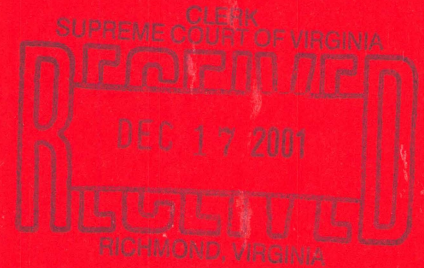


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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 011150

LASZLO N. TAUBER, LESLIE L. PETERS, IRWIN S. FREEDMAN, ESTATE OF SAMUEL BURTOFF, MICHAEL A. CORRADO, DAN J. FERIOZI, LESLIE P. GONDOR, REGINALD P. MCMANUS, MAGDOLNA A. IRANYI, ESTATE OF JAMES H. SCULLY, JEFFERSON MEMORIAL HOSPITAL JOINT VENTURE, JEFFERSON MEMORIAL HOSPITAL, INC., JEFFERSON MEMORIAL HOSPITAL ASSOCIATES, JEFFERSON MEMORIAL HOSPITAL CORPORATION, JEFFERSON CORPORATION OF ALEXANDRIA, THE TAUBER FOUNDATION, and THE CHARITABLE REMAINDER UNITRUST,

Appellants-Respondents,

v.

COMMONWEALTH OF VIRGINIA, *ex.rel.*, RANDOLPH A. BEALES, ACTING ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA; RANDOLPH A. BEALES, ACTING ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA; and THE COMMONWEALTH'S ATTORNEY FOR THE CITY OF ALEXANDRIA,

Appellees-Complainants.

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

-----X
COMMONWEALTH OF VIRGINIA, et al., :
Complainants, :
v. :
LASZLO N. TAUBER, et al., :
Respondents. :
-----X

ORIGINAL

In Chancery
No.: 96-1241

Alexandria, Virginia

Wednesday, July 28, 1999

The above-entitled matter came on for hearing
before the Honorable Alfred P. Swersky, Judge, in and
for the Circuit Court of the City of Alexandria,
Virginia, 520 King Street, Courtroom 4, Alexandria,
Virginia, beginning at 2:05 p.m., before Eva M.
Bridget, Verbatim Reporter, when there were present on
behalf of the respective parties:

J.APP. 2456

APPEARANCES:**On Behalf of the Complainants:**

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* * * * *

J.APP. 2457

P R O C E E D I N G S

1
2 MR. COCHRAN: Your Honor, I'd like to say
3 hello. I'm the new face in the audience. I'm Steve
4 Cochran. I've been admitted as counsel for the
5 Respondents. I look forward to seeing quite a bit of
6 the Court in the next eight months.

7 THE COURT: All right. I have mixed feelings
8 about that, Mr. Cochran. It's a pleasure to see you.

9 I've read the pleadings in this matter.
10 Anything you want to say, Mr. Bettius, about the motion
11 to compel the appointment of an administrator, CTA?

12 MR. BETTIUS: No, Your Honor, except that I
13 think it's long over due.

14 THE COURT: Mr. Bono?

15 MR. BONO: Just a brief response on that,
16 Your Honor. I've been in communication, or attempting
17 to, with the estates of Dr. Burtoff and Dr. Scully.

18 I've been informed by the sister of Dr.
19 Burtoff that an administrator is to be appointed to the
20 estate within the next month. They're still waiting
21 for an administrator to be appointed in that estate. I
22 have attempted to be in touch with the Scully family.
23 I'm waiting to hear from them.

J.APP. 2458

1 We don't oppose the substitution of a
2 personal representative, but we believe that the
3 estates should have a representative who should be
4 appointed, or at least have the opportunity to make
5 their wishes known. I just don't have that
6 information. We ask the Court to simply hold off a bit
7 until we can get the estates' preferences before the
8 Court and then appoint a personal representative. I
9 fully assume they will be amenable to have their own
10 estates' administrators appointed.

