.

7 Q And on the bottom there was a notation,
8 something to the effect that we will approve this or we
9 have approved this subject to final drawings and so on;
10 isn't that true?

11 A It's true, but the drawing --

12 Q Just answer my questions, please.

13 A It is true, yes, sir.

14 Q So there was an argument about whether or not
15 Mr. Paphites had approved this plan; isn't that true?

16 A There was an argument, and the Court ruled
17 that he did not.

18 Q But there were several hearings leading up to
19 the final ruling by the Court; true?

20 A Yes, sir.

21 Q The initial injunction, you indicated, was
22 dennied -- the initial injunction that you had asked for
23 was denied?

1 A The one in November of '93?

2 Q Yes.

3 A Yes, sir.

4 Q So that was successfully defended by Dr.
5 Chawla; correct?

6 A Yes.



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Q Excuse me, a slip of the tongue. Has this Court ever entered an order voiding the lease that Dr. Chawla has with the bank?

A Not to my knowledge, although I think it's fair to say that to the extent the Court has told --

Q Just answer my question, please.

A I don't think I can answer it yes or no.

Q All right. Go ahead then.

A I think what the Court has said is that the building has to comply with that development restriction. So to the extent we didn't want the bank to occupy a building that violated the restriction, the Court's ruling will prevent that.

Q Isn't it true that one of the major points in

1 your lawsuit was that that schematic says retail and that
2 a bank isn't retail; isn't that true?

3 A I believe that, yes, sir.

4 Q And that since the bank wasn't retail, the
5 bank had to go completely; isn't that true?

6 A Our theory was that the building was wrong,
7 that the building was the wrong size, it was the wrong
8 use, it had a drive-through. We had a lot of objections
9 to the way the building was being set up and we didn't
10 want -- we knew that if we were successful that we were
11 going to affect the bank's rights.

12 The bank expected to occupy a building and it
13 was our intent to prevent that building from being
14 constructed in the manner Dr. Chawla wanted.

15 Q Mr. Sacks, your counsel asked you questions
16 about the research that you had to do on what was retail;
17 correct?

18 A Yes, sir.

19 Q And you did a bunch of research and you said
20 at trial, did you not -- tried to prove at trial, did you
21 not, that a bank is not retail?

22 A Yes, sir.

23 Q You didn't prevail on that issue, did you?

1 A I believe that the Court ruled that simply a
2 bank per se could be retail.

3 Q What kind of research was necessary to
4 determine whether or not a bank was retail? Did you look
5 in the dictionary? Did you have to write a memorandum?
6 Did Ms. Cleary had to write a memorandum about what's in
7 the dictionary?

8 A Actually we did a lot of work. We looked, for
9 example, at the zoning laws in the city of Warrenton,
10 which have some definitions of retail use, we looked at --
11 the Virginia Department of Transportation has building
12 recommendations for different types of structures.

13 We looked basically everywhere we could to
14 find support -- we thought it was pretty much common sense
15 that if you think of going to a retail store, you're
16 talking about a store where you go in and you buy
17 something and you leave, but when you challenged that, we
18 felt that we had to come up with something other than
19 common sense.

20 Q But the Court never ordered the bank be
21 removed because it wasn't retail according to that plat;
22 correct?

23 A That wasn't the reason the Court ordered that

1 it be removed.

2 Q You also designated the number of expert
3 witnesses that came in and testified that a bank isn't
4 retail; isn't that true?

5 A Yes, sir.

6 Q We had to depose those witnesses to find out
7 what they were going to say; isn't that true?

8 A Yes, sir.

9 Q I don't know whether you want to look at this
10 again, but Count III --

11 (Mr. O'Connell handed the document to the
12 Witness.)

13 A Yes, sir.

14 Q You asked for restoration of the three parking
15 spaces; correct?

16 A Yes.

17 Q The three parking spaces are the ones that
18 were removed for the drive-in from the bank?

19 A Yes, sir.

20 Q Roughly in this area (indicating); true?

21 A Yes, sir.

22 Q In lieu of that, you asked for a lot of
23 damages for the loss of those parking spaces over an

1 infinite number of years; isn't that true?

2 A As our second choice, yes, sir.

3 Q You indicated, when your counsel asked you,
4 that you had to develop a case that asked for damages and
5 then you suggested that the case be bifurcated and that
6 the Court didn't order bifurcation, but you could have
7 just dropped that damage claim, couldn't you?

8 A I think that would have been very risky.

9 Q Why?

10 A Because if, for whatever reason, the Court
11 decided -- I know that anytime you ask a Court,
12 particularly as that building got bigger and bigger, you
13 ask the Court to take the step to demolish or reconstruct,
14 you're asking the Court to do a lot, and it's a hard thing
15 to ask a Court to do, and I think it would have been
16 malpractice on my part if I didn't give the Court an
17 alternative.

18 If it felt it was just -- could not bring
19 itself to force Dr. Chawla to comply with the lease, then
20 perhaps the Court would force him to compensate us.

21 Q But the Court did not force Dr. Chawla to
22 compensate BurgerBusters for loss of the parking, did it?

23 A No, because it ordered compliance.

1 Q As a matter of fact, you submitted a lot of
2 expert witnesses on the value of those parking spaces, a
3 Mr. Reith, for example; isn't that true?

4 A I can't remember him in particular, but we had
5 a lot of experts to help us establish twenty years of
6 damages.

7 Q And we had to depose all those experts so we
8 would know what they were going to say at trial; isn't
9 that true?

10 A Yes, sir.

11 Q You've read the Court's opinion striking those
12 damages, haven't you?

13 A I believe I have -- actually I don't think I
14 have.

15 Q You haven't?

16 A No, sir.

17 Q Maybe you want to take a minute and look at it
18 then.

19 (The Witness reviewed the document.)

20 A I've taken a look at it.

21 Q Would you read the section of the ending
22 that's highlighted on the last page, please?

23 A "In conclusion, giving the Petitioner all

1 favorable inferences, the Court concludes that its
2 evidence is strained, forced and contrary to reason."

3 Q Your client was the Petitioner; correct?

4 A Yes, sir.

5 Q That's a lot of time and money spent on
6 evidence that is strained, forced and contrary to reason,
7 isn't it?

8 A We knew it would be very difficult to prove,
9 but we felt we had to try, and again, I tried to avoid
10 that expense but was unable to do that.

11 Q There is no order of this Court requiring that
12 those three spaces be replaced, is there?

13 A I don't really know. Again, my understanding
14 is the general thrust of the Court's order is that Dr.
15 Chawla has to redesign -- submit designs for
16 reconstructing or reconfiguring the bank to comply with
17 the development restriction.

18 Q What else then?

19 A I think that's -- and pay for the cost of
20 going through this whole process.

21 Q What do you mean pay for the cost of --

22 A Attorney's fees, expert witnesses.

23 Q You mean there's this pending request that

1 we're here today on?

2 A Yes, sir.

3 Q But the relief of all this litigation, over
4 all these years, the relief that's been ordered is a
5 reconfirmation of the bank building; correct?

6 A Reconfiguration. I mean we asked him to make
7 him build something --

8 Q Pardon me. Reconfiguration.

9 Q We asked him to build what the lease tells him
10 to build. As I understand it, the Court has ordered him
11 to do that.

12 Q So when somebody goes down there in a few
13 months at least, they will see -- the bank will still be
14 there; right?

15 A I don't know what the time table is, but I
16 assume that ultimately -- it may take a long time, but
17 ultimately Dr. Chawla is going to have to comply with the
18 Court's order and submit a plan that complies with the
19 development restriction.

20 Q You recall your deposition being taken in this
21 case, do you not, in the fee application case?

22 A Yes, sir.

23 Q Isn't it true that a law firm in this area

1 could have handled this case just as well, just as
2 competently, as Faggert & Frieden and these other law
3 firms?

4 A Not under the circumstances.

5 Q What was so unusual about the circumstances
6 that a Northern Virginia law firm couldn't handle this
7 case?

8 A It's not a matter of the competence of the law
9 firm. It's a matter of the fact that we -- my law firm,
10 to begin with, had drafted the very documents or been
11 involved in drafting the documents we were negotiating.
12 Our law firm understood the relationship --

13 Q Let me stop you just there a second. Drafting
14 the documents. There was a lease; correct?

15 A Yes, sir.

16 Q How many pages?

17 A I would guess thirty.

18 Q And an easement; how many pages?

19 A I don't remember, but a couple of pages
20 probably.

21 Q Those are the documents, right, basically?

22 A Plus all the correspondence, drafts,
23 negotiations, letters back and forth.

1 Q All that culminating in a lease and an
2 easement at some point; correct?

3 A Well, but when we're faced with your claim
4 that we should throw out the lease and look at all the
5 discussions of the party, then everything else becomes
6 that much more important.

7 Q Mr. Frieden, the man who was designated on
8 your bills as AMF, is the so-called transactional partner
9 that drafted the documents?

10 A Yes, sir.

11 Q So in response to your counsel's questions,
12 you had a lot of conferences with Mr. Frieden; correct?

13 A Yes, sir.

14 Q You're the litigator and he's the
15 transactional partner and you're handling the litigation.
16 Why was it necessary to have so many conferences with him
17 about the litigation?

18 A It was particularly because we were
19 particularly faced with theories that you espoused that
20 would get us to just throw out the documents and talk
21 about all the discussions between the parties and
22 representations and conversations, and those are things
23 that Mr. Frieden was involved in.

1 Q Wouldn't it have been more reasonable to talk
2 with another litigator instead of the guy -- an office
3 guy?

4 A I don't understand.

5 Q If you're looking for advice on how to
6 litigate a case, if you're stumped, wouldn't it have been
7 more reasonable to talk to another litigator instead of
8 the guy who sits in the office and draws up contracts?

9 A No. As I saw it, our law firm -- in order to
10 draft the document, you have to understand what your
11 client's business is. You have to understand what it is
12 they need to have a successful restaurant. Mr. Frieden
13 understands that. That's why he put that development
14 restriction in the lease. That's why he put the easement
15 in the lease.

16 So when it came time to litigate, in order to
17 get the Court to understand why we have these things in
18 there and why they are important, we have to understand
19 our client's business.

20 Q So you're saying that Mr. Frieden couldn't
21 have located a law firm in Northern Virginia and done all
22 this back and forth with them over the phone, that it had
23 to be done with the people in his law firm; is that what

1 you're saying?

2 A No. What I'm saying is when we initially
3 tried to have the matter handled up here by local counsel,
4 Mr. Pearson, I looked at the transcript from that November
5 hearing and I could see that this was going to be an
6 extremely difficult piece of litigation, that we were
7 going to be faced with a very talented attorney on the
8 other side, a very creative attorney, someone who was
9 going to come up with everything possible to stop us.

10 My client, particularly after we didn't get
11 that first injunction in November, said, Skip, I want you
12 to go to Warrenton. You know my business and I'm not
13 going to have some gentleman up there, as competent as he
14 might be, who might not know something about my business,

15 Why we need the kinds of relief we need has a
16 lot to do with his relationships with his franchisor, the
17 type of business he's involved in. I mean I could name
18 many things about this case that my understanding of Mr.
19 Paphites' business put us in a better position to
20 represent him.

21 Q So that's why you had to have all of these
22 conferences with Mr. Frieden; correct?

23 A No. That's why I felt our law firm in general

1 had to be involved. The other aspect of it is once I came
2 up for that February hearing and I got an injunction
3 keeping Dr. Chawla's people off our property, two things
4 happened.

5 Number one, Mr. Paphites was even more sure he
6 wanted me to keep coming up here. I mean I came up and I
7 won, and that meant something to him.

8 The other aspect of it is, once you go to one
9 hearing, you begin to develop knowledge about the case,
10 knowledge about opposing counsel, what the judge said, how
11 he responded to different things, and so the more I was
12 involved with the case, the more and more difficult it
13 gets to have someone up here just come in for a hearing.

14 Q That injunction that you won didn't order that
15 the building be torn down, it ordered that the property
16 lines be honored by the contractor; isn't that true?

17 A It ordered them to not come on the property,
18 not destroy our property and, in essence, forced them to
19 change their building plans. Their plans provided for
20 some of their improvements for the bank to be on the
21 property we were leasing. The Court said --

22 Q Curbing; correct? Some curbing?

23 A I think it was some overhanging and -- you

1 know, the overhang in the drive-through.

2 Q There was a mistake in the survey; isn't that
3 true?

4 A I disagree. I asked Dr. Chawla myself if he
5 knew that they were coming on our property and he said
6 yes. He didn't seem concerned at all.

7 Q What they were talking about was a matter of
8 twelve inches, eighteen inches, along the sideline; isn't
9 that it? Isn't that really what that injunction was all
10 about?

11 A But it also involved parking spaces. That was
12 one of the difficulties. They put bollards, big steel
13 poles, in some of the parking spaces that the customers of
14 Taco Bell were using.

15 Q The Court didn't order the removal of the
16 bollards?

17 A It ordered Dr. Chawla, the Respondent, to stay
18 off the property and --

19 Q Which meant he had to move the curb over?

20 A -- that's the best we felt we could get until
21 trial, that the Judge had made comments at the November
22 hearing basically that we're going to have to try this
23 thing and if they have to tear it down, they have to tear

1 it down, but in the meantime if they stay off the
2 restaurant property, I'm not going to act short of trial.

3 So when they came on the restaurant property,
4 we felt it was appropriate to come up here and get an
5 order to keep them off the property.

6 Q Your counsel didn't present any of the bills
7 to you, but he talked about the bills and he talked about
8 what the jury will see on the bills, the conferences with
9 Mr. Frieden.

10 Do you recall that dialogue between you and
11 your counsel?

12 A Yes, sir.

13 Q In those bills, when you -- many of those
14 entries will show that you had conferences with Mr.
15 Frieden or he had a conference with you and they will show
16 no subject, will they?

17 A The subject is the lawsuit.

18 Q The lawsuit generally, but that won't be
19 recorded anywhere in the billings when the jury sees it,
20 will it?

21 A The entries for the time are specific to what
22 you're working on. So, for example, if I spent an hour
23 working on this case, I would put in a time slip that

1 showed an hour on that case. If I then spent the rest of
2 the day on another case, I'd put in time slips with that
3 file number and another file would be billed.

4 I mean if you're asking me if I billed time in
5 this file that wasn't for this case, the answer is no.

6 Q That wasn't the question. I said there will
7 be lots of time entries where you show conferences with
8 Mr. Frieden and he shows conferences with you and they
9 don't say anything more than that there was a conference;
10 isn't that true?

11 A You mean the bill?

12 Q The bill.

13 A The bill wouldn't say anything more; no, sir.

14 Q So no task, no discussion of memo that
15 Annemarie Cleary did regarding retail, no specific
16 description telling the customer or the client what was
17 actually done in that conference?

18 A In order to know what happened with a specific
19 conversation, you'd have to look at other parts of the
20 file, look at notes, drafts, correspondence. I mean, for
21 example, if I put an entry "prepare letter for Mr.
22 O'Connell," I don't describe what that letter says, but we
23 could find that letter and it's going to say what it says.

1 So there is documentation to support the entries.

2 Q But there's no original documentation in your
3 file which says what was done at that conference other
4 than maybe finding a letter if it refers to a letter;
5 isn't that true?

6 A Or notes, notes of meetings, things of that
7 nature. I mean I think --

8 Q All those have been destroyed or you never
9 made them in the first place; correct?

10 A All of what's been destroyed?

11 Q The notations, the original time notations,
12 that are in your entries that supposedly the jury is going
13 to see when you had conferences with Mr. Frieden or he had
14 conferences with you, the original time records that
15 resulted in that entry have been destroyed; correct?

16 A I think basically the procedure would be this.
17 I would write down on a piece of paper, a time slip, you
18 know, "confer with Mr. Paphites," put my time down. I
19 would give that to my secretary, she would type that
20 information into the computer, and I honestly don't know
21 what happens to that piece of paper after that, whether
22 it's saved or disposed. But I don't have any reason to
23 believe that it would reflect anything that wasn't typed

1 into the computer by my secretary.

2 Q I show you an entry on December 14, 1993. AMF
3 is --

4 A Alan Frieden.

5 Q Four-tenths of an hour, conference with SJS.

6 Who is SJS?

7 A That's me, Stewart J. Sacks.

8 Q You don't know sitting here today for certain
9 what that conference was about, do you?

10 A Other than by looking at other entries and
11 seeing what happened after that conference. I mean I can
12 see we had a conference and then a pleading was amended.
13 So I presume we were talking about that pleading.

14 Q How difficult would it have been for you to
15 state that's what the conference was about in your time
16 records?

17 A I mean there's a limit on how much detail you
18 can put into your bill. Our bills show the date, the
19 attorney, the time and a brief description of what they
20 did. If I had to describe in my bill once again what I
21 did, then -- I mean my client is going to have to pay me
22 to describe to him what he's paying me for, and I don't
23 think he would want that.

1 Q Is it true that Mr. Paphites never complained
2 about any of your bills that you're aware of?

3 A Yeah, I don't think he ever complained.

4 Q Your counsel asked you why Mr. Lawrence was
5 brought into the case and you indicated that he had had a
6 case, been involved in damages in a landlord/tenant
7 situation; is that correct?

8 A Yes, sir.

9 Q So he was brought in primarily as a consultant
10 on the damage issue in the case?

11 A Well, initially he was brought in really just
12 to kind of give me the sense that I wasn't missing
13 something. I mean it wasn't just damages. I laid the
14 whole thing out to him in his office one day, just to see
15 if he had a different theory.

16 My client was concerned that even though we
17 ultimately prevailed, it took a long time and he wanted me
18 to see if maybe there was some way to speed it up or get
19 another idea.

20 Q In any event, a substantial reason for
21 consulting with Mr. Lawrence was because he wanted a
22 second opinion on the damage issue?

23 A Not until later. Later on when I failed in my

1 efforts to get the damage issue postponed, we realized we
2 were going -- we had to put the damages on, get all the
3 experts, then I began to consult with him about names of
4 people who were respected in the industry who could help
5 us with things like land use and damage calculations,
6 things of that nature.

7 Q Those were damages of the parking spaces that
8 the Court struck?

9 A Well, damages for the overall effect of the
10 violation of the restrictive -- the development
11 restriction in the lease.

12 Q Money damages?

13 A Money damages.

14 Q Dr. Cross, he's a money damage expert;
15 correct?

16 A I think he was an economist, if I remember.

17 Q You were present at the trial on damages,
18 although you indicated you didn't charge?

19 A Yes, sir.

20 Q The testimony from your experts was that they
21 were entitled to over two million dollars in damages or
22 something of that nature?

23 A I think if you took it over the twenty years,

1 it was a couple of million dollars.

2 Q So you were asking the Court to award a couple
3 million dollars in damages for loss of those parking
4 spaces?

5 A If we couldn't get injunctive relief.

6 Q You didn't get two million dollars; correct?

7 A We didn't. We got injunctive relief.

8 Q Just answer my question. You didn't get an
9 award, a damage award, for two million dollars.

10 MR. DURRETTE: Your Honor, I object. He's --

11 THE WITNESS: That's correct.

12 MR. DURRETTE: -- badgering the witness now.
13 He's responded to this question three or four times.

14 THE COURT: He's answered it.

15 MR. O'CONNELL: I think that's all I have,
16 Your Honor.

17 THE COURT: All right. Redirect, Mr.
18 Durette?

19 REDIRECT EXAMINATION

20 BY MR. DURRETTE:

21 Q Mr. Sacks, you remember the questions that
22 were asked you regarding the letter and the sketch exhibit
23 attached to it, and the handwritten note from Mr.

1 Paphites?

2 A Yes, sir.

3 Q That was the issue of waiver that I had asked
4 you about on direct?

5 A Yes, sir.

6 Q Would you agree with Mr. O'Connell's
7 characterization that that issue of waiver produced a lot
8 of controversy and a lot of discussion before the Court?

9 A Yes, sir.

10 Q How did that issue relate to your ability to
11 prevail on this document?

12 A Prior to our getting into the litigation, Dr.
13 Chawla had done a drawing of a bank building and sent it
14 to Mr. Paphites and asked him to approve it. Mr. Paphites
15 responded that he could not approve it until he saw a full
16 drawing, because what we wanted to see was what's going to
17 happen to the rest of the shopping center.

18 Again, the reason for the development
19 restriction was to make certain that there were other
20 people in that shopping center that would bring business
21 to the shopping center and to the restaurant, and so until
22 we could see, not just the little space next to us, but
23 were they going to make up that retail space elsewhere,

1 how was the traffic flow going to work in the shopping
2 center, there was another phase, I think a third phase of
3 the development, we wanted to see if it would be expanded
4 in order to make up the space that was being missed, and
5 ultimately when we got the full sized drawing, it was
6 clear that there was going to be a lot less space in the
7 shopping center.

8 So when Mr. O'Connell claimed or Dr. Chawla
9 claimed that that drawing and Mr. Paphites looking at it
10 constituted a waiver, again that's just a good example of
11 something where now we had to research what constitutes a
12 waiver, so that ultimately we could come into court and
13 say no, that wasn't a waiver, it was a clear statement
14 that he needed to see more before he could give his
15 approval.

16 Q Would you agree with Mr. O'Connell that in
17 dealing with that issue it took several hearings leading
18 up to the final ruling by the Court?

19 A Yes, sir.

20 Q And if you had not won that issue on waiver,
21 you would have lost your complete contention under this
22 agreement, wouldn't you?

23 A Yes, sir.

1 Q That was one of the most critical issues in
2 the case, wasn't it?

3 A Their position was we agreed to it, our
4 position was we didn't.

5 Q And the case could have turned on that issue?

6 A Absolutely.

7 Q So is it any wonder that there was a lot of
8 controversy and a lot of court hearings?

9 A Not at all.

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PARTIAL TRANSCRIPT

1

1 V I R G I N I A

2 IN THE CIRCUIT COURT FOR FAUQUIER COUNTY

3 - - - - - X
4 BURGERBUSTERS, INC. :

5 Petitioner, :

6 -vs- :

CASE NO: CH93-266

7 INDER CHAWLA, et al., :

8 Respondents. :

9 - - - - - X

10 South Courtroom
11 Fauquier County Courthouse
Warrenton, Virginia

12 Thursday, December 12, 1996

13 The above-entitled matter came on to be heard
14 before the HONORABLE WILLIAM SHORE ROBERTSON, Judge, in
15 and for the Circuit Court of Fauquier County, in the
16 Courthouse, Warrenton, Virginia, beginning at 9:06 o'clock
17 a.m.

18 APPEARANCES:

19 On Behalf of the Petitioner:

20 WYATT B. DURRETTE, JR., ESQUIRE

21 On Behalf of the Respondent:

22 DANIEL M. O'CONNELL, JR., ESQUIRE
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Q Did there come a time when a lawsuit was
filed?

1 A Yes.

2 Q Roughly when was that?

3 A I think it was sometime in October of '93.

4 Q And that was seeking an injunction?

5 A That's correct.

6 Q Do you remember what the injunction was for?

7 A The injunction was for me to halt construction

8 of the building.

9 Q Of the bank building.

10 A Correct.

11 Q Between the time that you had gotten this

12 letter back from Mr. Paphites and you had had these

13 conversations with his attorney, had you received any

14 indication from Mr. Paphites that he objected to the bank

15 building?

16 A No, none whatsoever.

17 Q Then after you obtained counsel the first

18 injunction was denied; correct?

19 A That's correct.

20 Q And then what happened next?

21 A Then I believe they tried to file for a second

22 injunction while I was continuing to construct the

23 building.

1 Q Now the second injunction, did that relate to
2 the area that had been leased and some curbing that was
3 not properly located? Do you remember the details of
4 that?

5 A Yes.

6 Q Explain what happened there.

7 A A portion of the curbing was being put in the
8 lease area of Taco Bell. And that was an engineering
9 error in drawing over there. So all we did is that we
10 eliminated the curbing and we had to put batters in that
11 area.

12 Q So the second injunction was over that issue?

13 A Correct.

14 Q And you corrected that.

15 A Yes.

16 Q And then what happened next?

17 A Then they continued to block and filed a full-
18 blown lawsuit at that time for me to prevent continuing
19 the bank construction.



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Q When you saw this lawsuit and you read this lawsuit, what was your state of mind? What was your personal, emotional reaction to this when you saw this lawsuit?

A I was shocked and horrified. I was very surprised after I had a conversation with Paphites, after he gave me consent on that letter over there, and here he was coming back and after I had entered an agreement and obligated myself to Southern Financial Savings Bank in the

1 lease agreement. I had obligated myself to get a loan on
2 the construction of it. I had obligated myself to the
3 contractors, to the Town, and a large number of personnel
4 involved in the construction of something like this. I
5 was really surprised that someone was coming back and
6 pulled something legal like this and asking me to halt
7 everything, but I could not do it.

8 Q Did you know in your mind and did you have any
9 mental impression as to what the basis for this was?

10 A I had no idea what the basis was.

11 Q And when you hired counsel to defend the
12 lawsuit, did you defend it because you felt it was unjust,
13 these allegation were unjust, unfair?

14 A Absolutely.

15 Q Was part of the basis for that this letter
16 that you had gotten from Mr. Paphites?

17 A Yes.

18 Q There followed roughly two years of
19 litigation --

20 A That's correct.

21 Q -- in this case, and a very vigorous
22 prosecution and a very vigorous defense.

23 Why did you defend this so strongly? Why did

1 you hire attorneys and spend this time defending this
2 lawsuit?

3 A I did not have any choice in the matter
4 whatsoever. I was just a victim of this entire process.
5 I was just doing my job over there, trying to build up a
6 successful center in Warrenton which I was paying large
7 amounts of monies to carry through. And the bank came
8 across and wanted me to build a building and I was given
9 permission from Mr. Paphites to do ahead and do that. And
10 here he was asking for a huge amount of damages and
11 pulling all of these legal maneuvers. I had no choice in
12 the matter but to continue to defend myself.