11 THE COURT: Do you know how long ago Dr.
12 Burtoff died?

13 MR. BONO: Dr. Burtoff died, I believe, in
14 February.

15 THE COURT: Is that estate being administered
16 in this court?

17 MR. BONO: No, in Florida.

18 THE COURT: In Florida?

19 MR. BONO: In Palm Beach, Florida. He died
20 in Houston, Texas and he lived in Florida. It's being
21 administred in Palm Beach, Florida.

22 THE COURT: How about Dr. Scully?

23 MR. BONO: Dr. Scully died in Essex,

J.APP.2459

1 Connecticut in -- I believe last year sometime, and we
2 have made several attempts to contact the family and
3 they have not yet returned our inquiries. We're simply
4 waiting to hear. I don't know the status of that
5 estate. They have a right to select people or at least
6 be heard that they be granted that right.

7 THE COURT: Mr. Bettius, anything else?

8 MR. BETTIUS: Yes.

9 THE COURT: Briefly, Mr. Bettius.

10 MR. BETTIUS: Obviously there is a
11 substantial difference in the status of a defendant
12 after verdict and after judgment, before the amount of
13 a verdict. We're about to take some very significant
14 steps from the Commonwealth's point of view, the filing
15 of our accounting.

16 I am, frankly, very uncomfortable. Counsel's
17 been filing pleadings on behalf of parties he obviously
18 doesn't represent, because they're in estate
19 situations. I believe that it's absolutely incumbent
20 to have an administrator appointed and we can
21 substitute someone if the estates come in and authorize
22 representation.

23 I'm also very concerned that these

J.APP. 2460

1 Respondents, at critical stages of the proceedings
2 which are about to occur, will not be represented
3 either by personal representative or guardian ad litem.
4 I think we need both.

5 THE COURT: All right. What I'm going to do,
6 Mr. Bono, is I'll give you 30 days to get me 2 names.
7 If you don't get them by the end of the 30 days, I'll
8 name 2 people. It will not be the sheriff, because we
9 decided a long time ago in this jurisdiction not to
10 burden the sheriff with those duties. I'll just find
11 two people and I'll name them.

12 MR. BONO: Thank you, Your Honor.

13 MR. BETTIUS: We'll submit an appropriate
14 order.

15 THE COURT: All right. What's next?

16 MR. BONO: Your Honor, a housekeeping matter
17 first. We had agreed upon a schedule the last time we
18 were in front of the Court and I've got the consent
19 scheduling order that's now been signed by all parties.

20 THE COURT: All right.

21 MR. BONO: On the scheduling order, I note
22 that the Commonwealth has noted some objections with
23 respect to their rights. I don't exactly know what

1 they mean, but whatever objections they wish to
2 preserve, they have a right to do that.

3 THE COURT: All right.

4 MR. BONO: I don't understand it. This was
5 simply an order on the schedule that we agreed to.

6 THE COURT: All right. Let's enter it.

7 MR. BONO: Your Honor, the next order of
8 business is a -- we had filed two motions to compel
9 with respect to our Interrogatories. Your Honor,
10 before I address the specifics of the Interrogatories,
11 I would like to present just a little background to
12 provide the backdrop for the motion and the
13 Interrogatories.

14 Your Honor will recall that back in March of
15 this year my colleague, Cameron Cohick, was before the
16 Court on a motion to compel by the Commonwealth with
17 respect to Interrogatories that they had served upon
18 us, long before our accounting was due.

19 The Interrogatories asked either identical or
20 similar information as to our contentions with respect
21 to our accounting and as to the contentions we are now
22 asking them to respond to our Interrogatories. At that
23 point we had argued to the Court that our answers to

JAPP.2462

1 those Interrogatories were premature and that our
2 accounting had not been completed.

3 The Commonwealth vigorously opposed that and
4 argued to Your Honor that it was our obligation to
5 respond in the course of discovery, and Your Honor
6 agreed with that argument and we were compelled to
7 answer those Interrogatories. I believe what was
8 appropriate with respect to us should likewise apply to
9 the Commonwealth.

10 Secondly, Your Honor, the Commonwealth has
11 filed a laundry list of exceptions to our accounting,
12 and our Second and Third Set of Interrogatories are
13 directly designed to address those exceptions, which we
14 don't quite understand the basis for them and disagree
15 with them and we are seeking to attempt to get
16 information with respect to that.

17 With that as background, Your Honor, I would
18 like to address our first motion to compel. I have
19 categorized the Interrogatories into five categories.
20 This is with respect to our First Set of
21 Interrogatories. If Your Honor is looking at them, the
22 first category of Interrogatories deals with
23 Interrogatory numbers 5, 6 and 7.

1 These Interrogatories basically ask the
2 Commonwealth to specify their basis for claiming an
3 ownership interest in the Jefferson Hospital building
4 and additions to that building and which entities had
5 that ownership interest, if any, and what the basis of
6 that claim is.

7 Your Honor, this is obviously a core issue on
8 the accounting. It's whether the building is or is not
9 part of the assets of JMHI and I think we're entitled
10 to that information. Although they have given a
11 pretext of information, we do know from their answers
12 what the basis of this claim is. I know of no
13 document. I know of no deed for their basis, and I
14 think we're entitled to it.

15 And, of course, it will have an impact on
16 getting to the bottom line of the accounting and we
17 think we're entitled to that.

18 The second category, Your Honor, are
19 Interrogatories 9 and 17, which ask for an
20 identification of the assets which the Commonwealth
21 claims should be included in the accounting or
22 excluded. This is verbatim from the First
23 Interrogatories that they served on us that we were

1 compelled to answer.

2 It obviously is relevant and we ask that the
3 Commonwealth identify these assets which they claim are
4 in or out. They have not done that.

5 The third category, Your Honor, asks for the
6 Commonwealth to identify the items of JMHJB income that
7 they -- that the Commonwealth claims should be included
8 in the accounting and traceable to the assets of JMHI,
9 and they have not provided us with that information.
10 Obviously that is -- again, goes to the core of an
11 appropriate accounting.

12 Your Honor, the fourth category of
13 information is for the Commonwealth to identify what
14 portion of the Inova settlement monies it claims should
15 be part of an accounting, and to identify specifically
16 what assets of JMHI they claim are traceable into the
17 settlement monies, which is, of course, the whole issue
18 here.

19 If there is no tracing -- if there's no
20 assets of JMHI that is traceable to the Inova
21 settlement monies, then those are not included in this.
22 If there's some assets that give rise to a portion,
23 that will be their contention. But obviously this is a

1 core issue and fundamental in this case.

2 The fifth category of information, Your
3 Honor, is Interrogatories 22, 23, 24 and 25, which asks
4 the Commonwealth to identify any financial benefits
5 that JMHI derived from either the Commonwealth of
6 Virginia or the United States Government.

7 Your Honor, this is a core issue in dealing
8 with conversions of charities to for-profit companies.
9 The position of the attorney general and the
10 Commonwealth in past similar transactions has been to
11 identify these benefits, because they give rise,
12 purportedly, to the -- an item of surplus in the
13 charity.

14 For example, in the recent conversion of
15 Trigon-Blue Cross/Blue Shield from non-profit to
16 for-profit, the attorney general took the position that
17 it was the non-profit benefits derived by Blue Cross
18 when it was a non-profit in the state as being the
19 investment of the public in that non-profit entity.
20 Therefore, when it converts to a for-profit, there has
21 to be a charitable donation based on any of those
22 benefits.

23 Your Honor, we know of no such benefits that

1 were derived by JMHI back in the '65-'71 time period,
2 because, as Your Honor will recall, their tax exempt
3 status was revoked. They went back and repaid --
4 refiled their tax returns as a for-profit entity. It's
5 my understanding, and I think the proof at trial was
6 that they had never received tax exempt status from the
7 Commonwealth of Virginia.