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Q So after all of this litigation, after three years of litigation and here we stand in December of 1996, would you explain to the jury how this building, the Southern Financial Bank building, how it's going to be changed?

(Mr. O'Connell handed a diagram to the witness.)

A Okay. Basically, that's the entrance to the bank over here (indicating).. All we're doing is we're going to remove the center island here (indicating) from where the drive-through lanes are coming out. And there is already a roof around there for the canopy. We will extend the roof in the back and then on the side, from basically where the drive-through lanes are currently occurring and enclose that structure.

Q And when is that supposed to be completed?

A Sometime in the fall of 1997.

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Q Have you been ordered to do anything else?

A No.



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CROSS-EXAMINATION

BY MR. DURRETTE:

Q Dr. Chawla, you attended at least the three days of the trial or four days in April and three days in August of 1995, did you not?

A That's correct.

Q And you heard Mr. Paphites testify about the same events that you testified to concerning your

1 conversations with him and conversations that he had with
2 you in connection with this letter that's in Exhibit
3 No. 1, did you not?

4 A Yes.

5 Q And his testimony was different from yours in
6 some respects, was it not?

7 A Somewhat.

8 Q And you lost on that issue in this litigation,
9 did you not?

10 A Right.

11 Q Now, Mr. O'Connell had an associate in his
12 firm named Beth Munro, did he not?

13 A Right.

14 Q And she worked on this case, too, didn't she?

15 A Yes.

16 Q And she attended the hearings and helped Mr.
17 O'Connell in all the trial dates in this case?

18 A Yes.

19 Q And she took some depositions?

20 A Right.

21 Q Now, you heard the testimony today regarding
22 Burgerbusters efforts to get an injunction in late 1993
23 and 1994. Do you recall that?

1 A Yes.

2 Q And are you aware of the fact that in that
8 lawsuit, when they were first seeking an injunction, they
4 did not ask for damages?

5 A I don't recall that.

6 Q You don't know that one way or the other?

7 A Right.

8 Q Do you recall the testimony where
9 Burgerbusters asked to have what was called a bifurcated
10 trial, that is to have the trial to determine whether they
11 were entitled to the injunction and then deal with damages
12 later, and that there wouldn't be any damages if they were
13 entitled to the injunction? Do you recall that?

14 A Yes.

15 Q And you know that your attorney opposed that,
16 didn't he?

17 A I believe so.

18 Q And you heard the testimony that Burgerbusters
19 moved for summary judgment on more than one occasion to
20 try to get the issue of whether or not they were entitled
21 to an injunction decided and told the Court that if they
22 got an injunction they didn't want the damages. Do you
23 recall that?

1 A Right.

2 Q Now, you indicated that there were three -- I
3 believe you said. And if my note is wrong tell me. But I
4 think you said that there were three or four days of trial
5 on the retail issue. Did you mean to say that? Three or
6 four days of --

7 A Well, that was part of the -- the retail
8 discussion went on for longest time, I remember, in that
9 three or four-day trial.

10 Q But the trial involved a lot of other things,
11 did it not?

12 A I believe so.

13 Q In fact, there was only one witness offered by
14 Burgerbusters who testified on the issue of retail use,
15 isn't that right? Mr. Kimball.

16 A I don't recall who were the experts there.

17 Q Is it your present intention, Dr. Chawla, to
18 complete the renovation according to the schedule that the
19 Court has approved?

20 A That's correct.

21 Q And after that work is performed and the
22 renovation that you've testified to is completed, what you
23 will have is a building that conforms with Exhibit D to

1 the lease, will you not?

2 A (No response.)

3 MR. O'CONNELL: It's behind the photograph.

4 MR. DURRETTE: Thank you. I've got it.

5 BY MR. O'CONNELL:

6 Q What you will have is a closed-in building
7 like this of approximately 4,500 square feet, won't you?

8 (Mr. Durette presented a diagram to the
9 witness for his examination.)

10 A Right.

11 Q And after that work is done the parking
12 places, the four parking places that were eliminated or
13 that Burgerbusters was deprived of as a result of the
14 structure of the drive-through lanes that are there now,
15 they will be restored, won't they?

16 A Yes, but that's at my option to restore them.
17 I could have done landscaping with that. That was not in
18 the court order.

19 Q So your interpretation is that those parking
20 places were not required to be restored.



1 Q Dr. Chawla, do you recall the testimony that
2 after the Court's ruling and order you submitted four
8 proposals to the Court for consideration? Do you recall
4 that?

5 A Right.

6 Q And all of them had a drive-through in them?

7 A Right.

8 Q Did you at that time understand from the
9 Court's previous order that you would be allowed to have a
10 drive-through?

11 A It was not clear.

12 Q Like the parking places aren't clear?

13 A The parking places are very clear.

14 MR. DURRETTE: That's all I have, Your Honor.

15 THE COURT: Redirect, Mr. O'Connell?

16 MR. O'CONNELL: No redirect.

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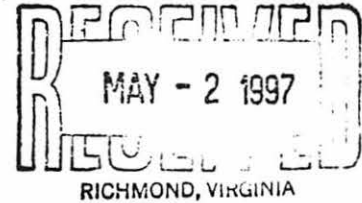


VOLUME #8

VIRGINIA

IN THE CIRCUIT COURT FOR FAUQUIER COUNTY OF VIRGINIA

CLERK



BURGERBUSTERS, INC.

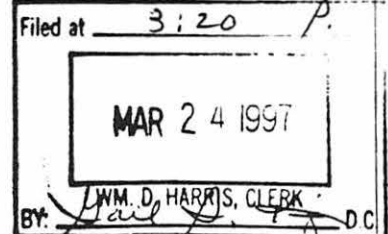
Petitioner,

-vs-

INDER CHAWLA, et al.,

Respondents.

CASE NO: CH93-266



South Courtroom
Fauquier County Courthouse
Warrenton, Virginia

Thursday, December 12, 1996

The above-entitled matter came on to be heard
before the HONORABLE WILLIAM SHORE ROBERTSON, Judge, in
and for the Circuit Court of Fauquier County, in the
Courthouse, Warrenton, Virginia, beginning at 9:06 o'clock
a.m.

APPEARANCES:

On Behalf of the Petitioner:

WYATT B. DURRETTE, JR., ESQUIRE

On Behalf of the Respondent:

DANIEL M. O'CONNELL, JR., ESQUIRE

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testified, as follows:

DIRECT EXAMINATION

BY MR. DURRETTE:

Q Good morning, Tassos.

A Good morning.

Q Would you state your full name for the record,
please.

A Tassos John Paphites.

Q And where do you reside, Mr. Paphites?

A Virginia Beach, Virginia.

Q And are you the president of Burgerbusters,
Inc.?

A Yes, I am.

1 Q And one of the shareholders?

2 A Yes.

3 Q How many shareholders are there?

4 A Six.

5 Q Do you have responsibility for the day-to-day
6 operation and management and decision-making for the
7 company?

8 A Yes.

9 Q When was Burgerbusters created as a
10 corporation?

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1 BY MR. DURRETTE:

2 Q I think I asked you did you have legal -- was
3 that the question? Did you have legal representation when
4 you incorporated Burgerbusters, Inc.?

5 A Yes, I did.

6 Q And who was that?

7 A Faggert and Frieden. Alan Frieden.

8 Q Now, I'm going to come back to that and ask
9 you more questions later on on that subject, but I'm going
10 to move ahead.

11 What business does Burgerbusters engage in?

12 A Burgerbusters, Incorporated, is a franchisee
13 of Taco Bell Corporation. We own and operate Taco Bell
14 restaurants in Virginia, West Virginia, and Maryland.

15 Q How many Taco Bell restaurants does
16 Burgerbusters own and operate?

17 A We're currently operating twenty-four
18 restaurants, with one under construction.

19 Q At or about 1992, when you negotiated for the
20 Taco Bell that is the subject of this litigation, how many
21 did you have?

22 A Approximately twelve.

23 Q Now, did there come a time when you met and

1 negotiated with Dr. Chawla with respect to the Taco Bell
2 restaurant that is the subject of this litigation?

3 A Yes, sir.

4 Q And did you handle some of those or all of
5 those negotiations yourself?

6 A Yes, sir.

7 Q You met personally with Dr. Chawla?

8 A Yes, sir.

9 Q And did you have legal representation?

10 A Yes, sir, I did.

11 Q And who represented you in those negotiations
12 and the drafting of the documents that were ultimately
13 executed?

14 A The law firm of Faggert and Frieden.

15 Q Now, in the course of those negotiations and
16 the preparation of the documents, did you negotiate for a
17 provision in your agreement that related to the future
18 development of the shopping center?

19 A Yes, sir.

20 Q And if I put this up here --

21 (Whereupon, Mr. Durette placed a document on
22 an easel.)

23 -- Paragraph seven of the agreement called

1 Development Restriction, is that the provision in the
2 agreement that we're talking about?

3 A Yes, sir.

4 Q And did you also negotiate for a provision
5 that related to your rights with respect to getting in and
6 getting out of the shopping center, and the use of parking
7 spaces, and things of that nature?

8 A Yes, sir.

9 Q And if I put this up here and show you
10 Paragraph eight of that agreement, would that be what
11 we're talking about?

12 (Whereupon, Mr. Durette placed another
13 document on the easel.)

14 A Yes, sir.

15 Q Now, were these two provisions important to
16 Burgerbusters, Mr. Paphites?

17 A Yes, sir. They're very important.

18 Q Can you tell the jury why, please.

19 A Individually or as a whole? I mean, one at a
20 time?

21 Q Whichever way is easier for you that they
22 would understand.

23 A Sure.

1 The development restriction is critical to
2 Burgerbusters because we were the first people going into
3 the shopping center and we had to make sure that the
4 future -- we signed the lease to be there for twenty years
5 and we needed to make sure that we had as much of a
6 possibility to be successful at that business as we could.
7 And the only way to do that was to have a development
8 restriction that would have an exhibit drawn out as part
9 of the contract so that we knew what was going to be built
10 on the shopping center at a later date, and nothing could
11 change, like hurting our visibility by putting a building
12 next to us or change traffic patterns that would make it
13 inconvenient to our customers, or -- secure enough, what I
14 felt was enough parking spaces to operate our business,
15 make sure we had the correct amount of retail support in
16 the center to help our business have the best possibility
17 of success. Various items like that make the development
18 restriction very critical.

19 A secondary critical thing is that my
20 franchisor, Taco Bell Corporation, requires a development
21 restriction and requires that it's enforced. They take
22 the position and they --

23 MR. O'CONNELL: Your Honor, I'm going to

1 object. This is hearsay.

2 THE COURT: All right. If it's offered for
3 the truth of the matter, it would be hearsay and excluded.
4 However, if it's offered to show why Mr. Paphites took a
5 certain view with respect to these covenants, which I
6 think is its purposes, I'll allow it for that purpose.

7 MR. DURRETTE: That's the only purpose, is to
8 why the covenant was important.

9 THE COURT: All right.

10 THE WITNESS: Well, it was also important to
11 me because if I didn't do a development restriction, even
12 though it's critical to my business, I couldn't get a
13 franchise for this location. Every location has its own
14 franchise agreement, and the franchisor has first right of
15 refusals and they have options to go in and take out a
16 franchisee and be the actual operator if for some reason
17 the franchisee decides not to do business there anymore,
18 and they have to make sure their attorneys are comfortable
19 and they can move forward and operate the restaurant the
20 way they think is correct.

21 The easement restrictions are just as critical
22 as the development restrictions. We have to make sure
23 that we have proper entrances and exits, easy

1 accessibility, convenience for our customers. We have to
2 make sure we have enough parking spaces and our customers
3 have the use of all the parking spaces. We try to secure
4 that we have good, solid contracts so people can't
5 trespass on our property. We make sure that the -- their
6 safety concerns are taken care of when we're designing
7 traffic patterns and walkways and things like that.

8 And it's very important that those things
9 don't change because, you know, the success of our
10 business rides on all of that.

11 BY MR. DURRETTE:

12 Q Now, there's an Exhibit D referred to in the
13 development restriction with respect to the building that
14 was to be located next to the Taco Bell facility.

15 What did you negotiate for Exhibit D?

16 A For just the building next to us?

17 Q (Nodding head.)

18 A That there would be an approximately 4,500-
19 square-foot retail building with parking spaces in front
20 of it.

21 Q Now, did there come a time when you learned
22 that construction was going to begin at the shopping
23 center that you felt was contrary to the provisions that

1 you had negotiated?

2 A Yes.

3 Q And approximately when was that?

4 A Gosh, I can't remember the exact date. It's
5 been about three years.

6 Q Sometime in 1993?

7 A Yes, sir.

8 Q The summer maybe of 1993, approximately?

9 A Yes, sir. I don't remember the exact date.

10 Q What did you do? Well, first of all, what did
11 you learn?

12 A I learned that there was going to be a bank,
13 that Dr. Chawla had made a deal with a bank, signed the
14 contract and had negotiated a deal with a bank without
15 coming to me to get approval, and that it was going to be
16 completely different than what I had bargained for in my
17 contract.

18 It was going to be 1,900 square feet instead
19 of 4,500 square feet. It was going to be a banking
20 facility instead of a retail facility. It was going to
21 have drive-thru lanes instead of parking spaces. It was
22 going to change the traffic patterns of the shopping
23 center. There were a lot of changes.

1 Q What did you do when you learned this?

2 A I had my attorneys send Dr. Chawla a letter
3 telling him that it was not approved and he needed to send
4 me, per our agreement, complete detailed drawings made by
5 an engineer, a professional, so that we could review the
6 situation and give them a correct answer, a final answer.

7 Q What attorneys wrote that letter?

8 A Faggert and Frieden.

9 Q Now, obviously whatever efforts were
10 undertaken to resolve the matter were unsuccessful; is
11 that correct?

12 A Yes, sir.

13 Q And did you then instruct your attorneys to
14 file a legal action to enforce your rights under the
15 agreement?

16 A Yes, sir.

17 Q And what did you want your attorneys to
18 accomplish?

19 A I wanted them -- I told them that I spent a
20 lot of time, a lot of money, and a lot of effort to secure
21 a contract that was what I felt and what Taco Bell
22 Corporation felt was the best contract we could do for
23 this location to allow for the best possibility of

1 success. And Exhibit D shows the site plan as it was
2 supposed to be substantially built.

3 I asked them to stop the bank building from
4 being built because that's not what I bargained for and to
5 make sure that the only thing that was built was what we
6 had already negotiated.

7 Q Did you ask them to seek damages?

8 A No, sir.

9 Q You're aware -- are you not? -- that the
10 lawsuit was filed in 1993 and that there were judicial
11 hearings in 1993?

12 A Yes, sir.

13 Q And the lawsuit has gone on from 1993 until
14 today; is that correct?

15 A Yes, sir. I'm well aware of that.

16 Q Now, you are also aware -- are you not? --
17 that in January of 1996 Judge Robertson entered an order
18 granting Burgerbusters some relief in this case; is that
19 right?

20 A Yes, sir.

21 Q And what do you do understand that to be?

22 A My understanding is that the bank building was
23 ordered to either be torn down or to be reconstructed, to

1 be reconfigured, to change the existing square footage
2 from 1,900 square feet to 4,500 square feet. It's my
3 understanding that the judge ruled that the drive-thru
4 lanes were not part of the original bargain and that they
5 had to be taken away; they're currently in the process of
6 being taken away. Also, the parking spaces that were
7 taken away and were part of the agreement when the bank
8 was built had been ordered to be put back.

9 The traffic pattern that was originally on
10 Exhibit D will be restored now and the safety concerns
11 that I have will be corrected.

12 Q Now, are you aware that at some point in time
13 in the litigation Burgerbusters sought damages?

14 A Yes, sir.

15 Q And are you aware that those damages were
16 denied?

17 A Yes, sir.

18 Q What has been Burgerbusters' position
19 throughout the litigation with respect to the relief it
20 wanted?

21 A I asked my attorneys, when I came and
22 basically brought my company to court, only to get what I
23 had negotiated for and that's the 4,500-square-foot retail

1 building.

2 After I was in court, instead of the judge
3 ruling on that up front, I was told that he had asked us
4 to go ahead and put that case on, but also ask for
5 damages. That way he could use one or the other. And we
6 had to do that; that was not our request or intention from
7 day one.

8 Q Did you understand that if you got the
9 injunctive relief, that is, the court order directing the
10 building to be reconfigured as you had testified to, that
11 you were not going to get damages?

12 A Yes, sir.

13 Q And what were your feelings about that?

14 A That was fine. I didn't ask for damages to
15 start with. I asked for what I negotiated.

16 Q Now, as a consequence of the Court's ruling
17 and the relief that you got, which you indicate is the
18 relief that you wanted, why has that been important to
19 Burgerbusters?

20 MR. O'CONNELL: Your Honor, that's asked and
21 answered. He's already explained why those covenants were
22 important. We're going over the same territory.

23 MR. DURRETTE: This is with respect to the

1 relief, Your Honor.

2 THE COURT: Well, he's stated what he wanted
3 but I think this question is put in a slightly different
4 way. I'll allow it.

5 THE WITNESS: Could you ask it again, please?

6 BY MR. DURRETTE:

7 Q Yes.

8 Why is what you achieved from the Court's
9 ruling important to Burgerbusters?

10 A Well, it's important to Burgerbusters because
11 what will be built today is what we had bargained for in
12 Exhibit D, and that's what we feel -- I feel, as a
13 business person, is my best opportunity to be successful
14 and have a long business establishment operating at that
15 location.

16 I have signed a lease there that has at risk
17 over two and a half million dollars that I have to pay
18 over twenty years. I've spent a lot of money up front for
19 professionals and for research and development and for
20 franchise fees. I've personally guaranteed this deal and
21 I negotiated and signed it, a contract, with Dr. Chawla,
22 who also signed the contract. And this will allow me
23 to -- whether I end up being successful or not, it's going

1 to be because it was what I bargained for.

2 Q You've mentioned parking spaces. I'd like for
3 you to tell the jury specifically what was involved with
4 the parking spaces and what that means as a result of the
5 Court's ruling.

6 A Sure.

7 As part of the contract, Exhibit D allowed for
8 me to -- I had negotiated to have twelve, what I call
9 primary, parking spaces adjacent to my main entrance,
10 which is at the side of the building. And they are the
11 closest parking spaces to my entrance, which is very
12 important for my customers because it's a convenience,
13 easy-access. Most of our customers are either in a hurry
14 or they're on the run or they have a half-hour for lunch,
15 or whatever, and it's critical to have good parking close
16 to the building.

17 Well, of those twelve parking spaces that are
18 my most important, the construction of the bank took four
19 of them away, thirty-three percent of my parking spaces.
20 And that just does not allow me enough good, accessible
21 parking for my customers. That was my choice from the
22 first day and that's what both the parties signed. We
23 agreed to it. It took it away. And also, because of

1 those parking spaces being taken away and a road being run
2 through there, the drive-thru, twenty-four feet of road,
3 it created a safety problem for me putting my customers at
4 risk.

5 Q What is the significance of having the 4,500
6 feet of indoor space versus the drive-thru at the bank?
7 Why is that important?

8 A In the fast food industry -- and Pepsi-Cola
9 and Taco Bell, they've done many, many researches and
10 surveys. And we have on-hand experience that the more
11 retail space that you can have as a support vehicle for
12 your business, where customers will drive up to a
13 neighboring business establishment, park, get out of the
14 car, do their business, whatever it is that they went for,
15 whether it was to buy something or to -- whatever the
16 purpose is -- they're there; they're out of their car;
17 there's a good opportunity that they're going to -- since
18 they're already at the center and there's a restaurant,
19 they're going to patronize the restaurant.

20 If there's no parking spaces or no retail
21 space there, and it's drive-thru lanes, those people are
22 just going to drive through the property and drive out. I
23 have a drive-thru window, so I'm going to get drive-thru

1 traffic if they want to eat at Taco Bell. It's just -- it
2 hurts my business is just the bottom line.

3 Q Now, this agreement or this provision in the
4 agreement, or Exhibit D -- I'm sorry. Exhibit D to that
5 paragraph speaks of a retail facility?

6 A Yes, sir.

7 Q Now, also in this litigation you preferred to
8 have some other kind of retail establishment than a bank,
9 did you not?

10 A Yes, sir.

11 Q And you didn't get that in the litigation, did
12 you?

13 A That's correct.

14 Q Is there anything else that you sought with
15 respect to the injunctive relief from the Court, other
16 than that retail-versus-bank use that you didn't get?

17 A Well, I didn't get the words changed from bank
18 to retail. But what I did get and what my concern was --
19 the parking spaces, the drive-thru lanes, the total square
20 footage -- all that is being fixed the way it was supposed
21 to; no more, no less.

22 But I have changed -- even though the bank may
23 leave or they may stay, because they're not going to have

1 a drive-thru and they'll have no control over that, I have
2 changed and I guess the Court has changed the habits of
3 those customers. So those banking customers, instead of
4 sixty percent of them going through the drive-thru, if
5 that bank stays, they're going to all be basically retail
6 customers, act like retail customers because they're going
7 to drive up and park and get out of their car and go do
8 whatever business they want to do. Undoubtedly, that's
9 very critical for me.

10 Q So the evidence in this case was that sixty
11 percent of the bank's customers would have used that
12 drive-thru.

13 A That's what the bank told us in this case.

14 Q And now if the bank stays there, if they're
15 going to bank there, they will park and get out of their
16 cars.

17 A A hundred percent of them will have to do
18 that.

19 Q Now, you indicated to the jury earlier that
20 the law firm of Faggert and Frieden and Mr. Alan Frieden
21 had been your attorneys when you incorporated and started
22 to do business; is that correct?

23 A Yes, sir.

1 Q And that was approximately 1986.

2 A Yes, sir.

3 Q And they've been your attorneys since 1986
4 until today; is that right?

5 A Yes, for ten years.

6 Q As far as you're concerned, that's going to
7 continue for a while, isn't it?

8 A Yes, sir. As long as I'm in business.

9 Q Would you tell the jury what process you went
10 through at the inception when you selected a law firm?

11 A Sure.

12 There were five shareholders in my company.
13 We all sat down and decided, tried to decide together,
14 which law firm we felt would meet the needs of a growing
15 fast food restaurant company based in Virginia,
16 incorporated in Virginia. We each shared experiences and
17 presented different law firms. We had fifteen or twenty
18 law firms that we had all done business with for various
19 previous businesses and for personal reasons. We also
20 looked at a couple that were highly recommended to us.

21 We all lived in the Tidewater, Virginia -
22 Virginia Beach - Norfolk area. And we researched firms
23 that were there that we could establish a relationship

1 with and be part of our development team, along with an
2 engineer or any other type of professional Tidewater
3 corporate representative. And the firm that stood out at
4 the time, very reasonable in their fees, had all the
5 experience we needed and the professionalism, and had
6 already performed to our satisfaction for other things
7 that individually some of the shareholders needed, was
8 Alan Frieden of Faggert and Frieden. That's why we chose
9 them.

10 Q Now, would you describe the relationship that
11 Burgerbusters has had with Faggert and Frieden since 1986,
12 the type of work they've done for you, where they've done
13 it, etcetera.

14 A Sure.

15 The principal contact is Alan Frieden. He is
16 the lead attorney that handles the Burgerbusters'
17 business. The firm has expertise in everything that
18 Burgerbusters needs. They have real estate development
19 experts; they have litigation experts; every facet that we
20 would need legal support for.

21 They have done everything for our company from
22 the first day -- from processing or drafting all the
23 documents for any real estate purchase agreements, any

1 leases; if we've had any problems ever that were
2 litigated; if there was a vendor that thought they should
3 get \$2,000 when they really shouldn't, Faggert and Frieden
4 represented me; if there -- any situation.

5 In ten years' time I think we've had to
6 litigate three, four, five different things. They've
7 always been my attorney.

8 Q And where has that litigation taken place?

9 A Oh, gosh. All of our restaurants are up in
10 Central Virginia, West Virginia, and Maryland, so it's all
11 taken up here. They've represented me in Harrisonburg,
12 Charlottesville, Woodstock, Manassas, Stafford, you know,
13 for litigation-type things. They've represented me in
14 every city, all the way up to Hagerstown, Maryland, for
15 just drawing up, you know, very important contracts and
16 leases and things like that.

17 Q How do you feel about this law firm? How do
18 you evaluate their services? How do you feel you've been
19 treated?

20 A I've had them for ten years. I'm very
21 satisfied. They always return my phone calls. Their
22 rates are probably average. I probably could find someone
23 more expensive. I probably could find someone cheaper.

1 But I've built a relationship with them and they've done a
2 great job for us. We've grown from no stores to
3 twenty-five stores over ten years.

4 Q Was it your decision to have them represent
5 you in this litigation in Warrenton in Fauquier County?

6 A Yes, sir.

7 Q Why?

8 A For me it's -- it's my decision, so if I
9 wanted to choose someone else, I could. But it's not a
10 matter of choosing. I have an issue where a landlord did
11 something against the contract not bargained for, so I
12 contacted my attorneys and asked them to, you know, to
13 represent me. And it wasn't a matter of -- I didn't
14 really want to start a new relationship with someone.
15 They had already earned, basically, the right to represent
16 me in this thing, and I felt that they would do a good job
17 and that they were the right firm for me.

18 Q Did you trust them?

19 A Yes, sir.

20 Q Did you have confidence in them?

21 A Yes, sir.

22 Q Have you always been satisfied with the
23 quality of their work?

1 A Yes, sir.

2 Q Have you been satisfied with the rates and
3 fees that you've paid the firm?

4 A Yes, sir.

5 Q Do you feel you've been charged reasonable
6 fees by the lawyers who have represented you?

7 A Yes, sir.

8 Q Now, Mr. Paphites, did you give any guidance
9 or preference to Mr. Frieden as to how you wanted him
10 involved in the matters concerning Burgerbusters,
11 including this case?