8 And because, prior to the subdivision of the
9 land, there was an undivided interest between JMHI and
10 the doctors, they were not entitled to tax exempt
11 benefits. So if there are any that the Commonwealth is
12 going to claim in this case, we believe that we're
13 entitled to ascertain that information so that we can
14 ferret out for this Court what is a proper and accurate
15 accounting.

16 Your Honor, those are the arguments with
17 respect to the First Set of Interrogatories. Now, the
18 Second and Third Sets of Interrogatories are very
19 limited, although very, very precise.

20 Your Honor, I might mention that I know that
21 we --

22 MR. BETTIUS: May I respond to the First Set?

23 THE COURT: No. I'm going to do them all.

1 MR. BONO: To the extent we have exceeded the
2 Interrogatory number, the limit by a few
3 Interrogatories, I would ask the Court to grant us
4 leave to go beyond that limit. We noted in our papers
5 that the Commonwealth has exceeded the 30 Interrogatory
6 limit itself and I would submit to the Court that this
7 is really form over substance.

8 We could have filed these Interrogatories by
9 separate parties to -- to get around the rule, as is
10 often done in this court, but we chose not to do that.
11 We think that it's more appropriate to get to the
12 merits of the information.

13 Your Honor, the Second Set of Interrogatories
14 only -- there are only five -- actually four
15 Interrogatories. The fifth one only asks for
16 documents. These Interrogatories, Your Honor, were
17 directly precipitated by contentions of the
18 Commonwealth, that made statements at the depositions
19 which have gone on in this case, that there are assets
20 and income that we did not account for in our
21 accounting.

22 Your Honor, I respectfully submit to the
23 Court that, to my knowledge, all items of income and

1 all assets have been accounted for in the Respondents'
2 accounting. I am unaware of any that were not. The
3 Commonwealth may disagree with the methodology and how
4 we arrived at the bottom line, but I submit that we
5 accounted for any assets -- every asset and every
6 income and attempted to trace it to any assets or
7 liabilities of JMHI.

8 Now, if there are any that we have not
9 identified, we should find out about it now, because
10 the purpose of the accounting, from the Court's point
11 of view, is to get to an accurate, precise bottom line
12 accounting. We think we've done it and we're doing our
13 best to do it.

14 So we filed the Interrogatories to ask the
15 Commonwealth to identify any assets or liabilities of
16 JMHI that were not taken into account in our
17 accounting, and to set forth what they are and to
18 itemize the dollar amounts. We asked for assets and
19 liabilities. We've asked for income and revenues.

20 We've asked for expenses and disbursements of
21 anything they claim we didn't account for. We think
22 we're entitled to this at this stage of the litigation
23 and we think it's relevant in light of the

1 Commonwealth's contentions, especially in light of the
2 exceptions they've filed to our accounting, and we
3 would ask the Court to order the Commonwealth to
4 respond.

5 Your Honor, our Third Set of Interrogatories
6 is again very, very short, but, again, goes to the core
7 issues of the accounting in this case.

8 Your Honor, will recall that in Your Honor's
9 opinion in the first phase of this case, you held as a
10 matter of law under Virginia common law, that the
11 Commonwealth has the right to elect to void
12 transactions as the beneficiary of a trust, as the law
13 was in Virginia back in 1971. Now the standing of the
14 law, that changed in 1978, would not permit such a
15 voiding.

16 So in order to do an accounting, Your Honor,
17 we need to know what transactions the Commonwealth is
18 going to void or elect to void so that the proper
19 accounting can be done.

20 Your Honor, a simple example of that is in
21 the Kessler case that Your Honor cited in Your Honor's
22 opinion, there Dr. Kessler had bought shares of stock
23 from the Doctors Hospital, and the Court found that

1 that was unauthorized and ordered -- and said that
2 transaction could be voided.

3 That sale was voided and the doctor had to
4 give back the shares of stock and the corporation had
5 to give back to Dr. Kessler the price he paid for those
6 shares.