12 A Sure.

13 Q And what did you tell him?

14 A Well, in this case, just like anything else I
15 do, no matter who in the firm is the expert at something
16 -- whether it's a real estate issue, or a litigation
17 issue, or a payroll issue, whatever -- I always ask for
18 Alan Frieden to participate a hundred percent into the
19 whole case. He's my contact. He's my attorney and his
20 firm represents me, but he's the lead person. I have all
21 the confidence in the world in his opinion, and I want his
22 opinion in everything. So I feel like I'm being
23 represented much better if there's always someone there.

1 You know, if Mr. Lawrence was representing me but he was
2 not available for some reason, I can make the phone call
3 and get the same information from Mr. Frieden. I value
4 his expertise.

5 Q And you knew that was going to require intra-
6 office conferences, did you not?

7 A Of course.

8 Q Generally, about intra-offices conferences,
9 you knew that your attorneys in representing you were
10 going to have intra-office conferences, didn't you?

11 A It's critical for me to be represented
12 correctly.

13 Q And you saw that on the bills, did you not?

14 A Yes, sir.

15 Q And you paid for that or expect to pay for
16 that, do you not?

17 A Yes, sir.

18 Q Now, to the best of your knowledge, have you
19 been rendered bills for services rendered at least through
20 October 31st by Pearson and Pearson, by Howell Daugherty,
21 and by Faggert and Frieden for their work on this case?

22 A Yes, sir.

23 Q Have you been billed for expenses that those

1 law firms have either incurred or paid on your behalf in
2 this case?

3 A Yes, sir.

4 Q Have you received bills from service providers
5 in this case, such as court reporters, experts, and other
6 vendors, for the services rendered in this case?

7 A Yes, sir.

8 Q And have those bills either been paid or do
9 you, Burgerbusters, intend to pay them?

10 A Yes, sir.

11 Q Do you consider these to be legal obligations
12 for Burgerbusters to pay?

13 MR. O'CONNELL: Objection, Your Honor. He's
14 asking for a professional opinion.

15 MR. DURRETTE: I agree.

16 BY MR. DURRETTE:

17 Q Do you consider yourself obligated -- do you
18 consider Burgerbusters obligated to pay these bills?

19 A Yes, sir.

20 Q Now, Mr. Paphites, we are here in this case,
21 Burgerbusters is here in this case seeking to recover the
22 fees and expenses that it has been charged by the lawyers
23 and the service providers in this litigation and other

1 expenses that I'll ask you about; is that correct?

2 A Yes, sir.

3 Q And when you were negotiating this agreement,
4 did you and Dr. Chawla negotiate a provision in your
5 contract that addressed this issue?

6 A Yes, sir. We equally negotiated that
7 position. We agreed on it a hundred percent. We both
8 signed the document.

9 Q Paragraph twenty-seven, Expenses, is that the

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MR. O'CONNELL: Objection to leading.

MR. DURRETTE: I'll rephrase the question,
Your Honor.

BY MR. DURRETTE:

Q Did the agreement and the rights that you had
under it relate in any way to your decision to hire the
security guards?

A Yes, sir. I hired --

Q Tell the jury what that is.

A Well, I hired them because of all the problems
that the bank construction and the changes from the bank
construction created for me, whether it was trespassing or
leaving debris on my property or encouraging people to
drive through my property. There was construction workers
cursing at my employees, and they had equipment on my
property.

It was a horrible situation. I never had
security guards there prior to that. I didn't need them.

MR. DURRETTE: May I have a moment, Your

1 Honor?

2 (Mr. Durette and Mr. Lawrence conferred off
3 the record.)

4 MR. DURRETTE: That's all I have, Your Honor.

5 THE COURT: Thank you.

6 Cross-examination, Mr. O'Connell.

7 CROSS-EXAMINATION

8 BY MR. O'CONNELL:

9 Q Now, Mr. Paphites, you are president and on
10 the board of directors of Burgerbusters; correct?

11 A Yes, sir.

12 Q And there are five shareholders?

13 A No, sir.

14 Q Six shareholders?

15 A Yes, sir.

16 Q And you own approximately twenty-one percent
17 of the stock?

18 A I own exactly twenty-one percent of the stock,
19 yes, sir.

20 Q In your capacity as an officer, you are
21 responsible to the stockholders of Burgerbusters
22 Corporation?

23 A Yes, sir.

1 Q And your responsibility is to produce revenue
2 for their stock interest in the corporation, isn't it?

3 A That's one of my responsibilities, yes, sir.

4 Q And what other responsibilities, other than to
5 produce a return on their investment, do you have to the
6 stockholders of Burgerbusters Corporation?

7 A To operate Taco Bell restaurants under a
8 franchise agreement; to have a good relationship with our
9 franchisor; to negotiate on purchases of properties and
10 leases, to --

11 Q Well, those are things that are --

12 MR. DURRETTE: Your Honor, I think he needs to
13 let the witness finish.

14 THE COURT: All right.

15 THE WITNESS: To make sure that our customers
16 are always taken care of, that their needs are taken care
17 of; that we have good, clean establishments; to make sure
18 that we're fair to our employees; to handle any situation
19 that is needed for the success of our company.

20 BY MR. O'CONNELL:

21 Q Now, you do all those things to try to ensure
22 that a profit will be returned to your stockholders, isn't
23 that true?

1 A Sometimes that is true, but sometimes it's not
2 true.

3 Q Isn't it a fact that the major function of an
4 officer and director of a corporation is to return a
5 profit to the stockholders of the corporation? Isn't that
6 true?

7 A It can be true, yes, sir.

8 Q Now, your corporate offices are in
9 Charlottesville; right?

10 A Yes, sir.

11 Q So did you conduct any interviews when you
12 were looking for legal counsel for any law firms in
13 Charlottesville that could handle your legal requirements
14 for your corporation that's headquartered in
15 Charlottesville?

16 A No, sir.

17 Q Did you check with any firms in Northern
18 Virginia when the Chawla litigation came about to see what
19 they would charge as compared to what Faggert and Frieden
20 had been charging to handle your litigation?

21 A It wasn't necessary. No, sir.

22 Q Just answer the question.

23 You did not check with any firms in Northern

1 Virginia when this litigation came up?

2 A Could you ask it again, please.

3 Q Isn't it a fact that when this litigation with
4 Dr. Chawla came up, you made no effort to check with any
5 law firms in Northern Virginia as to what they would
6 charge you to handle this litigation as compared to what
7 Faggert and Frieden was charging you?

8 A Maybe I don't understand. I have my law firm
9 already. I don't understand.

10 Q I'm not trying to confuse you, Mr. Paphites.
11 Maybe you didn't understand the question.

12 My question is: Isn't it a fact that you did
13 not check with any law firms in Northern Virginia as to
14 what they would charge to handle the Chawla litigation
15 when it came about?

16 A Of course not.

17 Q Now, you described this long-term relationship
18 you had with Mr. Frieden.

19 You didn't have the same long-term
20 relationship with Mr. Sacks before this litigation came
21 up, did you?

22 A Yes, sir.

23 Q You did?

1 A (No response.)

2 Q Now, do I understand from your counsel's
3 questions that you've never questioned any of the bills
4 you've received from Faggert and Frieden or any of the
5 other law firms that you're seeking reimbursement in this
6 case?

7 A That's correct.

8 Q Did you even look at the bills?

9 A Yes, sir.

10 Q Now, your counsel asked you about the action
11 that you filed and what you sought, and I believe you
12 indicated that you objected to the bank because it wasn't
13 retail; correct?

14 A That's one of the things I indicated, yes,
15 sir.

16 Q And you wanted the bank evicted from the
17 premises because it was not retail; correct?

18 A No, sir.

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BY MR. O'CONNELL:

Q Well, your counsel has answered the question for you.

You didn't get that relief, did you?

A I got --

Q Just, please, answer the question.

You didn't get the bank removed from the premises, isn't that true?

A It's in the process of being changed right now --

Q You didn't get the bank -- please, answer the question, Mr. Paphites.

A I'm trying to, sir.

Q There is no order of this court -- there is no relief that you obtained removing Southern Financial Corporation from the premises that exists at this present time, is there?

A As it exists today, there is an order from the Court changing it --

Q Changing it.

A Taking away --



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Q Are you trying to tell this jury that when these orders, this building conformation is completed, that Southern Financial will no longer be down there next to Taco Bell? Is that what you're trying to tell the jury?

A I'm not trying to tell the jury anything. But once the construction of the building is done, per the Exhibit D that we both negotiated and agreed to, and the bank does not have drive-thru lanes, it may or may not stay. I don't know. The bank has to decide that, I

1 assume.

2 Q But there is no court order saying that
3 Southern Financial must leave those premises, is there,
4 Mr. Paphites?

5 A I guess I'd have to read it. I mean, I could
6 read it for you if you want to give it to me.

7 MR. DURRETTE: Your Honor, if it will save
8 time, we'll stipulate that there is no court order
9 directing Southern Financial Corporation to leave the
10 premises.

11 MR. O'CONNELL: Thank you.

12 THE COURT: All right. The stipulation may be
13 regarded by the members of the jury as a part of the
14 evidence.

15 BY MR. O'CONNELL:

16 Q Now, another portion of your lawsuit asks for
17 literally millions of dollars in damages for those four
18 parking spaces that you testified to earlier when your
19 counsel asked you a bunch of questions that were so
20 important to you.

21 Do you remember that, Mr. Paphites?

22 A I remember the part of the litigation, but the
23 numbers you said aren't accurate.

1 Q Well, you hired experts to come in and -- you
2 were at the trial, weren't you?

3 A Yes, sir.

4 Q Do you remember your experts, like Mr. Kimball
5 and others, that testified as to how valuable those four
6 parking spaces were in that particular position and how
7 much money you were going to lose if those four parking
8 spaces weren't replaced? You remember that, don't you?

9 A Yes, sir.

10 Q And you didn't get any damages, did you?
11 Burgerbusters didn't get any damages for the loss of those
12 parking spaces from this Court, did they?

13 A No, sir.

14 Q Thank you.

15 And there is no court order of this Court that
16 requires Dr. Chawla to replace those parking spaces, is
17 there?

18 A Could you say that again, please.

19 Q I said, there is no court order of this Court
20 requiring Dr. Chawla to replace those four parking spaces,
21 is there?

22 A There is a court order that says he has to
23 replace the parking spaces.

1 Q There is?

2 A (No response.)

3 Q And when did that court order come down, if
4 you recall, Mr. Paphites?

5 A Six to nine months ago. I don't know the
6 exact date, sir.

7 Q And was it in the form of a letter opinion
8 from the Judge?

9 A I don't remember how it came down.

10 Q Let me show you a document and ask you if
11 you've seen this before.

12 MR. DURRETTE: What is it?

13 MR. O'CONNELL: It is the July 24, 1996,
14 letter of Judge Robertson.

15 BY MR. O'CONNELL:

16 Q Have you seen that, Mr. Paphites?

17 (Whereupon, Mr. O'Connell handed a document to
18 the witness for his examination.)

19 A Yes, sir.

20 Q And that doesn't say that the parking spaces
21 are to be restored, does it?

22 A This is only a partial or preliminary letter
23 from the Judge. He rendered many other opinions on this

1 case.

2 The Judge ruled that the building has to be
3 changed from 1,900 square feet to 4,500 square feet. The
4 Judge ruled that the drive-thru lanes were not
5 substantially the same as Exhibit D (indicating) that was
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order.

I think in this case all of the letters opinions have at some point reached order stage, but I mention that because I think the jury should not be confused that a letter opinion speaks as an order of Court.

BY MR. O'CONNELL:

Q Now, since you didn't check with any Northern Virginia law firm, you don't know whether or not a Northern Virginia law firm couldn't have handled your case

1 just as well, if not better, than Faggert and Frieden,

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THE COURT: Do you want to take five minutes?

MR. DURRETTE: It doesn't matter to me.

1 THE COURT: Yeah. Let everybody stretch.

2 (Pause.)

3 Whereupon,

4 ANNEMARIE DINARDO CLEARY

5 a witness, was called for examination by counsel on behalf
6 of the Plaintiff, and, after having been duly sworn by the
7 Clerk of the Court, was examined and testified, as
8 follows:

9 DIRECT EXAMINATION

10 BY MR. DURRETTE:

11 Q Ms. Cleary, would you please state your name
12 for the jury.

13 A AnneMarie DiNardo Cleary.

14 Q And your profession?

15 A I'm an attorney with the law firm of Faggert
16 and Frieden in Chesapeake, Virginia.

17 Q And have you been involved in this litigation
18 from its inception through today, except for a brief
19 interlude?

20 A Yes. I was on maternity leave for three
21 months and appointed in early '94. But with the exception
22 of that period, I was with this litigation from the start.

23 Q Now, Mr. Sacks testified yesterday, sort of an

1 overview of what transpired in the litigation prior to his
2 leaving Faggert and Frieden in late March or early April
3 of 1994.

4 And you were involved throughout that same
5 period of time, were you not?

6 A Yes, I was.

7 Q And you participated in the hearings and the
8 trials that took place in April, did you not?

9 A Yes, I did.

10 Q With Mr. Lawrence as lead counsel?

11 A Yes.

12 Q Tell the jury just briefly about those days in
13 April.

14 How many days were involved here in that
15 particular month?

16 A In late April we began. I believe it was on
17 April 24, and we had an initial pretrial conference,
18 basically an effort to have the parties sit down with the
19 Judge and narrow the issues and come to some understanding
20 of what we were actually going to accomplish in the
21 ensuing three days. We spent the entire day on the 24th
22 doing that. We began the trial on April 25th. We were
23 here the 25th, 26th, and the 27th. During that time we

1 completed the Burgerbusters' portion of the trial.

2 Q Now, in that hearing on the 24th did
3 Burgerbusters advance a motion which we call a summary
4 judgment motion?

5 A Yes, we did.

6 Q And what did you seek to accomplish?

7 A Well, we, for all intents and purposes, sought
8 to make the trial unnecessary. We asked the Judge to take
9 a look -- and I think we have exhibits here somewhere --
10 take a look at what was Exhibit D to the lease, take a
11 look at what was actually constructed. And if you'll see,
12 Exhibit D of the lease shows a 4,500-square-foot retail
13 building for Building Number Two with no drive-thru. What
14 was actually was built was a 1,900-square-foot bank
15 building with two drive-thru lanes.

16 And we asked the Judge to look at that and
17 say, "You don't need any more evidence. That's it.
18 Whatever the evidence might be, there couldn't be any
19 other result except that that is not as substantially
20 agreed to by the parties."

21 Q And on behalf of his client, Mr. O'Connell
22 opposed your position on that, did he not?

23 A He did indeed.

1 Q And he prevailed, did he not?

2 A He did. He suggested to the Court that the
3 Court needed to make a factual inquiry, it needed to hear
4 evidence to determine what "substantial" meant, it needed
5 to hear evidence to determine what "retail" meant, and
6 needed to determine factually whether or not Burgerbusters
7 got, by virtue of the bank building, the benefit of its
8 bargain; in other words, it didn't really make any
9 difference.

10 And so the Court agreed with Mr. O'Connell
11 that it needed to hear evidence to decide those issues.

12 Q Now, in advancing that summary judgment
13 seeking to avoid the trial and to have a ruling in your
14 favor on the contract, what was Burgerbusters' position on
15 damages?

16 A We made it very clear to the Court that if he
17 would give us summary judgment, that would be the end of
18 it. We'd walk away. We weren't looking for money
19 damages.

20 If the Court granted us injunctive relief and
21 said, "Dr. and Ms. Chawla, you've got to make this bank
22 building the way you promised it would be," then any money
23 damages that we would suffer would end when said bank

1 building was renovated. And we recognized at all times
2 that whatever money damages we might be seeking, they
3 would be only for a limited period of time, assuming we
4 received injunctive relief.

5 At that initial pretrial conference on April
6 24th, we made it very clear to the Judge that if he would
7 give us injunctive relief that day, we would pack our bags
8 and go home. Burgerbusters was not after the money.

9 Q Now, you indicated that you had three days of
10 trial and you presented Burgerbusters' case.

11 That means that Burgerbusters went forward
12 with its evidence for three days; is that right?

13 A That's correct.

14 Q Witnesses were called, cross-examined --
15 exactly what's going on right here.

16 A Exactly.

17 Q Okay.

18 And at the end of those three days of trial,
19 what then transpired?

20 A Well, obviously, the Chawlas had to have an
21 opportunity to present their case, and so successive trial
22 dates were selected late August. I want to say the 28th,
23 29th, and 30th. In the interim, there were several

1 motions filed and heard by the Court. I believe there
2 were a couple of hearings.

3 One of the motions was a renewed motion by
4 Burgerbusters for summary judgment again, saying, "Judge
5 you've heard some evidence. Regardless of what else might
6 be out there -- and we think there is nothing else out
7 there -- nothing can change the fact that there is a
8 1,900-square-foot bank building with two drive-thrus, and
9 that's completely different from what was promised by the
10 Chawlas."

11 And the Judge, in ruling on that motion, got
12 us part of the way there. He said, "Well, I think
13 that" -- or he ruled, I guess is the way to say it .
14 "This is more than a trifling difference. This is not
15 substantially the same thing." And so to that extent we
16 prevailed in narrowing the issues further for the August
17 trial.

18 But the Court didn't feel that it could go all
19 the way. What it found was that the Chawlas should be
20 given an opportunity to demonstrate that Burgerbusters got
21 the benefit of its agreement. It got close enough to the
22 same thing as a literal performance would have gotten
23 them.

1 Q Now, were there any other rulings from the
2 Court in the interim before the August trial?

3 A Yes. The Chawlas filed a motion to strike our
4 claim for damages.

5 Q What does that mean? What is a motion to
6 strike?

7 A It's asking the Court to find that the
8 evidence is not sufficient to support a verdict in
9 Burgerbusters' favor for money damages. And the Court
10 agreed with the Chawlas and struck the damages claim. So
11 at that point all that was left was the injunction issue.

12 Q And so you had three more days of trial in
13 August on the injunction issue, did you not?

14 A Yes.

15 Q Is it correct to say that at that point in
16 time damages were out of the case?

17 A Correct.

18 Q Now, during the trials in April and August,
19 with respect to Burgerbusters' ability to get that
20 injunctive relief, can you recall some of the defenses or
21 arguments that you as attorneys had to deal with relating
22 to things like implied easement, counting the drive-thru
23 as business space, things of that nature? What sorts of

1 things were involved?

2 A The Chawlas raised very creative and
3 challenging defenses to Burgerbusters' position. As I
4 recall, the Chawlas argued, for example, because business
5 took place in the drive-thru, in the bank drive-thru, in
6 other words, a portion of the bank's business was done
7 there by virtue of the drive-thru windows and the ATM
8 machine, that that space should be counted as part of the
9 square footage in comparing a 1,900-square-foot bank
10 building and a 4,000-square-foot -- or 4,500-square-foot
11 retail building, that that calculation would actually get
12 you a lot closer to a 4,500-square-foot space.

13 Another issue we had to address -- well,
14 initially with respect to the retail issue, the Court had
15 indicated that "retail" was a word in common usage and it
16 felt fairly comfortable with that. As the trial
17 progressed, the Court determined that it would -- it
18 probably ought to hear some evidence on exactly what
19 "retail" encompasses. As a result of that, in the August
20 hearing, or August trial, August portion of the trial, we
21 had to have one of our experts come down and offer some
22 testimony as to what is typically included in the
23 definition of "retail" in the industry.

1 Q Now, after the August trial did the Court take
2 the matter under advisement? It did not rule at the



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16 Burgerbusters' right to object to this bank building.

17 Q Now, if that issue had been lost by
18 Burgerbusters, what would have been the consequence to its
19 ability to get the relief it was seeking under this
20 agreement?

21 MR. O'CONNELL: Objection, Your Honor. That
22 calls for speculation.

23 MR. DURRETTE: That calls for a legal

1 conclusion and she's a lawyer.

2 MR. O'CONNELL: It does not, Your Honor. This
3 calls for speculation, speculation as to a legal
4 conclusion, which may or may not have --

5 THE COURT: Well, I think while Ms. Cleary is
6 called as a fact witness, she can state the legal position
7 or view that she would take of the effect of that ruling
8 because it gives contextually the basis for whatever
9 course of conduct she entered into thereafter or how she
10
11

12 * * *

16 Q And the Court required additional memoranda
17 from you on that issue?

18 A Yes, it did.

19 Q Anything else that you recall happened between
20 the August trial and the January ruling? I don't know
21 that there is anything; I'm just asking.

22 A Give me a minute. This case has been going on
23 for quite some time.



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(Pause.)

I believe that was it. We researched and briefed the waiver issues and filed those. And then it was in January, at the end of January, when the Court issued its letter opinion.

MR. DURRETTE: May I approach, Your Honor?

THE COURT: (Nodding head.)

MR. DURRETTE: Finally, we going to get to see some of these.

THE COURT: Not again.

MR. DURRETTE: Yes.

THE CLERK: Plaintiff's 2.

THE COURT: Plaintiff's 2.

(The document referred to above was marked Plaintiff's Exhibit Number 2, for identification.)

MR. DURRETTE: May I do this, Your Honor?

BY MR. DURRETTE:

Q Ms. Cleary, let me show you what we've marked as Plaintiff's Exhibit 2, for identification, and ask if you can identify it.

1 (Whereupon, Mr. Durette handed a document to
2 the witness for her examination.)

3 A This is a copy of the Court's January 29,
4 1996, letter opinion in which the Court granted
5 Burgerbusters the relief that it sought at trial.

6 Q Now, we've heard discussion from other
7 witnesses and the questions of both counsel regarding the
8 definition of "retail use" and whether that did or didn't
9 include a bank. Do you recall that?

10 A Yes, I do.

11 Q And it was Burgerbusters' understanding and
12 the position that it advanced in this litigation was that
13 retail use did not include a bank; is that correct?

14 A That's correct.

15 Q And the Chawlas advanced the position that
16 retail use did include a bank, did they not?

17 A That's correct.

18 Q Let me direct your attention to the third page
19 of the Court's opinion.



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Q The jury is going to have this, but I just want you to read, if you would, the last two sentences of the full paragraph concluding the Court's approximately one-page discussion of that issue.

A "The Court also finds the evidence hopelessly conflicting on this term."

And by that term, he means "retail".

"For this reason, the Court is unable to conclude that the lease term does or does not encompass a bank."

Q So the effect of that was that the bank could remain, but neither side won in terms of what it wanted the definition to be.

A Absolutely.

Q The Court has, I think, stated the obvious and that is that this is an opinion and there is ultimately an order that is entered consistent with this opinion, is it not?

A That's right.

Q And the order just says that the Court rules in accordance with its letter opinion?

A And I think that it contained the language

1 that the bank did not conform with Exhibit D to the lease
2 in size, shape, and structure, I believe was the way it
3 was worded.

4 Q I'm going to get to that in a minute.

5 What did this letter opinion and the
6 subsequent order give Burgerbusters with respect to what
7 it was seeking as a consequence of this litigation?

8 A Well, Burgerbusters' primary objective in this
9 litigation was to have the Chawlas construct this building
10 to substantially what they've promised. The bank, however
11 -- the Court ruled that the bank, as a 1,900-square-foot
12 building, was -- I believe it was forty-three percent
13 smaller than promised, was the percentage that the Court
14 set forth in its letter opinion.

15 The Court also ruled that the existence of the
16 drive-thru and the loss of the four parking spaces that
17 went along with that was not in accordance with Exhibit D
18 of the lease.

19 Q And then there was an order that subsequently
20 embodied that; is that correct?

21 A Yes, that's true.

22 MR. DURRETTE: May I approach, Your Honor.

23

1 (Whereupon, Mr. Durette handed a document to
2 the Court.)

3 THE CLERK: Plaintiff's 3.

4 THE COURT: Plaintiff's 3, for identification.

5 (The document referred to above
6 was marked Plaintiff's Exhibit
7 Number 3, for identification.)

8 MR. DURRETTE: Thank you, sir.

9 BY MR. DURRETTE:

10 Q Let me show you what's been marked as
11 Plaintiff's Exhibit 3, for identification, Ms. Cleary, and
12 ask if you can identify it.

13 (Whereupon, Mr. Durette handed a document to
14 the witness for her examination.)

15 MR. DURRETTE: Your Honor, should I -- I did
16 not move the admission of Plaintiff's 2. I do move for
17 the admission of Plaintiff's 2.

18 THE COURT: All right.

19 Is there any objection --

20 MR. O'CONNELL: No objection.

21 THE COURT: -- once this order is
22 authenticated, to both Plaintiff's 2 and 3, Mr. O'Connell?
23 That would be the letter and order.

1 Any objection?

2 MR. O'CONNELL: I have no objection.

3 THE COURT: All right. Plaintiff's 2 and 3
4 will be received.

5 (The documents heretofore marked
6 Plaintiff's Exhibits Numbers 2 and
7 3, for identification, were
8 received in evidence.)

9 BY MR. DURRETTE:

10 Q Is Plaintiff's Exhibit 2 [sic] the order which
11 in part implements the letter of opinion of January 29?

12 A Yes, it is.

13 Q Now, it contains some other provisions related
14 to the procedure that we are here on today -- does it not?
15 -- on the front page? I'm not going to ask you about
16 those, but it does contain them?

17 A Right. The order addresses some rulings that
18 the Court made on other motions that had been filed after
19 the trial.

20 Q And, in fact, establishes the trial dates of
21 December 11th, 12th and 13th, to hear this evidence.

22 A And here we are.

23 Q Here we are. Okay.

1 But the part of the order that starts at the
2 bottom of the first page and goes over to the second page
3 is the order that implements the January 29th opinion;
4 correct?