7 Your Honor, similarly in this case, we're
8 entitled to know what transactions they are voiding.
9 We attempted to assume in our accounting various
10 scenarios for various transactions that they may or may
11 not elect to void. I think we were very thorough.
12 But, again, I don't know what they're going to do.

13 So our Interrogatory 1 of the Third Set asks
14 the Commonwealth to identify the specific transactions
15 that it is electing to void as a result of this Court's
16 opinion.

17 The second Interrogatory is directly the
18 result of the Supreme Court of Virginia's opinion which
19 said that we -- that this matter should be looked at as
20 a dissolution of JMHI in 1973.

21 We've asked that Interrogatory 2 specify the
22 assets and liabilities of JMHI at the time of its
23 dissolution that the Commonwealth claims should be part

1 of a constructive trust. Again, this is directly
2 relevant and it goes to what the Virginia Supreme Court
3 said should be looked at.

4 Interrogatory 3 simply says identify the
5 value of such assets and liabilities at the time of
6 dissolution. Interrogatory 4 simply asks for the
7 identification of the documents relating to that.

8 Interrogatory number 5 is directly related to
9 the Inova settlement and asks for the Commonwealth to
10 identify the documents and the factual basis from which
11 they claim that any assets or liabilities of JMHI are
12 traceable to any of the proceeds of the Inova
13 settlement.

14 Interrogatory 6 asks them to identify what
15 portion they allege to be part of the constructive
16 trust.

17 Your Honor, we think these Interrogatories go
18 literally to the core of what we're doing here and that
19 we are entitled to this information. We ask the Court
20 to order the Commonwealth provide it to us.

21 THE COURT: Mr. Bettius?

22 MR. BETTIUS: Your Honor, we have 150 years
23 of chancery practice that are just going down the drain

1 and being totally ignored in this case. This Court
2 entered an order, Your Honor, on March 3, 1997, and it
3 required that the Complainant shall file an accounting
4 that discloses rents, issues, profits, accretions,
5 benefits tangible and intangible which have accrued
6 therefrom and further proceedings shall be held.

7 I don't know if Your Honor has had an
8 opportunity to examine the document that has been filed
9 in this court and styled an accounting. If it is one
10 thing, it is not an accounting. It is, again, an
11 argument by these Respondents that some transaction
12 occurred in 1971, effectively ruled on by this Court as
13 a non-happening. That some transaction occurred in
14 1975, ruled upon by this Court and by the Supreme Court
15 as a non-happening.

16 What they have done -- and the first example,
17 Your Honor, as the Court knows, based on minutes of the
18 corporation, this charity was created as a thin
19 corporation, so thinly created that their own lawyers
20 on two occasions basically said it was a diaphanous
21 veil.

22 What they did, Your Honor, when caught, was
23 to file tax returns that said that JMHI and JMHC were

1 the same. And, in fact, Your Honor, there's no mystery
2 -- and I'd like to go back to some of the background.

3 First Counsel --

4 THE COURT: Mr. Bettius, if I've got a case
5 in my court that I'm familiar with the background on,
6 it's this one.

7 MR. BETTIUS: First counsel said we were
8 asking for Interrogatory information about their
9 accounting. That's not true. Your Honor will recall
10 we indicated that day that we had all the information
11 one could ever want about the income and we were here
12 to ask for information not about their accounting, but
13 any relevant information they had about disbursements.

14 Your Honor said what do you want me to do. I
15 said, Your Honor, I don't want you to do anything. I
16 want to issue fair warning to these Respondents that
17 it's their duty to account. Their accounting was
18 filed, Your Honor, this document they call an
19 accounting, on May 1.

20 On July 15 we get this supplemental filing,
21 supposedly documenting expenditures. Well, we
22 objected. Your Honor, the point is that there never
23 has been an accounting filed in this case.

J.APP. 2474

1 As to what we contend, there is a process
2 which this Court has set down that is to be followed.
3 They file their accounting and we file our exceptions
4 and our response to that accounting, which is being
5 prepared at the cost of thousands of dollars to the
6 Commonwealth by Arthur Anderson, and that response is
7 due on September 1.

8 It fully documents everything that one needs
9 to know. Counsel knows ultimately where this case is
10 going. It's going where it's been from the beginning,
11 that JMHI was JMHC, that this Court has ruled that the
12 operations of JMHC were usurped by JMHI and the
13 corporate opportunities of JMHI were ultimately sold to
14 a Tennessee group and ultimately sold to an Inova
15 group.

16 The indications that we have in this case,
17 which are clearly apparent now, is that in addition to
18 all the other problems the Respondents had, there's
19 been commingling of assets between Dr. Tauber's failed
20 real estate investments and the hospital. We're just
21 trying to sort those investments out.

22 On September 1, consistent with chancery
23 practice that's been going on for more than 100 years

1 in the court, we're going to file a response. We've
2 already filed exceptions. Your Honor, I don't know how
3 the Court can rule dispositively on this motion until
4 you see -- until you've had an opportunity to review
5 what was filed in the guise of an accounting.

6 The Commonwealth contends that from beginning
7 to end, and it's been our contention in the pleadings,
8 it comes as no surprise to anyone, that the charity's
9 assets were inappropriately usurped, that they were
10 ultimately bartered in leases to third parties and the
11 operating assets all belong to the Commonwealth, each
12 and every one of those assets.

13 What complicates the issue somewhat is that
14 apparently there's been commingling of other real
15 estate investments that they got involved in, tax
16 shelters.

17 But, Your Honor, the evidence will show in
18 this case, and we're going to present it on September 1
19 in full and complete form, that, in fact, in addition
20 to the purloining of assets, that, again, they disposed
21 of a corporation improperly and illegally that owes the
22 Commonwealth in excess of \$500,000 or \$600,000. These
23 issues are fully responded to or will be fully

1 responded to, as they are in the course of normal
2 practice.

3 We're being asked, in effect, Your Honor --
4 and they've exceeded the Interrogatory number in their
5 phase of the case -- what's going to happen when we
6 file our accounting, which, in effect, we've had to do
7 from scratch.

8 Your Honor, the document that's been filed in
9 the court doesn't address any of the relevant issues,
10 but again seeks to argue with the Court whether some
11 sustainable transaction occurred in 1971, '75, '82, '85
12 or '92. Your Honor, we're past that. We're frankly
13 not here to reargue the entirety of this case.

14 You resolved it. The Supreme Court resolved
15 it. What it requires counsel and Respondents to do is
16 to take the income in this year, the disbursements in
17 this year, the accretions in this year, the rents and
18 profits in every given year and bring them forward to
19 date.

20 Your Honor, we're going to do that on
21 September 1, because that's what the Court said is the
22 appropriate date for us to respond with an accounting
23 and exceptions of our own. To sit here and do this

J.APP.2477

1 piecemeal, Your Honor, the ultimate result is when you
2 identify problems with their accounting, I'm hitting a
3 moving target.

4 To file this after telling the Court in March
5 that we were going to get all the information in the
6 accounting on May 1, and when the deficiencies become
7 readily apparent, we get filings in July that exceed
8 the exhibits that were filed in the original
9 accounting.

10 Your Honor, there is an orderly process to be
11 followed here. On September 1, if they have any
12 unresolved questions, they can bring them back to the
13 Court. This Court set down a scheduling order that is
14 being absolutely adhered to by the Commonwealth in
15 every respect. That scheduling order will identify on
16 a year-by-year basis income, expenses and profits to
17 the extent we've been able to find expenses. It's
18 going to identify commingled items. It's going to
19 identify the sources of income.

20 I don't think it's appropriate, based on the
21 Court's scheduling order, to make me address the
22 deficiencies in their accounting on a piecemeal basis,
23 when I'm directed to do it by experts. At this point,

1 Your Honor, it is not a work product. I am in the
2 process of working with experts to determine what
3 should be in a proper accounting to be filed on
4 September 1 and I will do so.