5 A Correct.

6 Q And that order was entered when?

7 A May 20, 1996.

8 Q And let's just read to the jury that part of
9 the order: "Further, this Court having previously
10 ruled --"

11 A "Further, this Court having previously ruled
12 in its letter opinion of January 29, 1996, that the
13 Respondents have violated the developer restriction in
14 paragraph seven of the lease between the Petitioner and
15 the Chawlas, and directed that the Respondent shall remove
16 the bank building, or, in the alternative, alter the bank
17 building, it is ordered that within sixty days from March
18 29, 1996, the Respondents shall, with due diligence,
19 prepare and file with the Court a written proposal,
20 including appropriate engineer-prepared drawings, to
21 demolish the bank building or bring its size, shape and
22 structure into conformity with Exhibit D to the lease, as
23 more fully detailed in the Court's written opinion.

1 Thereafter, Petitioner shall file its objections, if any,
2 to the proposals within thirty days from receipt of the
3 proposal by Petitioner, and if the Petitioner should file
4 objections, a hearing shall be held on July 1, 1996, at
5 3:00 o'clock p.m., for resolution of the same."

6 Q Now, pursuant to that order, did the Chawlas
7 indeed file some drawings with the Court?

8 A The Chawlas filed four proposals with the
9 Court.

10 (Whereupon, Mr. Durette handed a document to
11 the Court.)

12 THE CLERK: Plaintiff's 4.

13 MR. DURRETTE: Yes, thank you. For
14 identification.

15 (The document referred to above
16 was marked Plaintiff's Exhibit
17 Number 4, for identification.)

18 MR. DURRETTE: Your Honor, in the interest of
19 brevity, I don't think there is any problem with any of
20 these exhibits. This is a letter from Mr. O'Connell
21 containing the four drawings that were submitted. I'd
22 just move for its admission.

23 THE COURT: Any objection?

1 MR. O'CONNELL: No objection, Your Honor.

2 THE COURT: Plaintiff's 4 will be received.

3 (The document heretofore marked
4 Plaintiff's Exhibit Number 4, for
5 identification, was received in
6 evidence.)

7 BY MR. DURRETTE:

8 Q Now, does this contain the four drawings that
9 were admitted -- or that were submitted?

10 (Whereupon, Mr. Durrette handed a document to
11 the witness for her examination.)

12 A Yes. These are the four proposals that the
13 Chawlas filed with the Court in May.

14 Q And do they all contain a drive-thru?

15 A Yes, they do.

16 Q And did Burgerbusters file objections?

17 A Yes, we did. Burgerbusters objected on
18 several grounds, most predominantly that none of the four
19 proposals removed the drive-thru or restored the four
20 parking spaces that were destroyed when the drive-thru was
21 initially constructed.

22 Q And it was your understanding of the Court
23 order that those parking places were to be restored;

1 correct?

2 A I believe the Court's order was quite clear.

3 Q And was there a hearing on July 1?

4 A Yes, there was. The Chawlas presented
5 evidence concerning each of these proposals. I believe
6 their engineer, Tom Dougher, testified as to what each of
7 them involved. He conceded that none of the proposals
8 deleted the drive-thru or restored the four parking
9 spaces.

10 Thereafter, the Court issued another letter
11 opinion in which it instructed the Chawlas to submit a
12 proposal without a drive-thru and restore the four parking
13 spaces.

14 Q And an order was entered consistent with that
15 letter of opinion; correct?

16 A Yes, there was.

17 MR. DURRETTE: Can we mark this as 5.

18 THE COURT: The Court's letter of July 24 will
19 be 5.

20 (The document referred to above
21 was marked Plaintiff's Exhibit
22 Number 5, for identification.)

23 MR. DURRETTE: And I would just move its

1 admission, Your Honor. It's the letter and the order.

2 THE COURT: All right. Do you have the order,
3 Mr. Durette?

4 MR. DURRETTE: It's attached to the letter.

5 THE COURT: Attached to the letter? All
6 right.

7 Any objection, Mr. O'Connell?

8 MR. O'CONNELL: Just one moment, Your Honor.

9 (Pause.)

10 THE COURT: All right. Plaintiff's 5 will be
11 received.

12 (The document heretofore marked
13 Plaintiff's Exhibit Number 5, for
14 identification, was received in
15 evidence.)

16 BY MR. DURRETTE:

17 Q Ms. Cleary, is that the opinion letter and
18 order that you just referred to?

19 (Whereupon, Mr. Durette handed a document to
20 the witness for her examination.)

21 A Yes. Yes, it is.

22 Q Okay. And the opinion is very brief. Would
23 you just read the opinion.

1 A "On July 1, 1996, the Court conducted a
2 hearing on whether the Respondents can conform his
3 building to the size and shape of the agreed development
4 plan. After considering the evidence and argument of
5 counsel, the Court concludes that the proposals offered in
6 Defendant's Exhibit 1 through 4 do not conform this
7 building.

8 As noted in the Court's letter opinion of
9 January 29, 1996, in terms of size and structure, the
10 Court concludes that the deviation is more than trifling.
11 The structure built is only 43.4 percent of the one
12 promised, and its construction with the drive-thru does
13 not even schematically conform to the structure to be
14 constructed.

15 The Respondent is directed to produce a plan
16 in conformity with the development plan in size and
17 structure, without a drive-thru, in twenty days. If not
18 approved, the Court will order the present structure
19 removed.

20 Ms. Cleary is requested to prepare an order
21 according to this letter to which all counsel may list
22 their exceptions."

23 Q And is the order attached which you prepared?

1 A Yes, it is.

2 Q And were subsequent plans submitted, Ms.
3 Cleary?

4 A Yes. The Chawlas subsequently submitted two
5 more proposals. One contained a drive-up window. The
6 other substantially conformed to Exhibit D and that was
7 the plan that the Court ultimately approved.

8 MR. DURRETTE: Just to complete the story.
9 (Whereupon, Mr. Durette handed a document to
10 the Court.)

11 THE COURT: Six.

12 THE CLERK: Plaintiff's 6.

13 THE COURT: Plaintiff's 6.

14 Any objection?

15 MR. O'CONNELL: No objection.

16 THE COURT: Plaintiff's 6 will be received.

17 MR. DURRETTE: Thank you, sir.

18 (The document referred to above
19 was marked Plaintiff's Exhibit
20 Number 6, for identification, and
21 was received into evidence.)

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BY MR. DURRETTE:

Q I'll show you what's marked as Exhibit 6, Ms. Cleary, and ask if that's what you just referred to.

(Whereupon, Mr. Durette handed a document to the witness for her examination.)

A Yes. This is Mr. O'Connell's August 9 letter submitting to the Court two plans, one with a drive-up window, and one without a drive-up window which deletes the drive-thru and restores the four parking spaces.

Q And that's the second one that's attached?

A That's correct. The first drawing has the drive-up window.

Q And the second one does not?

A That's correct.

Q And it restores the four parking spaces?

A That is correct.

Q And it was approved by the Court?

A Yes, it was.

Q And in representing his clients aggressively and thoroughly, as Mr. O'Connell does, there is a sentence in the bottom paragraph on page two that I'd like you to just read to the jury: "I would be remiss."

A Mr. O'Connell. "I would be remiss if I did

1 not make one last pitch for the plan preferred by the
2 Chawlas, and that is with the drive-up window on the far
3 side of the building as shown. There will be nothing more
4 than a window opening on the side of the building where
5 bank customers could drive up and pass their checks,
6 etcetera, to a bank employee inside. There will be no
7 canopy or pneumatic tube.

8 I hope the Court will take into consideration
9 the history of this case and the fact that an equity,
10 fairness, and a balance between competing interests is a
11 consideration. Suffice it to say that the conformation of
12 this building is going to be expensive, and it's hoped
13 that the Court will see fit to allow the Chawlas at least
14 the chance to retain their present tenant."

15 Q But the Court did not agree?

16 A That's correct. And in late August, I
17 believe, in a hearing, the Court approved the plan without
18 the drive-up window.

19 Q Which is what Burgerbusters wanted?

20 A Absolutely.

21 (Whereupon, Mr. Durette handed a document to
22 the Court.)

23 THE CLERK: Plaintiff's 7.

1 THE COURT: Plaintiff's 7.

2 Any objection?

3 MR. O'CONNELL: No objection.

4 THE COURT: Plaintiff's 7 will be received.

5 (The document referred to above
6 was marked Plaintiff's Exhibit
7 Number 7, for identification, and
8 was received in evidence.)

9 BY MR. DURRETTE:

10 Q Let me show you what's been marked as Exhibit
11 7, Ms. Cleary, and ask you what that is.

12 (Whereupon, Mr. Durette handed a document to
13 the witness for her examination.)

14 A This is an order which embodies the Court's
15 ruling, rejecting the plan with the drive-up window and
16 improving the proposal without the drive-up window.

17 Q And this was as a result of yet another
18 hearing; correct?

19 A It was in conjunction with other motions that
20 were being heard, yes.

21 Q I'd like to show you -- this is kind of bulky.

22 MR. DURRETTE: Your Honor, I'm going to just
23 as the Court, if I might, the Court's guidance and

1 counsel's guidance. I want to put in the Amended
2 Complaint. The package that I have contains the lease as
3 an exhibit. It's kind of bulky. I have no objection to
4 putting it in but I don't have any reason to put it in.
5 But since it's a part of the pleading, I don't feel like I
6 can just arbitrarily remove it.

7 So do you have an objection to my removing it,
8 or do you want it in?

9 MR. O'CONNELL: I don't have any objection to
10 your removing it.

11 MR. DURRETTE: Then I'll do that.

12 THE COURT: Fine.

13 MR. DURRETTE: Can we marked this as -- the
14 Amended Complaint, then, as the next exhibit.

15 THE COURT: Plaintiff's 8.

16 (The document referred to above
17 was marked Plaintiff's Exhibit
18 Number 8, for identification.)

19 THE COURT: Will there be an objection, Mr.
20 O'Connell?

21 MR. O'CONNELL: No objection.

22 THE COURT: Plaintiff's 8 will be received.
23

1 (The document heretofore marked
2 Plaintiff's Exhibit Number 8, for
3 identification, was received into
4 evidence.)

5 BY MR. DURRETTE:

6 Q Let me show you what we've marked as
7 Plaintiff's Exhibit 8, Ms. Cleary.

8 (Whereupon, Mr. Durrette handed a document to
9 the witness for her examination.)

10 That is the Amended Complaint that was filed
11 after the first injunction, temporary injunction hearings
12 in November of '93 that Mr. Sacks talked about; is that
13 right?

14 A That's correct.

15 Q And that is the complaint under which this
16 case has proceeded since it was filed on December 17th,
17 1993; right?

18 A That's correct.

19 Q And the relief that you were seeking in this
20 case you asked for in this complaint, didn't you?

21 A Yes. It's set out, well, on the second-to-
22 the-last page of the complaint.

23 Q And your signature appears on this page --

1 does it not? -- below Burgerbusters?

2 A Yes, it does.

3 Q And you prepared this pleading in conjunction
4 with other lawyers at Faggert and Frieden, did you not?

5 A That's correct.

6 Q This pleading contains what lawyers refer to
7 as a prayer for relief; is that correct?

8 A Or the wherefore clause.

9 Q The wherefore clause.

10 And the wherefore clause says, "Wherefore,
11 Burgerbusters respectfully requests that this Court enter
12 an order."

13 A That's correct.

14 Q And then it sets forth with little Roman
15 numerals what you're asking for.

16 A There were five things Burgerbusters was
17 asking the Court to do.

18 Q Let's go through them one at a time.
19 What is number one?

20 A Number one asked that the Court permanently
21 enjoin the Chawlas from further development and
22 development of the shopping center, other than in
23 accordance with the terms of the lease.

1 Q Did Burgerbusters prevail on item number one?

2 A I believe they did. The Court has ordered the
3 Chawlas to renovate the bank building so that it complies
4 with the drawing on Exhibit D to the lease, to increase
5 its size, to remove the drive-thru, to restore four
6 parking spaces.

7 Q Number two.

8 A Permanently enjoining the Chawlas from further
9 development and construction of the shopping center
10 contrary to the easement.

11 Q Did Burgerbusters prevail on that?

12 A Yes, they did.

13 Q And would you explain that, please.

14 A In the lease as well as in a separate recorded
15 document, the Chawlas granted to Burgerbusters certain
16 easement rights, certain rights across the bounds of the
17 shopping center so that Burgerbusters' customers and its
18 employees could drive through throughout the rest of the
19 shopping center without technically trespassing.

20 That easement also contained language that
21 required that the Chawlas obtain Burgerbusters' consent
22 for any alterations in the bounds of the shopping center.
23 And the Chawlas did not obtain Burgerbusters' consent when

1 they destroyed the four parking spaces that were in front
2 of the bank -- the bank drive-thru.

3 And the Court found that the Chawlas needed to
4 restore those four parking spaces, that they had violated
5 Burgerbusters' rights under that easement.

6 Q All right. Number three.

7 A Permanently enjoining the Chawlas from
8 constructing the bank building.

9 Q Now, we noted that this was filed in December
10 of 1993.

11 At that point in time what were you asking to
12 happen?

13 A Well, at that point in time the bank building
14 wasn't completed and we wanted the Court to stop it before
15 it got any further and got any more expensive to deal with
16 a building that didn't comply with the Chawlas' agreement.

17 Q And is that why you went to court for the
18 temporary injunctions in November and subsequently?

19 A Yes.

20 Q But Mr. O'Connell opposed that and so you
21 didn't get the relief at that time. He successfully
22 opposed that; correct?

23 A That's correct. There were several points at

1 which we asked the Court to stop things. And the Court
2 felt the need to hear evidence on the issue and Mr.
3 O'Connell very artfully argued that the Court needed to
4 hear evidence on that issue. And so, you know,
5 recognizing that it meant that his clients might be faced
6 with renovating or tearing down a building that they had
7 recently constructed, the matters continued until a final
8 resolution.

9 Q So since the building was constructed, what
10 relief could you get under paragraph three?

11 A Well, by that point the only relief that we
12 could get, basically, was the same as under paragraph one:
13 telling the Chawlas to renovate the building so that it
14 complied.

15 Q Number four.

16 A Permanently enjoining the bank from using
17 and/or leasing the bank building in a manner contrary to
18 the lease and to the easement.

19 Q And to what extent did you prevail or
20 Burgerbusters prevail on number four?

21 A Burgerbusters prevailed to a large extent on
22 number four, though, admittedly, not entirely, in that
23 this had two prongs to it.

1 Burgerbusters wanted the bank to not use the
2 drive-thru and, thereby, deprive Burgerbusters of its use
3 of those four parking spaces and, thereby, cause problems
4 with the opposing headlights in the drive-thru and things
5 of that nature. Burgerbusters was not enamored of the
6 idea of having people there legitimately at an ATM at 2:00
7 o'clock in the morning when its folks were leaving with
8 the night deposits, that sort of thing.

9 Burgerbusters also did not feel that the bank
10 was a retail facility and to that extent did not want the
11 bank to be entitled to use that building as a bank. As we
12 previously discussed, the Court did not make a decision on
13 the issue of retail. Neither party won on that point.
14 But Burgerbusters won on the balance of those points.

15 Q The effect of the Court's ruling, however, is
16 to allow the bank, if the bank chooses to stay, after
17 the --

18 A Absolutely. It was definitely Burgerbusters'
19 burden on that point.

20 Q And number five.

21 A Awarding Burgerbusters its damages for breach
22 of contract, trespass and encroachment, together with
23 attorneys' fees and costs expended in this matter and such

1 other further relief as the Court may deem appropriate.

2 Q Number five. As we know from the repeated
3 questioning, you did not get any damages.

4 A No, we didn't.

5 Q And the attorneys' fees and costs is what
6 we're here for now?

7 A That's correct.

8 Q As to the amount of damages that Burgerbusters
9 was seeking, how many expert witnesses testified as to the
10 amount of money that Burgerbusters was seeking?

11 A As I recall, only Lee Garvin testified as to
12 actual numbers.

13 Q Is Burgerbusters claiming a reimbursement for
14 the expense of Mr. Garvin?

15 A Mr. Garvin did not charge Burgerbusters. So,
16 no, Burgerbusters is not looking to recover anything from
17 Dr. Chawla for anything that was paid to Mr. Garvin.

18 Q But the time associated with Mr. Garvin is
19 part of the attorneys' fees bills in this case.

20 A Yes, it is.

21 Q Now, there were other experts in this case,
22 two in particular that I want to ask you about, because of
23 what I anticipate being the testimony from another

1 witness. And that is Mr. Kimball and Mr. Reith.

2 Would you tell the jury what Mr. Kimball's
3 expert opinions related to and Mr. Reith's expert
4 opinions.

5 A Yes, I will.

6 Mr. Kimball was an expert retained to testify
7 concerning the impact of the loss of the parking spaces,
8 the drive-thru, the fact that the bank was not a retail
9 facility in terms of the amount of traffic it would draw
10 to the site, those sorts of items. In his deposition Mr.
11 Kimball did testify to some dollar amounts. At trial,
12 however, his testimony did not -- he was not qualified at
13 trial to testify on that issue and did not offer testimony
14 on that issue, on the issue of a number, an amount. He
15 testified strictly on the importance of Burgerbusters
16 having the things that Mr. Paphites had negotiated in the
17 lease.

18 Mr. Reith's testimony at trial also concerned
19 the impact -- the importance of these factors that
20 Burgerbusters had indicated formed its basis for
21 requesting these things in the lease and for objecting to
22 this construction. Mr. Reith did not either -- I don't
23 believe in his deposition, and I'm certain not at trial,

1 did not testify to a dollar figure.

2 Q Now, would it have been necessary for
3 Burgerbusters to put on the testimony of Messrs. Kimball
4 and Reith, with or without a damage claim?

5 A Yes.

6 Q For the reasons that you've stated?

7 A Exactly. As I said, their evidence was --
8 went to support the injunction that Burgerbusters sought.

9 MR. DURRETTE: Your Honor, this is our next
10 exhibit.

11 THE CLERK: Plaintiff's 9.

12 (The documents referred to above
13 were marked Plaintiff's Exhibit
14 Number 9, for identification.)

15 THE COURT: It's marked as Plaintiff's 9.

16 BY MR. DURRETTE:

17 Q Ms. Cleary, this has been marked as
18 Plaintiff's Exhibit 9, for identification.

19 (Whereupon, Mr. Durette handed the witness a
20 binder of documents for her examination.)

21 Can you tell the Court and the jury what that
22 is.

23 A This is a compilation of the attorneys'

1 billing statements and service provider bills incurred by
2 Burgerbusters in its efforts to enforce its rights and
3 remedies under the terms of the lease.

4 Q Was it prepared under your supervision and
5 with your involvement?

6 A Yes, it was.

7 Q And who worked on it besides you?

8 A Predominantly my paralegal, Ann Miller. Mr.
9 Lawrence also had some participation in it. Mr. Pearson
10 participated in it with respect to his particular bills.
11 And Burgerbusters, obviously, participated in terms of
12 costs that it paid directly.

13 Q From all the information that you collected
14 from the law firms and the service providers in this case,
15 do you believe Exhibit 9 to be an accurate reflection of
16 the fees, costs and expenses that Burgerbusters is
17 claiming in this case?

18 A Yes, I do.



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MR. O'CONNELL: Yes.

THE COURT: All right. Ms. Cleary, we'll ask you to wait in the witness room, please. We'll take up a legal matter and call you back shortly.

(Whereupon, the witness retired from the courtroom.)

MR. O'CONNELL: Your Honor, do you have your copy of Hensley versus Eckerhart?

THE COURT: I can get that copy. I'll ask Deputy Heidt to pass over the Exhibit.

1 (The Bailiff complied with the Court's
2 request.)

3 THE COURT: All right, sir.

4 MR. DURRETTE: Do you have a copy of Hensley?
5 That was what --

6 THE COURT: I have a copy of, yes, the Supreme
7 Court opinion. Hensley versus Eckerhart, 461 U.S. 424,
8 and decided by that court in 1983.

9 MR. O'CONNELL: Your Honor, the pretrial order





and should maintain billing time records in a matter that will enable the reviewing court to identify distinct claims."

Again, Your Honor, there is nothing in this bold statement of \$25,000 that has any relevance to, or any right, reasonable right, for these people to claim the security guards in this case. There is no breakdown between when the guards were doing crowd control and when they were supposedly enforcing the rights of the partners.

Now, that's specifically my objection with regard to Blue Ridge Security.

With regard to the entire fee application, I would submit, Your Honor, that you don't have evidence before you that is sufficient to satisfy the requirements of Hensley versus Eckerhart. It said the most useful starting point for determining the amount of reasonable fees is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.

There's no evidence of that that's been

1 presented by the Petitioner underlying this particular
2 case. They talked about the hours they did spend. They
3 said they thought it was necessary. But there's no
4 evidence from any outside source that gives any reasonable
5 level from which the Court could make an underlying
6 judgement, even prima facie, as to the right for these
7 parties to bring this application within the ambit of this
8 case which we all agreed upon.

9 It says, "The party seeking an award of fees
10 should submit evidence supporting the hours worked and
11 rates claimed. Where the documentation of hours is
12 inadequate, the district court may reduce the award
13 accordingly."

14 Your Honor, there are over 1,600 entries in
15 this fee application which describe no task whatsoever.
16 And you can thumb through it and see. It talks about a
17 phone conference; it talks about a meeting date; but it
18 doesn't say what the parties did. That is not reasonable.

19 All the lawyers who testified here before
20 said, "Well, we don't know what we did but we assume that
21 what we did is related to some of the surrounding
22 entries," and so on.

23 But this is a higher standard. It's okay if

1 you want to pay your own lawyer and you're satisfied with
2 improper documentation. But as you go through this bill,
3 there are literally thousands and thousands of dollars,
4 and hundreds of entries, that don't describe at all what
5 was done.

6 That's objection number two.

7 The next objection I have, Your Honor, is that
8 the whole gist of Hensley is to be able to separate out
9 and provide a standard for reimbursement when you're
10 making a third party pay the fees for only those fees on
11 which the party has succeeded. And that is -- the rules
12 set forth in Hensley are both quantitative and
13 qualitative. And it says, "The product of reasonable
14 hours times a reasonable rate" -- and I submit, with this
15 fee application, we haven't even reached that point yet.

16 But Hensley says, "There remain other
17 considerations that may lead the district court to adjust
18 the fee upward or downward, including the important factor
19 of the results obtained. This factor is particularly
20 crucial where a plaintiff is deemed prevailing even though
21 he succeeded on only some of his claims for relief. In
22 this situation two questions must be addressed. First,
23 did the plaintiff fail to prevail on claims that were

1 unrelated to the claims on which he succeeded?"

2 There's been no evidence of that. They didn't
3 have anybody testify on the relationship between these two
4 claims. All they've testified to is what they did.

5 "Second, did the plaintiff achieve a level of
6 success that makes the hours reasonably expended a
7 satisfactory basis for a fee award?"

8 There's been no evidence on that. All they
9 did was testify as to what they did and what they thought
10 the relief that they got. There are candid admissions
11 that there are a number of points upon which they did not
12 succeed, but this bill doesn't bring any of that out.

13 There is absolutely no way that you can look
14 at this fee application and make the kind of
15 determinations that the court in Hensley requires a
16 district court to make in order to determine the
17 reasonableness of a fee application.

18 "In some cases a plaintiff may present in one
19 lawsuit distinctly different claims for relief that are
20 based on different facts and legal theories. In such a
21 suit, even where the claims are brought against the same
22 defendants -- often an institution and its officers, as in
23 this case -- counsel's work on one claim will be unrelated

1 to his work on another claim. Accordingly, work on an
2 unsuccessful claim cannot be deemed to have been expended
3 in pursuit of the ultimate result achieved."

4 There's no evidence on that, Judge. You know,
5 this is the case that everybody agreed was going to govern
6 this fee application. We've gone through a day and a half
7 of hearings and comments by lawyers, and there is no way
8 that you can apply the rules in Hensley, even at prima
9 facie, and make the determinations the Supreme Court says
10 a district court has got to make.

11 "The congressional intent to limit awards to
12 prevailing parties requires that these unrelated claims be
13 treated as if the had been raised in separate lawsuits."

14 There is no breakdown anywhere in all of these
15 pages -- three, four hundred pages -- of the work that was
16 done on the question of bank versus retail, the work that
17 was done on the question of the parking lot damages, the
18 work that was done on the question of whether or not the
19 bank, as built, conformed to Exhibit D on the lease.
20 There isn't one single entry or break-out or summary. All
21 the summary provides is a summary by service provider, not
22 the kind of summary that's required by Hensley versus
23 Eckerhart.

1 It says, "And therefore no fee may be awarded
2 on the unsuccessful claim."

3 There is no way that this bill on its face,
4 prima facie, can tell this Court what needs to be deducted
5 for the time that was spent on the bank versus retail,
6 upon which they did not succeed; on the question of
7 damages, upon which they did not succeed.

8 And then finally it says, a "district court
9 should focus on the significance of the overall relief
10 obtained by the plaintiff in relation to the hours
11 reasonably expended on the litigation."

12 You can't even get to that point, Judge,
13 because you can't determine, based on the different levels
14 of relief that were obtained, you can't even make a
15 determination as to what hours were reasonably expended on
16 the portion of the litigation upon which they succeeded.

17 This is just a flat -- this is just throwing
18 all of their fees on the table and expecting the Court to
19 sort it out. But you don't have to do that, and that's
20 what Hensley says. They've got to present this
21 application to you in a form that will allow you to make
22 these determination, because that's what we're going to be
23 asking the jury to do. How's the jury going to make these

1 determinations when this fee application is in this form?

2 At Page 436 they say, "If, on the other hand,
3 a plaintiff has achieved only partial or limited success,
4 the product of hours reasonably expended on the litigation
5 as a whole times a reasonable hourly rate may be an
6 excessive amount."