5 That accounting will fully and totally
6 disclose the Commonwealth and the Commonwealth
7 Attorney's position with respect to every one of the
8 issues that we're dealing with here today.

9 I think it's inappropriate, under the
10 circumstances, to ask counsel what's wrong with my
11 case. What's wrong with it? What's included? The
12 Supreme Court and this Court have told them what's
13 included in this case.

14 It is the assets, tangible and intangible,
15 the rents, profits that belong to Jefferson Memorial
16 Hospital, Incorporated, and we'll respond to that in
17 full and complete detail by Arthur Anderson's report
18 and counsel's submission with it on September 1.

19 THE COURT: Mr. Bono, what about that?
20 Wouldn't that satisfy this if we waited until September
21 1 to see what the position of the Commonwealth was in
22 their accounting and that might satisfy all -- maybe
23 not all of these, but most of them?

1 MR. BONO: No, Your Honor, it would not
2 satisfy it one iota, because, Your Honor, in March it
3 wasn't satisfactory to the Commonwealth.

4 I don't see how they could come before this
5 Court in March and tell us they can't wait until we
6 file our accounting in May and then come here in court
7 and say they should be permitted to wait. I don't see
8 how they can do that with this Court.

9 Your Honor, their accounting, I will submit,
10 will not give us the information that we've asked for.
11 This is core information, Your Honor, and they don't
12 want to answer these questions and it's pretty obvious
13 why. Because the answers to these questions will show
14 that our accounting is proper and their accounting is
15 not proper.

16 They can't simply throw assets up in the air.
17 It has to be traced to the assets and liabilities of
18 JMHI, and this is a 28-year accounting which we've
19 done. We were very thorough.

20 I take offense to the Commonwealth's comment
21 that there is something ineffective about our
22 accounting. It is very precise, very detailed, has
23 every data in it, traces every item of asset, present

1 values, every item of income, accounts for every
2 liability and has backup.

3 Now, the Commonwealth has picked up this
4 volume of stuff. Now, the only thing I supplemented as
5 far as the numbers were concerned is we had one
6 estimated number in our accounting and we corrected
7 that estimation because it's our obligation to be
8 precise. Our supplement simply reduced the estimate
9 that we had given, because we got the exact numbers
10 from the tax returns.

11 So basically our filing of the supplement has
12 benefitted the Commonwealth. It's our obligation to be
13 precise. The only thing we put together for them were
14 all the financial documents and tax returns that --
15 they have had part of those for years.

16 We submitted the other ones way back in March
17 of this year, because -- in direct response to the
18 Commonwealth's rhetoric that our numbers were not
19 substantiated, when our numbers were taken directly
20 from the financial statements and tax returns.

21 So we simply gathered them up immediately in
22 one package and presented it to them. They had all of
23 these documents for months, if not years.

JAPP.2481

1 Your Honor, I think we're entitled to answers
2 to these Interrogatories, just like the Commonwealth
3 insisted that they were entitled to answers.

4 MR. BETTIUS: Your Honor, counsel's response
5 to the documents is -- in their own words they're now
6 telling us we have to trace. That shows the whole
7 purpose of these proceedings is to turn it on its head.
8 They converted the assets and we are, in fact, tracing
9 them. But it's not our duty to trace for them. It's
10 their duty in their accounting to trace and that's the
11 whole burden.

12 I think on September 1 we're going to answer
13 these questions.

14 THE COURT: The Court is satisfied that the
15 Interrogatories must be answered, Mr. Bettius, and I'll
16 direct that they be answered within 21 days of today's
17 date.

18 MR. BETTIUS: Yes, sir.

19 THE COURT: Anything else?

20 MR. COCHRAN: Your Honor, if the Court
21 please, I'm the new guy on the block. I feel almost
22 obligated to say something. It seems to me that there
23 truly are a lot of unresolved issues, with due

1 difference to Mr. Bettius, and perhaps he's resolving
2 them by saying we are going to void everything that we
3 can void.