7 Well, certainly, prima facie, you can
8 determine that right off the bat because they have
9 admitted that there were portions of this claim upon which
10 they were successful, but they have provided no basis for
11 you or a jury or anyone else to make any kind of
12 reasonable determination as to how to break that down and
13 how to make those deductions.

14 It says, "This will be true even where the
15 plaintiff's claims were interrelated, non-frivolous, and
16 raised in good faith. Congress has not authorized an
17 award of fees whenever it was reasonable for a plaintiff
18 to bring a lawsuit or whenever conscientious counsel tried
19 the case with devotion and skill. Again, the most
20 critical factor is the degree of success obtained."

21 There is no way at this stage, looking at this
22 document, to make the proper -- that the Court has any
23 basis to make the proper deductions for portions of this

1 case that were unsuccessful.

2 It says, finally, Your Honor, "A request for
3 attorney's fees should not result in a second major
4 litigation. Ideally, of course -- where settlement is not
5 possible, the fee applicant bears the burden of
6 establishing entitlement to an award and documenting the
7 appropriate hours expended and hourly rates. The
8 applicant should exercise billing judgment with respect to
9 the hours worked and should maintain billing records in a
10 manner that will enable a reviewing court to identify
11 distinct claims."

12 You simply don't have that here, Judge, and





The Blue Ridge Security, let me just say that our position on that is that it's an expense -- including attorneys' fees does not restrict the entitlement. The entitlement under this paragraph is a broader one. And it is an expense incurred by a tenant in exercising their rights or remedies, or in enforcing any of the terms, conditions, or provisions.

THE COURT: Let me say, we can maybe focus the argument on the security firm's fee, albeit, if I were to interject -- I had sent Ms. Mitchell out to see if she could get my letter opinion of June 12, 1996, simply





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7 because I want to hear all the evidence. So I'm not
8 inclined to evaluate. But I will tell you that I don't
9 consider Hensley as a binding authority beyond the manner
10 in which we've adopted it for this case.

11 MR. O'CONNELL: Well --

12 THE COURT: It may be persuasive for argument
13 on instructions, just as the Dot case out of Alabama.

14 MR. O'CONNELL: Well, Your Honor, certainly
15 with your letter about the Aiani versus Kmonk case, and
16 attaching that, you certainly emphasized the importance
17 of the result --

18 THE COURT: In that case I made the -- as
19 trier of fact. I was sitting as trier of fact, not on the
20 law issue. I made a judgment that that factor, as a trier
21 of fact, would drive my opinion. But I was sitting as
22 they are. I had two functions in that case. I was trier
23 of fact. I simply explained to them so that they would

1 understand the fact that persuaded me.

2 But in this case, they are the fact and I am
3 sitting as the trier of legal issues.

4 MR. DURRETTE: Your Honor, may I make an
5 observation?

6 THE COURT: Yes.

7 MR. DURRETTE: I believe that ultimately the
8 argument over the extent to which Hensley applies is one
9 that more appropriately would address jury instructions or
10 any motions at the conclusion of the evidence. But
11 because we still have witnesses to be heard and we still
12 have the jury, I would suggest that -- and I think maybe
13 this is where the Court was going -- that this particular
14 objection is disposed of by the order. And that's what I
15 meant when I said I wasn't going to argue very much.

16 The order says the petitioner may offer its
17 authenticated claim for fee costs and expenses incurred by
18 it to establish its prima facie entitlement to recover.





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7 meet the Hensley criteria. And I'm saying that I don't
8 believe that our order requires that. And even though one
9 can arguably go to Hensley and talk about admissibility or
10 nonadmissibility -- I'm not even sure Hensley says that
11 altogether.

12 I'm just telling you that Hensley does not
13 bind the Court on anything other than how we have adapted
14 it through this pretrial order, that you people agreed to
15 Hensley. I went along with it. I said, "If that's what
16 your agreement is, I will try this case on the Hensley
17 factors." And that's what the order says. And it also
18 tell us the order of proof. And those are the only things
19 that came out of Hensley in this case.

20 MR. O'CONNELL: Your Honor, the footnote in
21 Hensley states out the factors. The factors are
22 meaningless unless you read the interpretation of those
23 factors as granted by Hensley.

1 THE COURT: Well, then that's for the trier of
2 fact, Mr. O'Connell.

3 MR. O'CONNELL: But then they've got to be
4 instructed on it.

5 THE COURT: Well, I'll deal with that at
6 instructions. We'll --

7 MR. O'CONNELL: I mean, I --

8 THE COURT: You see, what we've got at the
9 instruction level in this case is a question, again, of
10 whether we've covered the field, whether we've plugged in
11 the mosaic. Maybe this order doesn't cover the field.
12 I'll hear you on instructions.

13 But I think the exhibit is admissible. It has
14 some probative value and should be admitted. But you need
15 you reserve your objection because this is one of the
16 appellate issues that the Supreme Court will be
17 addressing.

18 (The document heretofore marked
19 Plaintiff's Exhibit Number 9, for
20 identification, was received in
21 evidence.)

22 MR. O'CONNELL: I do want to dictate my
23 exception.

1 THE COURT: Certainly. Well, please, confine
2 them to what you have on the record. I got reversed one
3 time because I allowed someone to supplement their
4 objections and they didn't raise the same things on the
5 record to the court that they raised to me. And you
6 wouldn't do that, I know, but there are lawyers who would
7 do that.



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MR. DURRETTE: Your Honor, may I take the blue book back to the witness?

(Whereupon, Mr. Durette retrieved the exhibit from the Court and handed it to the witness.)

(Whereupon, at approximately 12:35 o'clock p.m., the jury returned to the courtroom and resumed their seats in the jury box.)

MR. O'CONNELL: Ready, Your Honor?

THE COURT: Yes. Please, proceed, Mr. Durette.

Continued direct examination of Ms. Cleary.

1 Whereupon,

2 ANNEMARIE DINARDO CLEARY

3 a witness, was called for examination by counsel on behalf
4 of the Plaintiff, and, after having previously been duly
5 sworn by the Clerk of the Court, was examined and
6 testified further, as follows:

7 DIRECT EXAMINATION

8 BY MR. DURRETTE:

9 Q The blue book that you've got in front of you
10 which has now been admitted by the Court as Exhibit 9, I'd
11 like you to look at it. And I think we want to describe
12 it a little bit for the jury so that they'll kind of know
13 what to look for when they go in.

14 A Okay.

15 Q The first three pages constitute a single
16 continuation summary, do they not?

17 A Yes, they do.

18 Q Would you just describe for the jury what
19 they'll see when they look at the summary.

20 A This is a document entitled Exhibit A to
21 Petitioner's Application for an Award of Attorneys' Fees
22 and Costs and this breaks down, by law firm and provider,
23 the attorneys' fees and costs incurred by Burgerbusters in

1 pursuing its rights and remedies under its lease.

2 Q Okay.

3 Now, the fees for Faggert and Frieden and for
4 Pearson and Pearson are broken down into two categories,
5 the injunction suit and the fence suit.

6 A That's correct.

7 Q What is the fence suit?

8 A I think we've previously explained to the jury
9 that one of Burgerbusters' concerns with the bank drive-
10 thru was the opposing headlights. And as the cars coming
11 into Burgerbusters' drive-thru and the cars coming in the
12 opposite direction would come through the bank drive-thru,
13 the headlights would oppose and could interfere.

14 And, so, in order to remedy that situation,
15 once it became apparent that the construction of the bank
16 building and its operation was going to go forward until
17 this matter was concluded, Burgerbusters determined that
18 it was necessary to take some steps. More to the point,
19 Burgerbusters' franchisor directed Burgerbusters to erect
20 a fence between the bank property and Burgerbusters'
21 property. That fence was constructed with a weave through
22 it to cut down on the glare that would come from opposing
23 headlights.

1 Burgerbusters attempted to obtain a permit as
2 required by Warrenton town ordinances for the erection of
3 this fence. The Town declined to award or grant this
4 petition on the grounds that Burgerbusters was not the
5 owner of the property or its authorized agent.
6 Burgerbusters, of course, believed that it was the owner's
7 authorized agent under the terms of its lease.
8 Nonetheless, when they requested that the Chawlas
9 cooperate so that they could erect this fence, the Chawlas
10 declined to do so.

11 There came a point where Burgerbusters was
12 faced with a directive from its franchisor to erect this
13 fence, the problems inherent in the opposing drive-thrus,
14 and its inability to get a permit, and, frankly,
15 Burgerbusters put up a fence without a permit.

16 Immediately the Town filed suit asking the
17 Court to direct Burgerbusters to take the fence down.
18 That suit was ultimately settled and the fence was taken
19 down.

20 Sometime after that Burgerbusters applied
21 again for a permit and, on appeal to the Board of Zoning
22 Appeals, became aware that the Town would grant a permit
23 to a tenant, and had done so over the years in a number of

1 other cases, upon the submission of an affidavit or a
2 statement from the tenant that it was the authorized
3 agent. Burgerbusters submitted that statement and the
4 permit was granted and Burgerbusters erected the same
5 fence again.

6 And that litigation with the Town and all of
7 the surrounding disputes in obtaining the permit
8 ultimately to put that fence up between the bank and the
9 restaurant is what is encompassed there.

10 Q And it's the legal fees that are itemized
11 under the two law firms, Pearson and Pearson, locally
12 here, and Faggert and Frieden?

13 A That's correct.

14 Q And is this the fence (indicating) that we're
15 talking about?

16 A Yes, it is.

17 Q And that was necessitated or that was done by
18 Burgerbusters, I believe you said, because the franchisor
19 required it?

20 A Yes.

21 Q And that was because of the drive-thru.

22 A Correct.

23 Q Now, the second page of --

1 A Excuse me. I should point out, because of the
2 drive-thru in the general sense, but, specifically, the
3 headlights. It also provided the added benefit of
4 providing a barrier there between the ATM and the
5 restaurant when folks came out for the night deposit and
6 that sort of thing. It addressed the safety issue, too.

7 Q The next page, the second page of this first
8 three-page document. At the top of the page it's expenses
9 paid directly by Burgerbusters, Inc.?

10 A Yes, sir.

11 Q And they are itemized things like court
12 reporters, expert witnesses, etcetera.

13 A That's correct.

14 Q And then on the third page everything is
15 totalled; is that correct?

16 A That is correct.

17 Q And then there is an entry of estimate for
18 future fees.

19 A That's correct.

20 Q And that's how much?

21 A \$25,000.

22 Q And would you tell the Judge and the jury,
23 please, what assumptions went into that estimate.

1 A Well, the total that appears right above the
2 \$25,000 is for fees and costs incurred through October 31,
3 1996. The \$25,000 is for fees and costs that
4 Burgerbusters anticipates it would incur after October 31
5 through the completion of this matter.

6 I should point out that it assumes that the
7 Chawlas' currently pending petition for appeal and any
8 subsequent appeals do not proceed any further. It also
9 assumes that the renovation of the bank building goes
10 smoothly. There's a construction schedule set out and
11 it's in effect now. And it assumes that we don't need to
12 come up here on any further disputes or discrepancies with
13 respect to the implementation of that order.

14 So this is predominantly to address this
15 trial, what we've got here today. And I would estimate,
16 based on the work I've seen put into this and the length
17 of time we've been here, that we'll meet or exceed that.

18 Q That's all the first three pages; right?

19 A That's correct.

20 Q And then we have a -- just to avoid any
21 confusion. This is styled Exhibit A, Petitioner's
22 Application for an Award of Attorneys' Fees and Costs, the
23 document we were just discussing?

1 A That's correct.

2 Q Can you just tell the jury why that label is
3 on it.

4 A When this whole process started with respect
5 to attorneys' fees, Burgerbusters filed a pleading
6 entitled Fee Application and it set forth its requests and
7 had a wherefore clause at the end and we asked for this
8 relief, and attached as exhibits this breakdown of fees
9 and costs and attached the bills which were designated as
10 Exhibit B.

11 Q Now, the next document then is a sixteen-page
12 document titled Exhibit 1?

13 A That's correct.

14 Q Do you want to tell the jury what this is,
15 please.

16 A Exhibit 1 is an exhibit to the interrogatory
17 response that we provided to the Chawlas. They asked
18 questions about the bills and we created this chart in
19 response. And that's why it's not sequential with the
20 Exhibit A. This is a chart of items that were deducted
21 from the bills, things for which Burgerbusters is not
22 seeking to be reimbursed at this time.

23 You'll see on the Topic column, designation

1 paving suit and designation car damage cases. There is
2 another dispute between the parties concerning the paving
3 of the parking lot and other matters like that. And that
4 suit is no longer pending. There is also some suits filed
5 by Burgerbuster employees whose cars were damaged while
6 the bank was being constructed. Those are not a part of
7 this claim.

8 Q So are these itemized from the invoices that
9 then follow and deducted from the fees that Faggert and
10 Frieden is claiming?

11 A That's correct. If you look through some of
12 the bills that follow, you'll see some strike-outs, lines
13 drawn through text. And those are the things that there
14 should be a corresponding entry on this Exhibit 1 for
15 anything that is struck.

16 Q So when the jury gets this exhibit, for
17 example, just taking the top entry. It says 1/18/94; AMF
18 is Alan Frieden; amount of deduction .1; topic - paving
19 suit; text - office conference with SJS.

20 They should be able to go to the invoice that
21 follows later in this book and verify that that, in fact,
22 happened if they want to. Is that accurate?

23 A That's correct.

1 Q Those are the two separate exhibits, if you
2 will, that appear at the front of the blue book; is that
3 right?

4 A That's true.

5 Q And the rest of the blue book is this
6 (indicating) big thing. Do you want to tell them what the
7 rest of the blue book is.

8 A The rest of the book is broken down with tabs
9 that correspond to the sections on the Exhibit A. The
10 first set is Faggert and Frieden which are bills rendered
11 by Faggert and Frieden to Burgerbusters and they are
12 broken down by month.

13 Q Are these bills rendered monthly?

14 A Yes, they were.

15 The next section is a bill rendered by Howell,
16 Daugherty, Brown & Lawrence, which was Mr. Lawrence's firm
17 before he joined Faggert and Frieden.

18 The next section is bills from Pearson and
19 Pearson, Gary Pearson, local counsel here. His bills
20 which were rendered to Burgerbusters.

21 And the final section is for expenses paid
22 directly by Burgerbusters. And those are broken out:
23 court reporters and private process servers, expert fees,

1 those sorts of things.

2 Q Now, I'd like you to look at the first invoice
3 from Howell-Daugherty, Mr. Lawrence's firm.

4 A Okay.

5 Q And I believe you testified earlier, but I
6 know Mr. Sacks testified that he left Faggert and Frieden
7 around late March or early April of 1995?

8 A That's correct.

9 Q Would you just tell the jury the date of the
10 first billing entry for Mr. Lawrence at his old firm.

11 A Mr. Lawrence first billed Burgerbusters on
12 March -- for time on March 20, 1995. In other words,
13 he --

14 Q And -- excuse me.

15 A I'm sorry.

16 He first charged them for his efforts on that
17 day.

18 Q And are you aware of the fact that he had been
19 involved or had been consulted for some number of months
20 prior to that time?

21 A Oh, absolutely.

22 Q Just briefly, because Mr. Sacks touched on
23 this when he was describing how he kept his time, would

1 you just briefly tell the jury how the bills are generated
2 at Faggert and Frieden, what you do, what Mr. Lawrence
3 does, and how it results in a bill that then goes out to
4 Burgerbusters.

5 A Sure.

6 Each evening or sometimes the following
7 morning, I prepare a timesheet. I make notes during the
8 day of files I've worked on and create a -- my timesheet
9 would have a file name and number, the tasks I performed,
10 and the amount of time it took me to perform those tasks.

11 Q Do you write that out?

12 A I write that by hand.

13 Q And some lawyers dictate that, don't they?

14 A Mr. Lawrence dictates his.

15 Q But they do the same thing, in effect.

16 A Exactly.

17 Q And then what happens?

18 A I hand that sheet to my secretary and she
19 types it directly into our computer billing system. That
20 entry, along with -- say, Mr. Lawrence worked on the same
21 file on something else that day. Put that in there.

22 At the end of the month, to be more exact, a
23 couple of days after the end of the month, computer

1 reports are generated, bills are created or, actually,
2 they're called WIPs, Work In Progress. The attorney
3 responsible for that particular client receives the bill
4 and reviews it, often will have the attorneys who do most
5 of the work on it review it, ensure that it's in order.

6 The bill is put in final form and it's
7 forwarded to the client.

8 Q Did that occur with respect to Burgerbusters
9 in this case by Faggert and Frieden?

10 A Yes, it did.

11 Q What's in all those boxes (indicating)?

12 A That's our file for this case. Over the three
13 years since this case started -- I believe it was
14 September or October of '93 -- that is what has resulted.
15 Research that we've had to conduct to respond to the
16 Chawlas' claims and defenses, correspondence that's been
17 generated, pleadings that have been generated and filed
18 with the court.

19 Q How many approximately?

20 A I think we're well over three hundred in terms
21 of pleadings. I don't recall the exact number.

22 Transcripts from hearings, deposition
23 transcripts, things of that nature.

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I should explain to the jury, in Virginia there's not an appeal of right. You have to ask the court for a writ. And so if this goes further --

Q You'd better tell them what a writ is.

A A writ, it says, "Come on up and we'll hear what you've got to argue about."

It could conceivably stop here. It could go on. The Virginia Supreme Court could say, "We want to hear you, Dr. and Mrs. Chawla, on your concerns regarding

1 the rulings of the court." At that point a whole other
2 round of briefs are filed and then the parties go and
3 argue to the Supreme Court and then the Supreme Court
4 makes a decision.

5 Q And as we sit here today, we don't know
6 whether their going to make a decision to take the appeal
7 or not take the appeal.

8 A That's right. We don't know that.

9 MR. DURRETTE: That's it, Your Honor. Thank
10 you.

11 THE COURT: Thank you.

12 Cross-examination, Mr. O'Connell.

13 MR. O'CONNELL: Do you have the two exhibits,
14 the July 24th, 1996, letter --

15 MR. DURRETTE: She may have them all.

16 THE CLERK: July 24?

17 MR. O'CONNELL: The order, the October 3rd,
18 '96, order.

19 (Whereupon, Mr. O'Connell retrieved documents
20 from the Court.)

21 CROSS-EXAMINATION

22 BY MR. O'CONNELL:

23 Q I show you Plaintiff's 5 and 7.

1 (Whereupon, Mr. O'Connell handed a document to
2 the witness for her examination.)

3 Your counsel asked you about these orders, the
4 letter opinion and the order. And I ask you to look at
5 the October 24, 1996, letter and read the second-to-the-
6 last paragraph.

7 A I'm sorry, Mr. O'Connell. You said October
8 24.

9 Did you mean July 24?

10 Q I'm sorry. July 24.

11 A Okay. I just want to make sure we're on the
12 same page.

13 I'm sorry. Which do you want me to read?

14 Q Read the second-to-the-last paragraph.

15 A The one that begins "The Respondent"?

16 Q Yes.

17 A The Respondent is directed to produce a plan
18 in conformity with the development plan in size and
19 structure without a drive-thru in twenty days. If not
20 approved, the Court will order the present structure
21 removed.

22 Q Now, that does not include a specific order
23 that Dr. Chawla replace the four parking spaces, does it?

1 A Those words do not appear there, no.

2 Q Now turn to the order dated October 3rd, 1994.
3 It was entered October 3rd, 1994.

4 Would you read paragraph two, please.

5 A The proposal without the drive-up window, a
6 copy of which is filed herein as Exhibit A, is approved.

7 Q And that does not contain a specific direction
8 to Dr. Chawla to replace the four parking spaces, does it?

9 A The words don't appear there, Mr. O'Connell.
10 But at the hearing at which the Court rendered this
11 ruling, the Court specifically directed me, when he
12 indicated that he was inclined to approve this plan, to
13 obtain from you a full-sized copy of this and confirm that
14 all of the parking spaces that were on Exhibit D were, in
15 fact, there.

16 Q But that's not in this order, is it?

17 A No. No.

18 Q There's no specific direction in this order
19 for Dr. Chawla to put the four parking spaces back, is
20 there?

21 A In this order there are no words concerning
22 four parking spaces.

23 MR. O'CONNELL: Thank you.

1 (Whereupon, Mr. O'Connell handed the documents
2 back to the Court.)

3 BY MR. O'CONNELL:

4 Q Now, your counsel has reviewed with you
5 Exhibit 9, I believe it is, which is the big book that you
6 have there. He has reviewed and discussed the fact that
7 Burgerbusters didn't get any monetary damages for loss of
8 those four parking spaces.

9 Do you recall that testimony?

10 A Yes.

11 Q In the Exhibit 9, which you have there, can
12 you show what part of that application was time spent
13 attempting to get those money damages from Dr. Chawla?

14 A No, I can't.

15 Q Your counsel also asked you about the fact
16 that the objection to the bank as not being retail was a
17 point upon which you were not successful.

18 Do you recall that?

19 A Yes.

20 Q Is there any way that the jury -- are any
21 notations in any those records that will allow the jury to
22 recognize the work that you did or the other law firms did
23 and that you're charging for that is attributable to that

1 issue?

2 A No.

3 Q If you would, please, turn to Exhibit 9.

4 And the first set of bills, I believe, are
5 January 13, 1994?

6 A Yes.

7 Q On the entry that's dated 1/10 1993 there is
8 initial AMF.

9 A Yes.

10 Q Who is that?

11 A Alan Frieden.

12 Q It lists three-tenths of an hour. Office
13 conference with SJS. Telephone call with Mr. Paphites.

14 A That's correct.

15 Q You don't describe what those telephone calls
16 or office conferences were about, do you?

17 A I didn't make the time entries so I wouldn't
18 have done it in any event. But, no, Mr. Frieden did not
19 indicate what those were about.

20 Q There's nothing in Exhibit 9 which would tell
21 the jury what was being discussed or conferenced for that
22 entry, is there?

23 A I'm not sure that's entirely correct to the

1 extent that they might be able to glean -- I know that I
2 would be able to glean from the surrounding time entries
3 what was going on in the case at that time. And that
4 might indicate what was being discussed. But with respect
5 to that particular office conference, there's nothing that
6 follows that entry that says, "Office conference with SJS
7 regarding." No, that's not there.

8 Q You chose to charge Burgerbusters for three-
9 tenths of an hour for an office conference with SJS and a
10 telephone call with Mr. Paphites and you didn't state what
11 they were about, isn't that true?

12 A I would assume Mr. Paphites would know what
13 that telephone conference was about since he was a party
14 to it.

15 Q Do you know sitting here or is there any way
16 the jury can determine from looking at this entry what the
17 office conference with SJS was about?

18 A It is not reflected in this entry, no.

19 Q Turn the page over. There's another entry,
20 12/2/93.

21 A I'm sorry. Which date?

22 Q Page 2. There's an entry 12/2/93.

23 A Yes.

1 Q It's AMF. Is that Mr. Frieden again?

2 A Yes, it is.

3 Q Three-tenths of an hour. Telephone call with
4 Mr. Paphites.

5 No record of what that's about, is there?

6 A Not there in that entry, no.

7 Q Turning over to page 3. 12/13/93. The entry
8 12/13/93.

9 AMF. That's Alan M. Frieden?

10 A Yes.

11 Q That's seven-tenths of an hour. Office
12 conference with SJS. Revision of letter to Mrs. Munro.
13 Telephone call with Mr. Paphites.

14 No indication there of what any of that was
15 about, is there?

16 A No indication in that particular entry, no.

17 Q That's what I'm asking you.

18 Turn to the March 11, 1994, bill on page 4.
19 The entry 2/9/94. AMF, seven-tenths of an hour.
20 Telephone call to Mr. Paphites. Office conference with
21 SJS.

22 There's no indication there about what those
23 calls are about or what those conferences are about, is

1 there?

2 A Not in that entry, no.

3 Q Let's go to May 13, 1994, on page 5.

4 Did you find it?

5 A Yes.

6 Q The entry 4/12/94. AMF. That's Mr. Frieden
7 again?

8 A Yes.

9 Q Seven-tenths of an hour. Telephone calls with
10 SJS.

11 No record there of what that was about, is
12 there?

13 A Not in that entry, no.

14 Q And below it, 4/13/94. AMF, two-tenths of an
15 hour. Telephone call to SJS.

16 No record there of what that call was about,
17 is there?

18 A No, not in that entry.

19 Q Let's go to the June 10, 1994, bill. 5/23/94.

20 AMF --

21 A Just a minute.

22 (Pause.)

23 May 23?

1 Q May 23.

2 A Okay.

3 Q The bill is dated June 10th. Page 5. The
4 entry is 5/23/94.

5 A Right.

6 Q One hour. Telephone call with the manager of
7 the Warrenton restaurant. Telephone calls with Mr.
8 Paphites. Telephone call with Mr. Ocell. Telephone calls
9 with Mr. Pearson.

10 No indication there as to what those calls
11 were about, is there?

12 A No, there's no indication in that entry.

13 Q Let's go to the August 12, 1994, bill. The
14 entry of 7/5/94. AMF again.

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1 No indication here of what those conferences
2 or calls were about, is there?

3 A No, not in that entry.

4 Q Just below that, 8/8/94. AMF, four-tenths of
5 an hour. Telephone calls with Mr. Paphites. Telephones
6 call with Mr. Pearson.

7 No indication there as to what that was about,
8 is there?

9 A No, not in that entry.

10 Q Let's go to the October 1994 bill. September
11 14, 1994.

12 A Okay.

13 Q 9/19/94. AMF, one and a half hour. Telephone
14 call with Mr. Paphites. Office conferences with SJS and
15 ADC.

16 No indication there of what those calls or
17 conferences were about, is there?

18 A Just a minute. I'm reading the surrounding
19 entries.

20 Q No. I'm not asking you about the surrounding
21 entries. I'm asking you about this entry.

22 Is there any indication in this entry as to
23 what those calls or conferences were about?

1 A Oh, no, not in that entry.

2 Q All right.

3 Let's go to the October 26, 1994, bill.

4 Page 8.

5 MR. DURRETTE: I'm sorry, Dan. I didn't hear
6 that.

7 MR. O'CONNELL: I'm sorry. The October 26th,
8 1994, bill. Page 8.

9 BY MR. O'CONNELL:

10 Q September 21, 1994. AMF, three-tenths of an
11 hour. Telephone calls with Mr. Paphites. Office
12 conferences with SJS.

13 No indication there as to what those calls or
14 conferences were about, is there?

15 A No, not in that particular entry.

16 Q Let's go to the January 16, 1995, bill.

17 A Okay.

18 Q December 1, 1994. AMF, again, half an hour.

19

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21

22 conferences were about, is there?

23 A Not in that entry, no.

1 Q Let's go to the March 10, 1995, bill. Page 6.

2 A I'm there.

3 Q At the bottom, the entry 2/17/95. AMF, three-
4 tenths of an hour. Office conference with ADC. Telephone
5 call with Mr. Paphites.

6 No indication there of what those calls or
7 conferences is about, is there?

8 A Not in that particular entry.

9 Q Let's go to the April 17, 1995, bill. Page 2.

10 MR. DURRETTE: I'm sorry. That one again?

11 MR. O'CONNELL: April 17, 1995. Page 2.

12 BY MR. O'CONNELL:

13 Q March 3, 1995. AMF, nine-tenths of an hour.
14 Office conference with Mr. Lawrence. Office conference
15 with ADC. Office conference with JAB. Telephone call
16 with Mr. Garvin.

17 No indication there as to what the subject
18 matter of those calls or conferences is, is there?

19 A No, not in that entry.

20 Q Okay. Let's go to the June 15, 1995, bill.
21 Page 2.

22 A Okay.

23 Q May 9, 1995. AMF, again, 3.6 hours. Office

1 conference with Mr. Lawrence and ADC. Luncheon conference
2 with Mr. Lawrence, ADC, Mr. Paphites, Mr. Bill Dragas, and
3 Mr. Achilleos.

4 No indication there as to what that conference
5 was about, is there?

6 A No, not in that entry.

7 Q Let's go to the July 21, 1995, bill. Page 2.
8 6/26/95.

9 MR. O'CONNELL: Did you get it?

10 MR. DURRETTE: I'm getting there. Okay.

11 BY MR. O'CONNELL:

12 Q AMF, again, seven-tenths of an hour.
13 Telephone calls with Mr. Garvin. Telephone call with Mr.
14 Lawrence and ADC.

15 No notation there as to what those calls were
16 about, is there?

17 A No, not in that entry.

18 Q Let's go to September 18, 1995. 8/9/95 entry.

19 A Which entry? There's one for --

20 Q 8/9. I'm sorry. AMF, 8/9/95.

21 Four tenths of an hour. Telephone call with
22 Mr. Lawrence. Telephone conference call with Mr. Lawrence
23 and ADC. Office conference with ADC.

1 No indication there as to what was being
2 discussed or conferenced.

3 A No, not in that entry.

4 Q Let's go to November 13, 1995. The entry
5 10/17/95.

6 A There are several entries for 10/17/95.

7 Q The top one that says AMF.

8 A Okay.

9 Q Three-tenths of an hour. Telephone call with
10 Mr. Paphites. Office conference with ADC.

11 No indication there of what that telephone
12 call or office conference is about, is there?

13 A No, not in that entry.

14 Q Let's go to the December 20, 1995, bill.

15 The entry 11/6/95. AMF, again, seven-tenths
16 of an hour. Office conference with Mr. Paphites. Office
17 conference with ADC and JGL.

18 No indication there as to what those
19 conferences are about, is there?

20 A Not in that particular entry.

21 Q Let's go to the March 5th, 1996, bill. The
22 entry 2/1/96.

23 AMF, again, two-tenths of an hour. Telephone

1 call with Mr. Paphites.

2 No indication there as to what that call was
3 about, is there?

4 A No, not in that entry.

5 Q Let's go to the April 11, 1996, bill.

6 A Okay.

7 Q The entry 3/13/96. AMF, again.

8 A Excuse me. I'm not there yet.

9 Q I'm sorry.

10 A You said March 13?

11 Q The entry is March 13, 1996.

12 A For Mr. Frieden?

13 Q For Mr. Frieden.

14 Office conference with JGL and ADC.

15 Conference call with Mr. Paphites, JGL and ADC.

16 No indication there as to what those
17 conference calls were about, is there?

18 A No, not in that entry.

19 Q Let's go to the May 10, 1996, bill.

20 A Okay.

21 Q The entry 4/2/96. AMF, again.

22 Do you have it?

23 A Yes.

1 Q 3.6 hours. Office conference with Tassos
2 Paphites, Mr. Achilleos, JGL and ADC.

3 No indication there as to what those 3.6 hours
4 were about, is there?

5 A No, not in that entry.

6 Q Let's go to the June 1996 bill. Page 3.

7 A Okay.

8 Q May 15 -- May 16, 1996. AMF, again, three-
9 tenths of an hour. Telephone call with Mr. Paphites.
10 Office conference with JGL.

11 No indication there as to what that call or
12 conference was about, is there?

13 A No, not in that time entry.

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20 O'Connell. Office conference with Mr. Paphites, Mr.
21 Achilleos and JGL.

22 No indication there, other than the letter,
23 that there was a letter, as to what those conferences were

1 about, is there?

2 A Not in that time entry.

3 Q Let's go to the October 16, 1996, bill.

4 Page 2.

5 At the bottom, again, AMF, half an hour.
6 Conference call with Mr. Paphites and JGL. Telephone call
7 with Mr. Paphites. Office conference with ADC.

8 Again, no indication as to what those
9 conferences or calls were about in this entry, is there?

10 A No, not in that particular entry.

11 Q Let's go to the November 20, 1996, bill. The
12 entry at the top of the page, 10/21/96.

13 AMF --

14 A Excuse me. I'm sorry. Which entry?

15 Q I'm sorry. Excuse me. 10/21/96.

16 A Oh. Hold on a minute.

17 (Pause.)

18 Page 5, okay.

19 Q Okay.

20 AMF, again, three-tenths of an hour. Office
21 conference with JGL.

22 No indication there as to what that was about,
23 is there?

1 A No, not in that entry.

2 Q Let's go to the November 20, 1996, bill.

3 Page 9.

4 MR. DURRETTE: I'm sorry. Which bill?

5 MR. O'CONNELL: The November 20th, 1996, bill.

6 Page 9.

7 Have you got it?

8 MR. DURRETTE: Yeah.

9 BY MR. O'CONNELL:

10 Q The entry 10/29/96. AMF, again, eight-tenths
11 of an hour. Telephone call with Mr. Paphites. Office
12 conference with JGL. Office conference with JGL and ADC.

13 No indication of what those conferences are
14 about in that entry, is there?

15 A Not in Mr. Frieden's entry, no.

16 Q If you turn to the Pearson and Pearson bills,
17 there's an entry on the 11/30/93 bill for 11/10/93.

18 Do you see that?

19 A The 11/30 bill. I'm sorry. Which date?

20 11/10?

21 Q The date on the bill, I think, is 11/30/93.

22 A I'm there. Which entry are you talking about?

23 Q It looks like page 1. 11/10/93.

1 A Okay.

2 Q GMP telephone conference with Alan Frieden.

3 GMP telephone conference with Alan Frieden.

4 There's no indication on the amount of time on
5 that, is there?

6 A No, I don't see an indication of a break-out
7 there.

8 Q And there's no indication of what that
9 conference was about, is there?

10 A No, not in that entry.

11 Q None of these Pearson and Pearson bills on
12 this page have any indication of the amount of time that
13 was spent on these various items that are being claimed.

14 A You mean the entries on this one page?

15 Q Yes, on this particular page.

16 A That's correct.

17 Q Let's turn to Page 1 of the 12/3/93 [sic]
18 bill.

19 A I'm sorry Page 1 of the December 31 --

20 Q Page 1 of the 12/31/93 bill.

21 There's no time for any of these specific
22 entries listed, is there?

23 A Not after the individual entries, no.

1 Q Look at the entry that's 12/16/93. GMP
2 telephone conference with Annemarie Cleary.

3 There's no notation there as to what that was
4 about, is there?

5 A Not in that particular entry, no.

6 Q Let's go to the February 1, 1994, bill for
7 Pearson and Pearson.

8 Do you have it?

9 A Yes.

10 Q There are no time entries for the line items
11 on this specific date, are there?

12 A Not for the individual items, no.

13 Q And under January 10, telephone call with
14 Stewart Sacks.

15 Do you see that?

16 A Yes.

17 Q No indication as to what that call was about,
18 is there?

19 A No, not in that entry.

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1 Stewart Sacks' office, two-tenths of an hour.

2 No indication as to what that conference was
3 about, is there?

4 A I'm sorry. Which date are you looking at?

5 Q March 1, 1994.

6 A No. There's nothing indicating on that
7 particular entry what that was about.

8 Q Let's go to the April 12, 1994, bill. It
9 looks like the first page.

10 A Okay.

11 Q April 1, 1994. Telephone conference with Skip
12 Sacks, three-tenths of an hour.

13 No indication as to what that call was about,
14 is there?

15 A No, not in that entry.

16 Q Then below that, April 4, 1994. The first
17 entry. Telephone call with Skip Sacks, two-tenths of an
18 hour.

19 No indication as to what that call was about,
20 is there?

21 A No, not in that entry.

22 Q Let's go to the April -- no. I'm sorry. It
23 looks like May 6th, 1994, bill. The second page. There's

1 an entry April 25th, 1994.

2 Do you see that?

3 A There are several April 25th entries.

4 Which one are you looking at?

5 Q Let's see. The middle one.

6 A Okay.

7 Q Telephone conference with Skip Sacks, three-
8 tenths of an hour.

9 No indication as to what that conference was
10 about, is there?

11 A No, not in that entry.

12 MR. DURRETTE: I beg your pardon. What was
13 the date of that entry? I'm sorry.

14 MR. O'CONNELL: It was April 25, 1994.

15 BY MR. O'CONNELL:

16 Q Let's go to the June 2nd, 1994, bill.

17 A Okay.

18 Q May 10, 1994. Telephone conference with Skip
19 Sacks, three-tenths of an hour.

20 No indication there as to what that conference
21 was about, is there?

22 A No, not in that entry.

23 Q May 10th, 1994. Telephone conference with

1 Skip Sacks, four-tenths of an hour.

2 No indication as to what that was about, is
3 there?

4 A No, not in that entry.

5 Q May 11, 1994. Telephone conference with Skip
6 Sacks, four-tenths of an hour.

7 No indication there as to what that was about,
8 is there?

9 A No, not in that entry.

10 Q At the bottom of the page, May 17, 1994.
11 Telephone conference with Skip Sacks, three-tenths of an
12 hour.

13 No indication there as to what that conference
14 was about, is there?

15 A No, not in that entry.

16 Q As a matter of fact, on many of these Pearson
17 and Pearson bills where there is reflected a telephone
18 conference or a call and the amount of time and no task,
19 you don't know what was being discussed or what was being
20 conferenced, do you?

21 A I can say that with respect to any of these
22 bills I don't know that.

23 Q All right. Let's go to the July 21, 1994 --

1 the bill is August 2nd, 1994.

2 July 21, 1994. Telephone call with Skip
3 Sacks, three-tenths of an hour.

4 Did you find that?

5 A Yes.

6 Q You don't know what that call was about, do
7 you?

8 A There's no indication in that entry.

9 Q Go over to the September 7, 1994, bill.

10 Have you got that?

11 A (Nodding head.)

12 Q August 2nd, 1994. Office conference with
13 Powell Duggan, half an hour.

14 No indication there as to what that conference
15 was about, is there?

16 A No indication in that entry.

17 Q Let's go to, I believe it's the next page.
18 September 7th, 1994, bill starting with April 15. I'll
19 read the series of them there here for you.

20 April 15, 1994. Telephone call with Annemarie
21 Cleary regarding subpoenas.

22 That was obviously about subpoenas. Let's go
23 to the next one.

1 August 16, 1994. Telephone call with
2 Annemarie Cleary, two-tenths of an hour.

3 August 18, 1994. Telephone call with Skip
4 Sacks, half an hour.

5 August 18, 1994. Telephone call with Skip
6 Sacks, three tenths of an hour.

7 August 19, 1994. Telephone call with Alan
8 Frieden, two-tenths of an hour.

9 August 19, 1994. Telephone call with Alan
10 Frieden, two-tenths of an hour.

11 No indication in any of these entries as to
12 what these telephone calls were about, is there?

13 A With the exception of the entry regarding
14 subpoenas, no, not in those particular entries.

15 Q Let's go to the October 6th, 1994, bill.
16 September 8th, 1994.

17 Did you find it?

18 A Yes.

19 Q Telephone conference with Skip Sacks and
20 Annemarie Cleary.

21 No indication there as to what that was about,
22 is there?

23 A Not in that particular entry, no.



A Okay.

Q November 16 [sic], 1994. Telephone conference with Annemarie Cleary, six-tenths of an hour.

No indication there as to what that was about, is there?

MR. DURRETTE: What was that date, please, Mr. O'Connell?

MR. O'CONNELL: November 15, 1994.

MR. DURRETTE: Thank you.

THE WITNESS: No. There's no indication in that entry.

BY MR. O'CONNELL:

Q Let's go to the March 2nd, 1995, bill.

A Okay.

Q The entry 2/2/95. Telephone call with Annemarie Cleary, Powell Duggan and Skip Sacks. Telephone call with Annemarie Cleary. You've got a half an hour and three-tenths of an hour.

No indication there as to what those calls

1 were about, is there?

2 A Not in that time entry, no.

3 Q Let's go to the June 2nd, nineteen ninety -- I
4 think it's a 1995 bill. Yes.

5 A Okay.

6 Q The entry 5/15/95. Telephone call with
7 Annemarie Cleary, two-tenths of an hour.

8 No indication there as to what that was about.

9 A No, not in that time entry.

10 Q On the December 7, 1995, bill.

11 A Okay.

12 Q 11/6/95. Telephone call with Annemarie
13 Cleary, eight-tenths of an hour.

14 No indication there as to what that call was
15 about, is there?

16 A No, not in that bill.

17 MR. DURRETTE: December 8th did you say?

18 MR. O'CONNELL: No. December 7th, 1995, was
19 the date of the bill. The entry was 11/6/95.

20 MR. DURRETTE: Thank you.

21 THE WITNESS: Excuse me. If I could -- I
22 think my answer was, "Not on the bill." I think the more
23 accurate answer is: Not in that time entry.

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BY MR. O'CONNELL:

Q Let's go to the June 3rd, 1996, bill. May 28, 1996.

Did you find it?

A Yes.

Q May 28, 1996. Telephone call with Annemarie Cleary, two-tenths of an hour.

No indication there as to what that call was about.

A Not in that particular entry.

Q Let's go to the August 19, 1996, bill.

A Okay.

Q 8/19/96. Telephone call with Annemarie Cleary, two-tenths of an hour.

No indication there as to what that was about, is there?

A No, not in that entry.

Q Let's go to the October 2nd, 1996, bill.

A Okay.

Q There's an entry 9/16/96. Telephone call with Annemarie Cleary, three-tenths of an hour.

There's an entry 9/19/96. Telephone call with Annemarie Cleary, two-tenths of an hour.

1 No indication there as to what those calls
2 were about, is there?

3 A No, not in those entries.

4 Q You have no original time records that are
5 traceable to your personal time entries, handwritten time
6 records that you could consult that would tell you what
7 occurred on those specific entries where there is no task
8 listed and no specific item of work that you're doing
9 listed like the ones that we've been going over.

10 A Well, I think the ones you asked me about, Mr.
11 O'Connell, were all Mr. Frieden's, so I wouldn't have any
12 personal written time records for Mr. Frieden.

13 Q Where your time records are reflected in these
14 bills, your original notes have been destroyed?

15 A My original time sheets?

16 Q Your original time sheets.

17 A After a time they are destroyed. The most
18 recent ones may still be in existence.

19 Q Would you find it unusual if I told you that
20 there were at least 1,326 entries of these in your Faggert
21 and Frieden bills that listed no task, just a phone
22 conference or a conference between parties? Would you
23 believe that?

1 A I wouldn't have any basis to believe or
2 disbelieve it. I haven't counted those entries.

3 But, Mr. O'Connell, I should point out.

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1 Q So you're asking that the jury or some third
2 party assume that these surrounding entries are going to
3 have the same subject matter as these office conferences
4 and telephone calls for which you list no specific task;
5 is that right?

6 A I'm suggesting, Mr. O'Connell, that if I put a
7 time entry down that said, "Office conference with AMF
8 regarding settlement," then that's what it was about and
9 it is unlikely that Mr. Frieden would make up a time entry
10 for something other than that.

11 Q Well, that's just an assumption on your part.
12 You can't sit here today -- you have no proof as to
13 actually what went on in those telephone conferences or
14 those conferences between attorneys where no specific task
15 is listed, do you?

16 A I am absolutely confident that every one of
17 those entries that you read off to me had to do with this
18 litigation and Burgerbusters' enforcement of its rights
19 and remedies under this lease. The attorneys in my firm
20 do not fabricate time. We've got enough to do.

21 Q I'm not asking you whether you fabricated
22 time.

23 I'm asking you, there's no way -- you have no

1 written proof as to exactly what was being talked about or
2 exactly what was being conferenced in those entries which
3 we just went over where there is no specific task set
4 forth.

5 MR. DURRETTE: Your Honor, I object to the
6 question. It mischaracterizes her testimony. She's
7 testified to at least two sources of written proof. One
8 is surrounding entries; the other would be handwritten
9 notes in the boxes. So I think that mischaracterizes her
10 testimony.

11 THE COURT: I believe the question has been
12 answered. Sustained.

13 MR. O'CONNELL: That's all I have at this
14 time.

15 THE COURT: Redirect, Mr. Durette?

16 MR. DURRETTE: Yes, Your Honor. I'm going to
17 try some -- I'm not sure how I'm going to do this, but I
18 tried to keep up and tab and mark.

19 REDIRECT EXAMINATION

20 BY MR. DURRETTE:

21 Q Let's start at the end because that's the
22 freshest one, I hope.

23 You were asked by Mr. O'Connell about two

1 entries in September in Pearson and Pearson's bill, the
2 October 2nd, 1996, bill for telephone calls with you on
3 September 16 and September 19.

4 A Yes, I was.

5 Q Do you see those?

6 A Yes, I do.

7 Q And you told him from that entry you couldn't
8 tell what that was about.

9 A That's correct.

10 Q Okay.

11 Would you look back and the Faggert and
12 Frieden bill for October 16, 1996, where you record your
13 time on September 16 and September 19.

14 A I've indicated what those conferences were
15 about.

16 Q Would you tell the jury what those telephone
17 calls were about.

18 A My entry for September 16, 1996, reads,
19 "Telephone call with Mr. Pearson regarding site plan
20 approval time table."

21 My entry on September 19th reads, "Telephone
22 call with Mr. Pearson regarding site plan review process."

23 Q Now, those were the last ones. I'm going to

1 start back at the beginning and ask you questions about as
2 many as I could get marked.

3 I believe there was a question about a
4 December the 13th, 1993, entry of Mr. Frieden's about an
5 office conference with SJS, revision of letter to Ms.
6 Munro, telephone call with Mr. Paphites.

7 A You said December 13th?

8 Q December 13th.

9 A So that would actually be the January bill.

10 Q It's actually the January bill.

11 A Right.

12 Q I apologize.

13 With respect to the office conference with
14 SJS, would you look at SJS's entry on December 13th
15 regarding an office conference with Mr. Frieden. What
16 does he say?

17 A SJS is Skip Sacks and his time entry for
18 December 13th reads, "Office conference with AMF regarding
19 damage claim and hearing transcripts."

20 Q Go on and read the rest of Mr. Sacks' entry.

21 A Office conference with ADC regarding
22 interrogatories, request for production, and request for
23 admissions. Review letter to attorney Munro. Office

1 conference with ADC regarding alternative damage claim.

2 Q Go with me to the May 13th, 1994, bill.

3 A I'm there.

4 Q I'm sorry. I have to do it this way.

5 (Pause.)

6 I marked that one wrong. I'm unable to
7 correlate this, but I'm going to ask you anyway.

8 Look at the April 4th, 1994, entry for Mr.
9 Sacks over on page two of the May 13th bill. He records a
10 telephone call with Mr. Pearson, does he not?

11 A He does.

12 Q What does he say?

13 A Telephone call with attorney Pearson regarding
14 subpoenas.

15 Q All right. Look at Mr. Pearson's bill, and
16 this is one you asked about.

17 Look at Mr. Pearson's bill for May the 6th,
18 1994.

19 A Yes.

20 Q And the entry on April 25th, 1994. Telephone
21 conference with Skip Sacks, .3.

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fence permit and hearing on show cause order.

There's also a later one. Telephone call with attorney Pearson regarding easement provisions.

Q Now, you were asked about -- look at the June 10th, bill.

A Okay. June 10, 1994?

Q Uh-huh.

Entry for AMF. May 24th. Telephone call with Mr. Paphites. Office conference with SJS.

No description on the office conference with SJS; right?

A That's correct.

Q Look at SJS's entry for May 24th.

What does he say about that office conference?

A Office conference with AMF regarding fence issues.

Q Look at September 14th, 1994, on the October 26th bill.

A Okay.

Q AMF has an entry on September the 14th.

1 Office conference with SJS and ADC.

2 Do you see that?

3 A Yes, I do.

4 Q And you have an entry for that same date
5 regarding that conference, do you not?

6 A I do.

7 Q What do you say?

8 A I stated, "Office conference with SJS and AMF
9 regarding status."

10 Q All right. And for your entry on that same
11 day Mr. Sacks records an office conference with AMF, does
12 he not?

13 A He does. Office conference with ADC regarding
14 service on Ms. Leonard [ph] and Ms. Hamlin [ph]. Office
15 conference with ADS -- AMF, excuse me -- regarding
16 hearings, depositions, etcetera.

17 Q Look at the January 16, 1995, bill that
18 records December time.

19 A Okay.

20 Q (Pause.)

21 MR. DURRETTE: Your Honor, I apologize. I
22 can't tell what I marked here on some of these. I
23 apologize to the witness, too, and the jury.

1 BY MR. DURRETTE:

2 Q Let's go to March of 1995.

3 A Okay.

4 Q On February 15th, AMF records an office
5 conference with SJS, .10; right?

6 A Just a minute, please.

7 Q February 15.

8 A One-tenth of an hour, office conference with
9 SJS. Yes, he does.

10 Q Now, you look at the other entries -- look at
11 your entry for February the 15th, 1995, and the office
12 conferences that you held on that day and read that to the
13 jury, please.

14 A On February 15, 1995?

15 Q Yes.

16 A The entry reads, "Telephone call with Mr.
17 Butler regarding fence permit. Telephone call with Mr.
18 Garvin regarding peak hours. Telephone call with Mr.
19 Paphites and SJS regarding fence permit, crowds in the
20 parking lot and security guards. Letter to Dr. Chawla
21 regarding crowds. Telephone call with Mr. McGee. Office
22 conference with SJS."

23 Q What were the issues that you were talking

1 about that day?

2 A Obviously, the fence, obtaining a permit to
3 erect the fence; peak hours is with reference to
4 calculation of damages for lost parking spaces.
5 Burgerbusters has had some problems with the crowds
6 congregating in the parking lot. And Mr. McGee was
7 someone we consulted regarding a parking study and use of
8 the parking spaces in the parking lot.

9 Q Look at Mr. Pearson's bill of April the 3rd,
10 1995.

11 A Okay.

12 Q And his entry for March 6.

13 A Okay.

14 Q Telephone call with Annemarie Cleary, .2.

15 A Yes.

16 Q Look at your entry for March 6 on your April
17 17th bill.

18 A Telephone call with attorney Pearson regarding
19 fence permit and parking requirements.

20 Q So from your entry you know what Mr. Pearson's
21 entry is; correct?

22 A That's correct.

23 Q Now, go to the next entry in your Faggert and

1 Frieden bill. June 15th, 1995.

2 A I'm sorry. June 15?

3 Q The bill of June 15, '95.

4 A Okay.

5 Q You were asked about an entry on May 9th,
6 1995, by Mr. Frieden. Would you read that entry, please.
7 3.6 hours.

8 A Office conference with Mr. Lawrence and ADC.
9 Luncheon conference with Mr. Lawrence, ADC, Mr. Paphites,
10 Mr. Bill Dragas, and Mr. Achilleos.

11 Q And who is Mr. Dragas and Mr. Achilleos?

12 A Those are other shareholders of Burgerbusters.

13 Q Okay.

14 Look at your entry for that same date.

15 A Office conference with Mr. Lawrence and AMF
16 regarding trial. Conference with Mr. Paphites, Mr.
17 Dragas, Mr. Achilleos, AMF and Mr. Lawrence regarding
18 trial.

19 Q From your entries do you know what the
20 conferences were that Mr. Frieden participated in?

21 A I do.

22 Q What were they?

23 A They were regarding the trial, recapping and

1 reviewing what had happened in the April 24th through 27th
2 trials.

3 Q Go to the next bill, July. There's a June 26,
4 1995, entry for Mr. Frieden.

5 Telephone call with Mr. Lawrence and ADC.

6 A Yes.

7 Q What's your entry for June 26, 1995, regarding
8 that same telephone call?

9 A Office conference with AMF and Mr. Lawrence
10 regarding hearing on motion for partial summary judgment.
11 Telephone call with Ms. Munro regarding same. Telephone
12 call with Mr. Lawrence regarding order.

13 Q From your entries do you know what the subject
14 of the call with Mr. Lawrence and you was that Mr. Frieden
15 had?

16 A I do. It was regarding the hearing on the
17 motion for partial summary judgment.

18 I should point out that at this time I believe
19 Mr. Lawrence was still with his other firm, as a result of
20 which -- that's why it was a telephone conference instead
21 of an office conference.



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Telephone call with JGL regarding same. Memo to AMF
regarding same and office conference with AMF.

Q Do you know what you and Mr. Frieden talked
about on that day from your entries?

A This was concerning a telephone conference
that the court wanted to set up and transcript regarding
the same. Based on the timing, I would also surmise that

1 it had to do with the waiver issue.

2 Q Go to the next bill, the December bill.

3 A Okay.

4 Q You were asked about a November 6, 1995, entry
5 by Mr. Frieden. Office conference with ADC and JGL.

6 A Yes.

7 Q Do you remember that?

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A With respect to many of these entries for
which, for example, Mr. Frieden did not indicate the
topic, I think it would be quite -- relatively easy, I

1 should say, for someone to look at the surrounding entries
2 and determine what topics were in all likelihood
3 discussed.

4 Q Are you aware -- you personally. Are you
5 aware of any attorney at Faggert and Frieden that made any
6 entries on Burgerbusters' file that did not have to do
7 with, and are claiming fees today that did not have to do
8 with this case?

9 A Absolutely not.

10 MR. DURRETTE: That's all I have, Your Honor.

11 THE COURT: May Ms. Cleary be excused?

12 MR. O'CONNELL: Yes, Your Honor.

13 THE COURT: Thank you, Ms. Cleary.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: You may be excused.

16 MR. DURRETTE: Your Honor, we may have her
17 subject to recall.

18 THE COURT: All right. Fine.

19 Thank you, very much.

20 THE WITNESS: Thank you.

21 (Witness stood aside.)

22 FEMALE JUROR: May I stand up and wiggle,
23 please?

1 THE COURT: Yes. We're going to do that. I
2 just want to get a feel for our schedule.

3 Will there be further evidence, Mr. Durette,
4 on behalf of the --

5 MR. DURRETTE: Not on our primary case, Your
6 Honor.

7 THE COURT: All right. Would it be
8 appropriate to take a recess at this time? Will there be
9 any legal matters to take up?

10 MR. O'CONNELL: Yes, Your Honor. There'll be
11 a motion.

12 THE COURT: Members of the jury, please go to
13 your jury room now. We'll call you back. I can assure
14 you there'll be at least a fifteen-minute recess. I think
15 you need it.

16 (Whereupon, at approximately 1:59 o'clock
17 p.m., the jury retired from the courtroom.)

18 THE COURT: I take it the Plaintiff rests?

19 MR. DURRETTE: Yes, sir.

20 THE COURT: All right. The Plaintiff rests.
21 Are there any legal matters to take up at this
22 time?

23 MR. O'CONNELL: Yes, Your Honor. I would move

1 to strike the Plaintiff's case.

2 The fee application, you may want to look at
3 it.

4 (Whereupon, Mr. O'Connell handed the exhibit
5 to the Court.)

6 There's simply no way that this fee
7 application complies with the standards set out in Hensley
8 versus Eckerhart, even the standards set out in the
9 pretrial order. There is absolutely no way from this
10 exhibit -- I believe it's Exhibit 9 -- and the testimony
11 of the witnesses in their case in chief, for a jury with
12 any degree of even moderate or modest certainly, without
13 speculating to the skies, could evaluate the twelve
14 factors set forth in the pretrial order.

15 The time and labor required.

16 There are literally thousands of entries that
17 just show a telephone conference or a conference from one
18 attorney to another. I realize the attempt they made to
19 try to advise the jury how they could look at the
20 surrounding entries and tell what was going on. That's
21 just asking them to speculate, Your Honor. They're not
22 attorneys. The jury wasn't called in here to be a jury of
23 attorneys and speculate about how these factors are going

1 to be applied. There is simply nowhere near the kind of
2 specificity that a lay jury could possibly use to come up
3 with any kind of a result in applying these twelve
4 factors.

5 The time and labor required to do a specific
6 task. What do they have to judge that?

7 There's been no evidence presented by anyone
8 as to how they can judge, even where the entries are
9 specific, where they discussed what was done, what it took
10 to do -- what a reasonable time would be to prepare a bill
11 of complaint or to take a deposition or to respond to a
12 pleading or to prepare a demurrer or prepare a motion for
13 summary judgment. That evidence is simply not there.

14 They have taken the chance of just throwing
15 their bills on the table without any evidence that the
16 jury can use to assist them in judging the time and labor
17 required, number one.

18 Two, the novelty and difficulty of the
19 questions. You have no evidence on that.

20 The skill requisite to perform the legal
21 service properly. There's no evidence on that.

22 The preclusion of employment by the attorney
23 due to acceptance of the case. Perhaps that doesn't

1 apply; we don't even know that. There's been no evidence
2 presented on that and they've rested.

3 The customary fee. There's no evidence on
4 that.

5 Whether the fee is fixed or contingent. I
6 mean, we can assume that it's fixed, I guess. But I don't
7 even think that's clear from the evidence.

8 Time limitations imposed by the client or
9 circumstances. Well, there's been no evidence on that.

10 The amount involved and the results obtained.
11 This is the most serious defect in the entire case. They
12 have admitted in their case that there is nothing in this
13 exhibit that would allow the jury to make a consideration
14 for deductions for the unsuccessful portions of the
15 case: the claim for damages for their loss of the parking
16 and the claim that the bank was a retail establishment --
17 that the bank was not a retail establishment; that the
18 bank's lease should be voided; and that the bank's lease
19 should be completely nullified.

20 There is absolutely nothing -- even if we
21 don't use the other standards, the explanation of these
22 standards as set forth in Hensley, what basis is this jury
23 going to have to apply these factors based on what they've

1 heard? There is nothing other than pure speculation.

2 The experience, reputation, and ability of the
3 attorneys. We really haven't had any evidence on that.
4 Not an ounce. Maybe we had some description about when
5 they graduated from law school and stuff like that.

6 The undesirability of the case. There's been
7 no evidence on that. The only thing that they've talked
8 about --

9 THE COURT: You're not asking me to take
10 judicial notice on that.

11 MR. O'CONNELL: Pardon me?

12 THE COURT: No one's asking me to take
13 judicial notice of that factor.

14 MR. O'CONNELL: The undesirability of the
15 case. Well, if --

16 THE COURT: I think that may be applicable to
17 both sides.

18 MR. O'CONNELL: If you were sitting as the
19 trier of fact, Your Honor.

20 THE COURT: Yes, that's quite different.

21 MR. O'CONNELL: The nature and length of the
22 professional relationship with the client. That's about
23 all they've presented any evidence on.

1 Even if you take out of this pretrial order
2 the way the Supreme Court says these factors are to be
3 applied, there is simply no way that this jury is going to
4 be able to do anything with this exhibit and the evidence
5 they've heard but to speculate. And there's no basis for
6 them to do that in this case.

7 They didn't prove their case. They knew what
8 the factors were. And it would be ridiculous to even
9 submit this case to the jury. So I move that their
10 evidence be struck and the case dismissed.

11 THE COURT: All right. Thank you, Mr.
12 O'Connell.

13 Mr. Durette, do you wish to be heard on the
14 motion to strike, sir?

15 MR. DURRETTE: Your Honor, as you may have
16 noticed, my practice is to try the short argument first
17 and then see if I need to make a long argument.

18 The short argument is that the pretrial order
19 says the Petitioner may offer its authenticated claim for
20 fee costs and expenses incurred by it to establish its
21 prima facie entitlement to recover. Petitioner may choose
22 to offer other and further evidence.

23 So we believe that under the pretrial order we

1 have established our prima facie right to recover.

2 Now, the burden of proof has shifted.

3 Obviously, from our testimony we think that all the fees
4 are reasonable and we're entitled to recover all of them.
5 We think we prevailed on virtually everything. And they
6 now have the burden of proof to show that the fees were
7 excessive or unreasonable.

8 And in pursuit of that, you ordered these
9 attorneys to go through these bills and break these things
10 down by tenths of hours; and they did that. Those
11 breakdowns have been given to the experts. They've had
12 those things for months. And so they can take those and
13 they can challenge the reasonableness. They can make the
14 calculations as to what was done and under what claim.

15 It's their burden to show -- even under
16 Hensley. I mean, Hensley -- the famous footnote in
17 Hensley that we're talking about injunctive relief and
18 damages in the famous -- to the extent we're going to
19 follow Hensley, the footnote that, of course, we have
20 cited to the Court. I know it's been cited before.

21 "A plaintiff who failed to recover damages but
22 obtained injunctive relief, or vice versa, may recover a
23 fee award based on all hours reasonably expended if the

1 relief obtained justified that expenditure of attorney
2 time."

3 I mean, our evidence is we got everything we
4 asked for, virtually, except for damages. So we believe
5 that at this point in time, not only have we made a prima
6 facie case, but no matter what the evidence is, the issues
7 of reasonableness and so forth are for the jury.

8 THE COURT: Thank you.

9 Mr. O'Connell, further argument, sir?

10 MR. O'CONNELL: Your Honor, it still doesn't
11 excuse them from establishing a prima facie case. And the
12 Court in its pretrial order didn't say what the prima
13 facie case -- what the lower limit of the prima facie case
14 was to be. And I submit that this is not a prima facie
15 case of their entitlement to recover, just submitting
16 copies of bills.

17 And it's obvious from going through them that
18 there's no way that there could be any intelligent
19 discussion of the way that those factors have to be
20 applied. So my point is, they haven't even established a
21 prima facie case.

22 THE COURT: All right. Well, thank you,
23 gentlemen, for your argument.

1 On the motion to strike the Court must view
2 the evidence most favorably to the party against whom the
3 motion is brought and to give that party all reasonable
4 and appropriate inferences. From the evidence, the motion
5 to strike here centers on, I think, the applicable law to
6 this case.

7 As the Court has pointed out with reference to
8 the admissibility of Plaintiff's Exhibit 9, I do not think
9 that we have adopted from the case of Hensley versus
10 Eckerhart, the United States Supreme Court case, anything
11 other than what is contained in the pretrial order. I'm
12 sure counsel will recall that the Court suggested at the
13 end of one of the earlier conferences that it was
14 concerned about the law that would be applied in this
15 case, believing that the law in Virginia was less than
16 clear and less than detailed in its certainty as to how we
17 would decide this case. And the parties came forward at a
18 subsequent conference and asked the Court to follow the
19 factors of Hensley versus Eckerhart.

20 At that time the Court had given you a letter
21 that is referred to in the order, that is the letter of
22 June 12, 1996. The June 12 letter discussed some of the
23 difficulties that the Court found regarding the resolution

1 of this matter and left open, to some degree, how we would
2 properly proceed, but also made reference to a trial court
3 opinion in this Court in the case of Kmonk, K-m-o-n-k, v.
4 Aiani, At Law Number CL95-358, which was then pending.

5 In the Aiani case, the Court, on a fee
6 application arising out of the sale of real estate,
7 applied a standard from the case of Talb, T-a-l-b, Inc.
8 versus dot-dot Corporation, a Supreme Court of Alabama
9 case, 559 S. 2d 1054, also found 23 ALR 5th 905, 1990
10 case. In that case the Supreme Court of Alabama, in
11 determining the award of reasonable attorney's fees,
12 approved Disciplinary Rule 2-106(B) of the American Bar
13 Association Model Code of Professional Responsibility,
14 1982, as the lodestar approach to determining the
15 reasonableness of fees.

16 The reason the Court used in the Kmonk case
17 the analysis in Talb versus dot-dot is because the cases
18 in Virginia -- Mullins versus Richlands National Bank, 241
19 Va. 447, as a prime example of this -- our Supreme Court
20 simply has not revealed to us the full scope of what must
21 be considered. Now, in the face of all that, the reason I
22 give you that is because it shows, again, the context that
23 we're working in. We're working in an area of the law

1 this is not fully revealed under the jurisprudence of
2 Virginia.

3 And when counsel came forward and said to the
4 Court, "Judge, let's use the factors in Hensley," this
5 Court agreed to that. But I have taken note of the fact
6 that Hensley is a 1983 civil rights case and that there
7 are certain factors that are weighted in that case that
8 come about because of Congressional action and because of
9 federal jurisprudence that may or may not make that case
10 fully applicable here.

11 And so it was my intention, and I believe
12 carried out by the pretrial order, that we would create
13 for this case the law of this case in an order that we
14 would all address and all deal with as being the law of
15 the case. And, quite frankly, I think counsel found
16 themselves in the same plight that the Court was in and
17 readily agreed to that now.

18 To the extent that there may have been some
19 mis-impressions that we were going to extrapolate from
20 Hensley greater analysis, that certainly wasn't the
21 intention of the Court. The intention of the Court was to
22 take from Hensley two things: number one, the order of
23 proof and burden of proof; and, number two, the factors to

1 be considered.

2 Now, if you look at the pretrial order which
3 this Court deems for the reasons stated to be the law of
4 this case, the pretrial order starts off by making
5 reference to the June 12, 1996, letter that I referred to
6 where we talked about some of the problems with Virginia
7 law on this subject, and then from that went into the
8 Hensley-type structure as to how a case should be proved.

9 And it was done this way. By letter opinion
10 dated June 12, 1996, the Court determined that on the
11 issue of the Petitioner's fee claim, the Petitioner may
12 offer its authenticated claim for fee costs and expenses
13 incurred by it to establish its prima facie entitlement to
14 recover.

15 Now, what has happened here, over the
16 objections of the Defendants to be sure, the Petitioner
17 has offered Plaintiff's 9 and has offered contextual
18 testimony as to how it was created and what was undertaken
19 during the course of the litigation at bar. And the
20 question, then, is whether or not what they have submitted
21 forward sufficiently states a prima facie entitlement to
22 recover. The Court finds, viewing the evidence as it must
23 on the motion to strike, that that prima facie entitlement

1 has been shown.

2 The question then turns to what we will
3 address shortly and that is whether the Petitioner may
4 choose to offer other or further evidence on its case in
5 chief, and they've done that. But then we turn to what
6 will happen subsequently, which has not occurred yet, and
7 the Respondents must then seek to carry the burden of
8 proof that these fees and costs were not incurred by the
9 Petitioner or that they were excessive or unreasonable.
10 Also, we set forth the analyses regarding future fees and
11 costs.

12 If you will remember, from Mullins versus
13 Richlands National Bank, the Supreme Court of Virginia
14 addressed both fees that had been accrued and also those
15 which were prospective. That was a situation arising in a
16 collection on a note. A lawyer doesn't always know what
17 he or she is going to have to do in the future to collect
18 that note and so we typically see -- and these matters are
19 not uncommon in state trial courts -- requests now for
20 attorney's fees, usually on default basis where someone
21 has been served and they will file an affidavit following
22 the Mullins analysis, and they'll ask for present fees and
23 projected fees. We see that quite often.

1 But then turning beyond the order of proof
2 that's been established by this pretrial order, we come to
3 this paragraph, "The jury instructions and the ultimate
4 decision of the Court -- " and, I take it, the ultimate
5 decision of the Court is the decision this Court will make
6 following the jury verdict on the issue out of chancery.
7 So it's not just governing what this jury will do, but it
8 will govern the post-verdict procedures that we will have
9 to address after we receive a verdict.

10 The Court states this and it says, "Following
11 the factors from Hensley -- " and this is the famous
12 footnote in Hensley. It says this, "If and to the extent
13 shown by the evidence -- " and these are the factors that
14 will be considered.

15 Now, certainly, it is true, and to some extent
16 this has been argued, that some of these factors have, as
17 of this time, not been shown. For example, I'll just pick
18 because of the one I made jest of, Number 10, the, quote,
19 "undesirability of the case," unquote. I don't think we
20 have any evidence at all on this and, quite frankly, it
21 reminds me of two things that we deal with as judges very
22 often. The first is in the domestic relations field,
23 under either child support, spousal support, or equitable

1 distribution, Virginia Code sections 2107.1, 2, and 3.
2 We're given this listing of the General Assembly's desire
3 to have us consider certain factors, and if there's no
4 evidence on the factor the court can obviously scratch the
5 factor but it doesn't take away the court's jurisdiction
6 to make the E.D. award, the spousal support award, and the
7 like.

8 For example, in equitable distribution cases,
9 addressed typically to a judge, there is a tax factor.
10 What is the tax effect in the particular case? And I
11 would say that probably no more than five percent of the
12 cases that I ever have even offer any evidence at all on
13 the tax implication of the E.D. award, probably because
14 it's not such a great one. But we also see that cropping
15 up in spousal support and there is a tax implication in
16 spousal support always.





MR. O'CONNELL: I call Dr. Chawla.

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(Whereupon, the testimony of Dr. Chawla was transcribed under separate cover.)

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THE COURT: Call your next witness.

MR. O'CONNELL: I call Mr. Palmer.

THE COURT: Mr. Palmer.

MR. DURRETTE: Your Honor, I believe probably the simplest way to do it is to put him on out of the presence of the jury first, instead of getting into his testimony.

THE COURT: All right. Do you think that may be precatory to anything, including his name?

1 MR. DURRETTE: Not including his name.

2 THE COURT: All right.

3 Any objection, Mr. O'Connell?

4 MR. O'CONNELL: Well --

5 THE COURT: We want deal with the issue we
6 dealt with pretrial, and if you think that's going to come
7 on quickly, we are working under some time constraints
8 this afternoon.

9 MR. O'CONNELL: All right. That's probably
10 the best way to handle it.

11 THE COURT: All right. Members of the jury,
12 we'll be taking some evidence outside of your presence.
13 Initially, would you go to your jury room. After that's
14 been done, we'll call you back. We do still want to stay
15 with our schedule.

16 (Whereupon, at 3:18 o'clock p.m., the jury
17 retired from the courtroom.)

18 (Whereupon, the witness was duly sworn by the
19 Clerk of the Court.)

20 THE COURT: Mr. Palmer, there has been a
21 motion made pretrial to exclude certain testimony from
22 you. In order that the Court might address that motion, I
23 have felt it appropriate that we should begin your

1 testimony outside of the presence of the jury, and that
2 explains their absence here. We'll get into those
3 objections as we proceed.

4 All right, Mr. O'Connell.

5 MR. O'CONNELL: Well, does the Court prefer
6 that I go through his entire testimony or go to the issue
7 of the --

8 THE COURT: Well, you know, I want to do this
9 simply. I have the motion. I deferred ruling on it. I
10 have to deal with it, right or wrong.

11 MR. O'CONNELL: Well, let me try to go
12 directly --

13 THE COURT: We can pass over, for example,
14 things such as Mr. Palmer's qualifications --

15 MR. O'CONNELL: Let me try to go directly to
16 the issue, Judge.

17 THE COURT: -- and focus on this. We can take
18 all of his qualifications back before the jury. I think
19 that there's no objection.

20 MR. DURRETTE: I'm going to stipulate to
21 qualifications, but I think what Mr. O'Connell suggested
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Q Mr. Palmer, would you get your October 30th, 1996, letter out, please?

A (The witness retrieved a document.)

Q All right. Now --

MR. DURRETTE: Can you wait just one second, Dan? I've got his letter as an exhibit, but I wanted to get another --

BY MR. O'CONNELL:

Q Would you turn to page five, Roman numeral six.

A Yes, sir.

Q And do you want to read that? Are you familiar with that?

A I'm familiar with it.

1 Q Are you familiar with the opinion in the last
2 paragraph there, "Based upon my review of the case and in
3 consideration of what I would consider to be reasonable
4 hourly rates, considering the effort made with regard to
5 those aspects of the case upon which the Petitioner
6 prevailed, I would submit to you that a reasonable fee in
7 this case would be in the range of \$30,000 to \$40,000."

8 My question is: What did you do to prepare
9 yourself to give that opinion? What documents did you
10 review? What was your process that led to that opinion?

11 A I was supplied with two bankers' boxes, as you
12 can see here (indicating), or these two boxes of files.
13 They are essentially all of the pleadings in the case and
14 the findings in the case. Not all of the discovery is in
15 there. But I did go through that.

16 I have also looked at some materials in Mr.
17 O'Connell's office. I have reviewed some of the
18 transcripts of the experts' testimony at the time of the
19 hearing that was presented on behalf of the Petitioner. I
20 reviewed the case in general. Considered all of the
21 issues.

22 At the time that I made this letter opinion or
23 wrote this letter of opinion on October 30th, the Court

1 had not issued its opinion with regard to the twelve
2 factors that should be considered, and I had considered
3 the four factors that I felt were appropriate in Virginia,
4 under Virginia law, primarily the Beale [ph] case and some
5 other cases, and, of course, the ethical considerations
6 which essentially set forth four factors to include
7 reputation, ability, the time spent, and the results. And
8 based upon that, I went through that material.

9 In addition to the pleadings and the
10 materials, I also had the Petitioner's petition for the
11 attorneys' fees, along with the bills that were submitted
12 and their petition. And I went through those bills and
13 looked at them fairly extensively. I'm not going to tell
14 the Court that I studied every page. But I looked at them
15 extensively and concluded that, in my opinion, based upon
16 the work that was done, the effort that was necessary in
17 this case, and the result that was garnered by the
18 Plaintiff, I felt that a fee in the area of \$30,000 to
19 \$40,000 was an appropriate fee. And that was based upon a
20 review of all of those materials and a consideration of
21 the law to be applied in the case.



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Q Do you have your file, Mr. Palmer, and the handwritten notes and things available, or do you need me to give you one?

A No. I've got the file here. That's why I brought these boxes. I didn't know what you might want.

Q Find Exhibit 3 to your deposition which is your handwritten notes that created the days on the right-hand side.

A (Whereupon, the witness retrieved a document.)
This was what was prepared just a short time before the deposition after the letter opinion. Is that

1 what you're referring to?

2 Q Yes, Exhibit 3.

3 A Okay.

4 Q Now, what did you do to prepare Exhibit 3?

5 A This was an afterthought, after I had issued
6 the letter opinion. And I sat down and thought of what
7 this case involved and wrote down what I thought were the
8 appropriate times that I figured should be spent or should
9 have been spent on these matters.

10 Q Did you do this in the way that you would
11 prepare a budget if someone came into your office?

12 A I suppose I did. It's sort of a budget in
13 reverse, yes. This was done after I had done my letter
14 opinion.

15 Q I understand that.

16 And you wrote down here that if you add up the
17 days that you attributed to Court time in Exhibit 3, you
18 came up with seven and a half days, did you not?

19 A I believe that's correct.

20 Q And you are aware -- are you not? -- that
21 there were at least nine days devoted to court hearings
22 concerning the --

23 A Excuse me. I don't know that I'm correct. I

1 haven't looked at this recently.

2 So far as court time is concerned, there is
3 one, one and a half, two and a half, four and a half,
4 another four days of motions -- that's eight and a half.
5 Eight and a half days is what I have here.

6 Q Isn't it true that the first one-day entry on
7 this exhibit includes work -- is a day assigned to
8 preparing the petition, reviewing the law, conferencing
9 the client, etcetera?

10 A I think you're right. I'm sorry. You're
11 right.

12 Q Do you recall --

13 A Seven and a half days, you're right.

14 Q Do you recall that when I questioned you, I
15 counted eight and a half and you corrected me to seven and
16 a half?

17 A Right.

18 Q All right. So you had seven and a half court
19 days.

20 Are you aware that there were -- I think you
21 counted them up -- there were well in excess of thirty
22 court appearances in this case?

23 A No question about it.

1 Q And that many of those appearances involved
2 multiple days in court for trial?

3 A Yes, sir.

4 Q And do you have any explanation at all as to
5 why there were that many days that actually happened in
6 this case in a budget that you prepared where there should
7 have been seven and a half?

8 A I was asked to assess in this case what was
9 reasonable, and this is my estimation of what is
10 reasonable based upon what went on in this case and of
11 what the Complainant prevailed.

12 Q Do you have any explanation as to why there
13 were more than thirty court appearances involving close to
14 forty-seven days [ph] in this case?

15 A The case was over-lawyered.

16 Q On which side?

17 A I think primarily on the Plaintiff's side.

18 Q Do you have an opinion whose fault it is as to
19 why those court appearances occurred?

20 A I did not go through each one to make that
21 determination, no, sir.

22 Q So you don't know which ones of those court
23 appearances, if any, were caused by unreasonable conduct

1 by Mr. O'Connell and which one or ones were caused by
2 unreasonable conduct by the Petitioner's attorneys, do
3 you?

4 A Based upon what was supplied to me for time
5 sheets, it would be impossible for me to put that
6 together.

7 Q Did you have the transcripts from the
8 hearings?

9 A Not all of them, no, sir.

10 Q You could have gotten them, couldn't you?

11 A I don't know if there is a transcript for
12 every hearing, but I assume there may be.

13 Q Did you ask?

14 A No.

15 Q You could have gotten all the pleadings -- you
16 have them, don't you? -- that preceded most of the
17 hearings?

18 A I believe that's correct.

19 Q You could have determined what the issues were
20 in those hearings, couldn't you?

21 A I don't know. I haven't seen them, so I don't
22 know.

23 Q But you didn't make any effort to, did you?

1 A No, because I felt that the case was over-
2 lawyered and there were too many items that were being set
3 forth here.

4 Q But you did not assign responsibility to
5 either side in this case for that, did you?

6 A Not specifically on each appearance, no, sir.

7 Q Or collectively. Not just for each hearing,
8 but collectively for all the hearings, did you?

9 MR. O'CONNELL: He's already said that he --
10 he's answered that. He said it was primarily, in his
11 opinion, the Petitioner's fault.

12 BY MR. DURRETTE:

13 Q Mr. Palmer, do you remember my taking your
14 deposition on this subject?

15 A I recall the deposition last week, yes, sir.

16 Q And do you recall my asking you some questions
17 on this general subject?

18 A I recall there were some questions, yes.

19 Q And you indicated then when I asked you, "And
20 what is your judgment regarding the appearances?" on page
21 46 of your deposition. "My judgment is that there were
22 just too many hearings on this thing. The appearances
23 were outrageous."

1 Do you recall that?

2 A Absolutely.

3 Q The next question is, "Do you assign any
4 responsibility or fault to either party in this case for
5 that?" And you answered, "No. Responsibility, yes.
6 Fault, I don't want to be -- I'm not in the position to
7 make that judgement."

8 Question: "You obviously distinguish between
9 responsibility and fault."

10 Answer: "Yes. I think the lawyers involved in
11 the case are responsible for the many appearances before
12 the Court."

13 Question: "I would agree with that and maybe
14 my question was unartfully stated. What I intended to ask
15 you was: Do you assign to one side of this case or the
16 other -- " and you interrupted me and said, "No, I'm not
17 taking that position." And I finished, " -- any causal
18 relationship for the number of appearances?"

19 Answer: "I would not take that position."

20 Now, is that your position today, that you
21 would not assign to one side or the other in this case any
22 causal relationship to the number of appearances?

23 A To the degree that I have reviewed motions and

1 so forth again, since that deposition, and looked at the
2 various pleadings, it just seemed to me that there were
3 many more pleadings filed by the Plaintiff resulting in
4 motions.

5 Q So you went back and did some additional work
6 after the deposition?

7 A Yes, sir, I did. And I indicated to you at
8 the time of the deposition that I might do that.



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12 calculations, and I believe using your \$30,000 to \$40,000
13 that it would have taken about maybe 250 to 400 hours, or
14 300 to 400 hours, at \$150 an hour rate? Do you recall
15 that?

16 A That's correct.

17 Q Do you recall that I told you that there were
18 more than three thousand hours in this case?

19 A Yes, sir.

20 Q Do you have an explanation --

21 A I responded that that was a year and a half
22 for somebody working full-time on this case.

23 Q You did. You went through and you calculated

1 what it would be if one lawyer were working full-time for
2 a period of time.

3 And do you recall my asking you did you have
4 an explanation for why it took those hours?

5 I'll ask you now. Do you have an explanation
6 as to why it took those hours?

7 A I would say over-lawyering.

8 Q Over-lawyering.

9 A Over-lawyering. Yes, sir.

10 Q Do you recall my asking you that question in
11 your deposition?

12 A I think I just said that's what I mean about
13 the problem with the case.

14 Q Do you recall my asking you those questions
15 and then I concluded with the question, "Anything else?"

16 And you said, "I don't want to be put in a
17 position where I'm perceived to be criticizing lawyers or
18 anything like, but, the fact of the matter is, you just
19 asked me, 'If I told you it was three thousand hours,
20 would you think that is unreasonable?'"

21 And you said -- this is your calculation --
22 "Three thousand hours of work at forty hours a week is
23 seventy-five weeks of work. We're talking about a lawyer

1 working full time on this case for almost a year and a
2 half. There is no way that this case, even considering
3 all aspects of it, could take a lawyer full time a year
4 and a half to work. Absolutely no way. Now, do I have an
5 explanation for why it took that?" Answer: "It's beyond
6 me."

7 A That was a little hyperbole, as you know. I
8 had explained prior to that time during my deposition how
9 I criticized this bill.

10 Q You did. You said there were too many office
11 conferences, but you didn't know how much --

12 A And too many lawyers.

13 Q And too many lawyers.

14 A And too much work done on the case.

15 I would consider that to be a criticism of the
16 three thousand hours that you later asked about.





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4 Q Mr. Palmer, do you recall my asking you in the
5 deposition, with regard to Exhibit 3, that -- and I asked
6 you to identify it for me.

7 Do you recall that you told me that you'd
8 prepared this as though it was a budget for somebody
9 coming into your office?

10 A I think that's right. I think that I
11 indicated that this is something that I did after I had
12 done my letter opinion. I indicated that I had done some
13 calculations and things on that before, but I hadn't kept
14 those. It was just a rough piece of paper.

15 This was something I had done between the time
16 of the letter opinion and the time of the deposition. And
17 I did it without trying to come up with a specific number,
18 that is, that matched \$30,000 to \$40,000. I did this --
19 and you'll notice it's twenty and a half days, which, I
20 guess, is a little over \$30,000. But this was done to
21 see, based upon what I had estimated in the manner in
22 which I had done it then, sitting down as an afterthought
23 and preparing this in time for the deposition. I was just

1 sort of seeing what I would come up with.

2 Q And isn't it true that this was your
3 calculation of what a typical case involving a restrictive
4 covenant and easement dispute should cost?

5 A No. Actually, I mean, this is based upon my
6 review of this case. It's my estimate of what this case
7 should have taken. This case.

8 There is no such thing as an average case, as
9 we all know. I mean, you have to take a look at what's
10 involved in the case to make a determination.

11 Q Do you recall telling me that, "This is a
12 listing that I prepared in -- and it's in a rough
13 fashion -- by way of what I would consider to be sort of a
14 budget for this case. If somebody came into my office and
15 told me this is the case that is at issue, and I was
16 sitting down trying to figure up sort of a budget, which
17 we do on a regular basis nowadays for a lot of clients,
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1 Q How many of the court appearances in this case
2 were unnecessary and on what issues?

3 A Well, let me say that I think most of the
4 court appearances were on issues that ultimately the
5 Complainant did not prevail on.

6 Q Which ones?

7 A Issues having to do with the damages of the
8 experts, the expert testimony; issues having to do with
9 the injunction; issues having to do with the parking
10 spaces. Those are all items that the Complainant did not
11 prevail on.

12 Q How many days did the parking spaces take to
13 litigate?

14 A I couldn't tell you because it was all put
15 together. I mean, when you have a hearing -- and I would
16 have to sit down and read the transcript for the whole
17 case. And it would be impossible for me at that point to
18 be able to sit down and say, "There should have been a
19 half day for this, a half day for that," and so on.

20 I just -- you know, the only thing I can do is
21 say that based upon the items on which the Complainant
22 prevailed, this is my opinion as to how long trying those
23 issues would take.

1 Q What was the issue of federal preemption in
2 this case?

3 A The issue of federal preemption?

4 Q Yes.

5 How much time did it take to brief and argue
6 that issue?

7 A I don't recall that there was an issue of
8 federal preemption.

9 Q What was the issue of waiver in this case?

10 A The issue of waiver had to do with the defense
11 that the Defendant had with regard to the Complainant
12 waiving certain rights under the lease which the
13 Complainant claimed he had.

14 Q And how did he waive it?

15 A The argument was that he had waived it by
16 signing letters or failing to respond to certain
17 correspondence.

18 Q Was there anything else --

19 MR. DURRETTE: Your Honor, I'm going to object
20 now. We're getting beyond the scope of this hearing. I
21 think it's clear that Mr. Palmer's testimony, his letter
22 opinion is based on a review of what the --

23 THE COURT: Objection is sustained. Now,

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Q Are you familiar with Martindale-Hubbell?

A Yes.

Q And what is that?

A Martindale-Hubbell is a lawyer directory and I think Martindale-Hubbell has been published for sixty or seventy years now. They have a listing for almost every

1 lawyer in the state. You don't have to subscribe to be
2 listed in Martindale, but you get a listing. There's a
3 separate listing for each lawyer, and there's a separate
4 section -- if a firm, for example, wants to buy a section
5 having all its lawyers listed and explain what they do,
6 and it gives more information. Now, they've even got it
7 on the internet. I mean you can get it off your computer.
8 You don't even have to have the book.

9 Q Does this publication rate lawyers?

10 A Yes, it does.

11 Q And how does that work?

12 A The rating -- they have a panel. And
13 according to what I understand, they rate --



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Q So would you proceed, Mr. Palmer, in explaining how it works.

A They have a rating board that -- I think that they rate a tremendous number of lawyers. I mean, it's in the thousands every year. But in addition to this board that does this, they send requests out to the lawyers and ask them to rate other lawyers in the community. And they put all of this material together and they come up with a rating. If you get a rating, it's either A, B, or C, and you also get, I think, the V rating also, or you don't get any rating at all.

Q So what is the A rating? Is that the best?

A A rating is the best; and then B and C. And the V is very high standards and things of that nature.

1 The ratings, A, B, and C, are supposed to be based on
2 legal ability.

3 Q And you used this as part of your assessment
4 of other lawyers and law firms?

5 A Yes, sir. As a matter of fact, if I'm looking
6 for a lawyer out of state or in state to help me, I know
7 I'm going to look to Martindale-Hubbell first.



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Q Would you tell the jury what the general rules

1 are relating to such things as office conferences with
2 other attorneys?

3 A Well, the general rules have evolved, I think,
4 over the last ten years. I believe that anybody who's
5 representing a client now is pretty much governed by what
6 most of the industry is requiring.

7 Most corporations, almost all insurance
8 companies, very definitely limit the amount of time that
9 lawyers should be spending talking among themselves about
10 a case. They encourage one lawyer handling a case. They
11 encourage the restriction of delegating duties. They want
12 to try to keep the case under control.

13 So, based upon what I know from my own firm's
14 experience and based upon what I have seen as a result of
15 going to these meetings, I just don't see any way that
16 anybody can justify discussing a case all the time and
17 billing it to the client.

18 I think I might have mentioned when I wrote to
19 you about this. I don't see how you can bill an
20 unsophisticated client more than you should be billing a
21 sophisticated client.

22 Q So it doesn't make any difference if you
23 happen to have an unsophisticated client and he doesn't

1 complain. You still shouldn't be billing him for one
2 lawyer talking to another all the time.

3 A That's right. I mean, it's just -- the lawyer
4 is hired to do the job and he should be doing the job. He
5 shouldn't be talking about it all the time with somebody
6 else to find out what he should be doing.

7 Q Now, what about -- are you familiar with the
8 situation where you have a law firm that has a so-called
9 transactional partner, a guy that sits in the office and
10 doesn't go to court but does contracts, and he has a
11 client that gets into a litigation situation? Are there
12 rules and regulations that relate to charging for
13 conferences between lawyers in that situation?

14 A I don't know that there are rules and
15 regulations, but I would say that if I were going out to
16 hire a lawyer to try a case for me, I wouldn't be paying
17 for somebody sitting in the office finding out what's
18 going on and then calling me to let me know.

19 Q What about the number of lawyers that are
20 necessary to handle a particular case? How is that
21 handled from the viewpoint of your experience and what's
22 reasonable?

23 A Well, the number of lawyers depends on the

1 complexity of the case. Let me give you some examples
2 that I think may give some insight.

3 I have been involved in a lot of products
4 liability litigation in the last eight years. I've always
5 done some, but in the last eight years it's taken up a
6 whole lot of my time. I and an associate have handled six
7 or seven of these cases in the Metropolitan-Washington
8 area. Most of the time I did most of the work. This is
9 litigation that gets into technical aspects of plastics
10 and all that sort of thing. You have to learn it. That's
11 one of the reasons you try to limit the number of lawyers,
12 because once you pick up the lingo and you learn a little
13 bit about what it's about, at that point you don't want to
14 be getting somebody else in the case going into
15 depositions.

16 By the same token, this litigation that I've
17 been involved in has national counsel. There's a law firm
18 in Richmond that is the national counsel who coordinate
19 all of the activities of lawyers throughout the country.
20 This is litigation that involves -- actually, it involves
21 probably four or five million home owners.

22 Q Is this similar to like this asbestos or
23 silicon transplant type of litigation?

1 A Only on a larger scale. Actually, this is the
2 polybutylene litigation involving polybutylene pipes that
3 are used for hot and cold water systems.

4 Q So you and an associate regularly handle that
5 kind of litigation, just two lawyers?

6 A Yes.

7 Q Now, you've reviewed this --

8 A Let me just say, I wanted to go on further,
9 though.

10 Q Go ahead.

11 A What I wanted to explain to you is that the
12 firm that is coordinating this on a national basis, that's
13 coordinated all of the documentation -- and I'm talking
14 about over a million pages of documentation. We've got
15 records that go back to the early 1900's when they started
16 developing plastics and all of that sort of thing. These
17 folks have been coordinating all of this and they go
18 around the country, and that firm has five lawyers working
19 on it. And, I mean, this is somebody on a nationwide
20 basis handling tremendous amounts of information,
21 coordinating all of the litigation, and they've got five
22 lawyers doing it.

23 Q Now, you've had an opportunity to review the

1 pleadings in this case, the transcripts, the records of
2 hearings and so on.

3 On an order of complexity, how would you
4 characterize the litigation that occurred between
5 Burgerbusters and Dr. Chawla on a complexity level?

6 A Well, it's -- I'm not going to say it's
7 simple. I mean, I won't say it's simple, but it's
8 straightforward. It's not a complex matter.

9 Q And in your opinion, how many lawyers should
10 have been able to handle this case on Burgerbusters' side?

11 A I don't see any reason why one lawyer handling
12 the case, with the assistance of an associate or
13 paralegal, couldn't handle this case.

14 Q And how many lawyers, based on your review of
15 the records, did get involved in this case?

16 A From Chesapeake there were nine lawyers, I
17 think, involved in this.

18 Q Nine lawyers?

19 A Nine lawyers at one time or another from
20 Chesapeake. And three paralegals and a summer associate
21 and two lawyers in Warrenton.

22 Q And in your opinion is that excessive?

23 A Yes, sir.

1 Q Now, what about rates, the prevailing rates,
2 hourly rates, in this area? Can you give the jury a range
3 and how they are established, whether it has any
4 relationship to the rating in Martindale, and so on.

5 A No. Rates nowadays -- and, again, I sort of
6 hearken back to the sophisticated client. Because
7 nowadays lawyers are talking to their clients, the clients
8 are talking to their lawyers and they're saying, "This is
9 going to be your hourly rate," and, "Is this okay? Can we
10 work within these parameters?" Or some of the other
11 people are going out and they are saying. "I will do all
12 your business for X number of dollars for this year."

13 There are different ways of negotiating rates.
14 There are hourly rates, obviously. But the pressure is on
15 the hourly rate just now. I mean, and it's all across the
16 board. There are some lawyers out there who are charging
17 \$70 and \$75 an hour. There are lawyers with big firms who
18 do very specialized work who get fees in the nature of
19 \$300, \$350 an hour.

20 Q What in your opinion would be a reasonable
21 hourly rate for a law firm in this area to charge to
22 handle the Burgerbusters' side in this case?

23 MR. DURRETTE: Your Honor, can we define "this

1 area"? Is that Northern Virginia?

2 MR. O'CONNELL: Northern Virginia. Does
3 everybody know what Northern Virginia is?

4 THE COURT: I surely don't.

5 THE WITNESS: I don't think --

6 MR. O'CONNELL: Let's see, Fauquier --

7 THE WITNESS: Well, I don't think Fauquier is
8 considered part of Northern Virginia just now. But I
9 think the fact of the matter is that --

10 THE COURT: The General Assembly doesn't think
11 it's Northern Virginia.

12 THE WITNESS: I know that, Judge. Being a
13 resident here, I'm fully aware of that.

14 You know, rates around here are all across the
15 board. I would say a rate reasonable for this case would
16 be between \$125 and \$175 an hour.



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Q Now, when you're determining the
reasonableness of a fee application, particularly where

1 attorneys are involved, what are the factors that you look
2 at that go into your opinion?

3 A Well, when I did my letter -- and that was
4 before Judge Robertson made a ruling with regard to the
5 twelve factors that he thought should be included -- I
6 considered what I thought were essentially the law in
7 Virginia at this time, and that is the nature of the case,
8 the complexity of the case, the reputation of the lawyer,
9 the work that was done, and the results obtained by the
10 lawyer. And these are garnered from a number of Virginia
11 cases and also from the ethics rules that govern the
12 lawyers in Virginia.

13 Q And based on your knowledge, and the
14 application of those factors, and your review of the
15 documents in the fee application, what is your opinion
16 about the reasonableness or unreasonableness of the fee
17 application in this case?

18 A Based upon the factors I just mentioned, I
19 think the fee -- the application is unreasonable.

20 Q Is it just slightly unreasonable? Horribly
21 unreasonable, or what?

22 A Now, in looking at this case, I -- several
23 things -- I have mentioned the factors to look at. Let me

1 tell you how these things come into play. You look at the
2 reputation of the lawyer, the work that's done, the
3 complexity, and the result.

4 Now, with regard to the complexity of this
5 case, this is not an awfully complex case by any stretch
6 of the imagination. I don't mean to suggest that it's a
7 case that you go in and file in General District Court on
8 a warrant in debt and say, "You owe me \$10,000 and I want
9 my \$10,000." But by the same token, this is not an overly
10 complex case.

11 The rules of equity, they are pretty clear.
12 There are certain documents -- it doesn't matter what case
13 you get into. When you're in litigation, the lawyer
14 always has to do some research. There are some people who
15 you've probably seen on T.V. where they're spouting cases
16 off all the time. "The rule of law is this," and, "The
17 rule of law is that." It just doesn't work that way.

18 Lawyers have a good -- most lawyers,
19 especially trial lawyers, I think, have a good basic
20 knowledge of the law. When they get into areas they don't
21 know about -- just as when I'm involved in a products
22 liability case, I've got to learn about the product and so
23 I have to go get that training. Similarly, if you're in

1 an area of law with which you're not totally familiar, you
2 pick up the books and you learn it. And each case has got
3 its own side, its own facet, and you pick up a book and
4 you learn for that case.

5 Q Now, what about the --

6 A Now -- I'm sorry. I finished a thought and I
7 had stopped.

8 With regard to the nature of this case and
9 what the result was. The amended complaint that was filed
10 by the Complainant in this case was in three counts. The
11 first count sought to have this building, that is, this
12 building pad, conform with what the Complainant said it
13 should, based upon the lease and the attachments to the
14 lease. And I've read the lease and I've seen the
15 attachments and things like that.

16 The second count actually was a request to get
17 the Court to set aside the lease between the bank and the
18 owner and for other relief having to do with the bank.
19 And that really got into a decision that had to be made as
20 to whether or not the use of that property, of that piece
21 of property, as a bank was considered a retail use. The
22 tenant was trying to say, "The bank isn't retail, so
23 you've got to stop the bank from operating there."

1 And then the third item was the item
2 concerning parking spaces that they claimed that they had
3 lost. And in addition to that, as a result of this loss,
4 there were claiming some millions of dollars in damages.

5 Based upon the Court's rulings on those three
6 counts, the only thing that the Plaintiffs got was that
7 the landlord, Dr. Chawla, has to conform this building so
8 that it's a 4,000-square-foot building. The Court ruled
9 essentially that was put up, the drive-in bank -- 1,800
10 square feet with two drive-in windows or whatever it
11 was -- that that was not substantially in compliance with
12 the provisions of the lease. And as a result, the Court
13 indicated that that's got to change, and that's what
14 they're doing now.

15 So, in my opinion, the first thing is they
16 only won on that one count. That's the only thing they
17 got.

18 Then the other issue is: In thinking about
19 what they have gotten, what did they get? They didn't get
20 any damages. There's no evidence at all it's going to
21 improve their business. And so their win --

22 MR. DURRETTE: Your Honor, excuse me. I
23 object to Mr. Palmer's characterization as to whether

1 there was evidence that it's going to improve their
2 business. This is not a trial.

3 MR. O'CONNELL: Well, Your Honor, there is no
4 evidence that it's going -- they've admitted --

5 MR. DURRETTE: That's also not a factor.

6 MR. O'CONNELL: It's a result factor.

7 THE COURT: I think what you are asking Mr.
8 Palmer to do is to state the reasons why he reaches the
9 opinion that he does reach. Now, admittedly, the issues
10 were controverted in the trial of the case, and they're
11 controverted here in this hearing and in this trial. But
12 I think it's proper for Mr. Palmer to state the basis for
13 his opinion.

14 Now, if you want -- Mr. Durette, if you want
15 to cross-examine him on that. I think we've made this
16 clear that the basis for an expert's opinion is not
17 necessarily the dispositive issue; it is what his opinion
18 is.

19 BY MR. O'CONNELL:

20 Q Go ahead, Mr. Palmer.

21 A So that goes to what they prevailed on and how
22 successful the litigation was.

23 And then going into the bill itself, that is,

1 the time spent on the case. And, frankly, when I look at
2 these bills, it just -- it shocks me when I see the amount
3 of time that was used in several different ways.

4 One of the criticisms I have with the bills,
5 for example, is what we talked about earlier, this intra-
6 office conference. You cannot look at these bills -- you
7 will have them all, I assume, if this is an exhibit. When
8 you look at the bills from Faggert and Frieden, you will
9 not see a page that does not have an office conference.
10 Conference with JGL; conference with so and so, whoever it
11 might be, AMF. You will not find a page where they
12 actually have entries of the bills that does not have an
13 office conference, except for twelve -- there are twelve
14 in this package here. There are twelve of them that
15 don't. And on every other -- of those twelve, when I
16 looked at those pages, there are telephone conferences
17 either with Mr. Pearson here or one of the other lawyers
18 in the case. But it just seemed they had so many lawyers
19 working on this case, they're all talking to each other.
20 And we're not talking about a small amount of time. But
21 every single one of them -- as a matter of fact, I asked
22 Mr. O'Connell if he would mind if I didn't do this.

23 Q Go ahead.

1 A I made some blow-ups of some of the pages.
2 First of all, this is a blow-up (indicating) of a page
3 that's -- I don't know if it's in here. But this was
4 submitted with the application for fees. This is the list
5 of people (indicating) who worked on this case, and all of
6 them, down through here (indicating), are the Court's
7 contingent [ph], I'll call them. These last two, Robin
8 Gulick and Gary Pearson, are from Warrenton. But we've
9 got one, two, three, four, five, six, seven, eight -- nine
10 lawyers who worked on this case. Nine lawyers.

11 Now, when I talk about these telephone
12 conferences -- these I've picked out, and I'm sure that
13 there are some that's only got one. I'm sure there are
14 some that are only one. But there are numerous pages like
15 this, and I've highlighted them.

16 This is a bill here, a page from the bill of
17 February 10 of 1994, and it had to do with January 6 down
18 through January 13th. This is a week. The time that
19 these folks spent on this case is not a whole lot of time,
20 actually, in that week. They obviously didn't do a whole
21 lot of work on that week. But look at what is in here.
22 We've got an office conference with ADC. I'd have to look
23 back at the bill itself to see where it got started or

1 whose entry this actually is.

2 But this person had an office conference with
3 ADC and an office conference with AMF. Then on the 6th,
4 we've got an office conference with SJS. This is AMF that
5 day. Then ADC on January the 7th, office conference with
6 SJS. The 7th, the same day, office conference with ADC,
7 regarding request for admissions. Then we've got down
8 here a January 10th telephone call with Attorney Pearson.
9 The 11th, office conference with AMF, office conference
10 with SJS. The 12th, office conference with ADC. The
11 13th, office conference with SJS.

12 And they are billing this to the client.
13 That's the thing I don't understand. I mean, lawyers talk
14 all the time to their partners, but they don't bill the
15 client for it.

16 Similarly, I've got another one here. March
17 3rd, office conference with AMF. March the 3rd, office
18 conference with Lawrence, office conference with ADC,
19 office conference with JAV, office conference with ADC.
20 The same day, telephone call with Pearson regarding
21 deposition exhibits. Same day, office conference with
22 AMF. And then the 6th, again, telephone calls and office
23 conferences.

1 Now, there comes a time somebody's got to work
2 on the case. This is just the lawyers talking between
3 each other. And, as I say, it goes on.

4 Here's another one, April 17. I highlighted
5 all the office conferences again. Another page here from
6 May the 12th, 1994 -- excuse me, May 12th, 1995, office
7 conferences.

8 Now, when you have all of these lawyers
9 working on things, you've got a duplication of effort.
10 And I have a couple of examples. I've marked these in a
11 different color just so that I can remember what it's
12 about.

13 This is from December 20th, 1995. There's a
14 receipt and review of the draft order regarding the
15 October 30, 1995, telephone call between the parties and
16 the Court. What had happened was that they had had a
17 telephone conference with the Judge, and the Judge had
18 made certain rulings on some issues that were being
19 disputed at the time. And the Court had made its ruling
20 and somebody has to prepare an order. So the order is
21 sent. So they get a draft order from Mr. O'Connell with a
22 letter, and it says, "Receipt and review of draft order
23 regarding this phone call."

1 Okay. Then we have AMF reviews the proposed
2 decree. That's on the 14th. Then on November the 16th
3 there's an office conference that ADC has with JGL
4 regarding the draft decree and they send a letter to Mr.
5 O'Connell about the same. But then, on the same day,
6 we've got JGL here reviewing with the ADC order from
7 O'Connell regarding the waiver issue. They review it and
8 revise it again. Then on the 21st we get a receipt and
9 review of a letter from Mr. O'Connell regarding the decree
10 and they drafted a response.

11 Now, this has to do with the decree that says,
12 "On such and such a date on October 30, 1995, this Court
13 heard the parties on the following issues," and so on.
14 "The Court, after hearing the parties, made the following
15 rulings," colon, "One," and it can go on down. There are
16 different ways to do these things, but that's all it
17 essentially does. It encompasses what the Judge ruled.

18 Now, they get a draft decree, and we've got
19 three-tenths of an hour, four-tenths of an hour, six-
20 tenths of an hour -- that's an hour. Then we've got .4
21 here. That's an hour and four-tenths. And then another
22 five-tenths here. We've got almost two hours, 1.9 hours
23 spent about the form of this decree from one law firm.

1 Q Is that known as duplication of effort?

2 A Exactly.

3 Q And is it unreasonable to charge for that?

4 A It's ridiculous. There's just no way that
5 this kind of time should be spent on a decree.



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