4 It seems to me that there ought to be,
5 perhaps, a pretrial, after the accounting is submitted,
6 where there's some firm decisions made as to what
7 choices are they going to make, which elections are
8 they going to make. Maybe they'd make them all in
9 their accounting, but I would try to get a handle on
10 this case and I have some of the same problems as Mr.
11 Bono does. Maybe Mr. Bettius knows all the answers.

12 MR. BETTIUS: I can answer that.

13 THE COURT: Wait a minute, Mr. Bettius. Wait
14 a minute.

15 MR. COCHRAN: But I don't. I look at our own
16 accounting and it says well, if X happens, Y happens,
17 but if A happens, B happens. I think as contentious as
18 this case has been, the one thing we ought to agree
19 upon is okay, if the Commonwealth is going to make
20 elections, make the elections and we can provide a
21 meaningful answer, and a meaningful accounting at that
22 point in time.

23 So I would simply submit to the Court that it

1 ought to consider, perhaps, a pretrial in September at
2 which we thrash this out. Many of them -- most of them
3 don't require any kind of evidence. It's their
4 decision. But what they say as to an issue will
5 determine, you know, what kinds of facts and figures we
6 put forward.

7 Mr. Bettius is trying to put us in a position
8 where we take a position and then he files his
9 exceptions, which he's now withdrawn, which are valid
10 exceptions under certain circumstances. He's trying to
11 say you can't change that later. This is truly an
12 ongoing process until we know what their position is.

13 We're having to make certain assumptions and
14 get to end results that truly may not be the correct
15 result. So I would simply submit to the Court that it
16 consider a pretrial in September after that.

17 MR. BETTIUS: Your Honor, I want to make a
18 point clear. We haven't withdrawn any exceptions. We
19 did temporarily, until we file our accounting, withdraw
20 our motion to strike, which will be promptly refiled.

21 Let there be no mistake, the Commonwealth's
22 position is easily understood. A going business was
23 usurped, its corporate opportunities were totally and

1 completely usurped.

2 They pretended and masqueraded that they had
3 effected some sort of corporate change. We claim the
4 entirety of the Inova settlement. We claim the
5 entirety of the benefits of the lease with the
6 Tennessee group. We claim the entirety of the benefits
7 because they are -- and, Your Honor, you're going to
8 see a no more poignant demonstration than the words of
9 Dr. Tauber, that all of you participated in this thing
10 with virtually no investment.

11 What we have, Your Honor, is what the Supreme
12 Court found. A bunch of physicians who totally
13 obliterated a charity and took its corporate
14 opportunities.

15 There are no elections to be made, Counsel.

16 THE COURT: Wait, Mr. Bettius.

17 MR. BETTIUS: I'm sorry.

18 THE COURT: I'll be glad to entertain
19 pretrials at any time, particularly in this case,
20 because I have, on a number of occasions, urged the
21 parties that, rather than continue the contentiousness,
22 that perhaps the matter be resolved in some way, either
23 in alternative dispute resolution, perhaps, or

2
3 accounting in this matter, Mr. Cochran, I'll be glad to
4 entertain any motions or requests for pretrials or
5 anything else that you want to do, but I think it may
6 be premature to talk about that now.

7 MR. COCHRAN: Thank you, Your Honor.

8 THE COURT: All right. Court stands
9 adjourned.

10 Mr. Bono, will you prepare an appropriate
11 order?

12 MR. BONO: Yes.

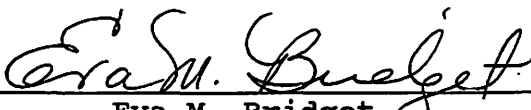
13 (Whereupon, at 2:36 p.m., the proceedings in
14 the above-entitled matter were concluded.)

15 * * * * *

CERTIFICATE OF REPORTER

I, Eva M. Bridget, the Stenomask Reporter who was duly sworn to well and truly report the foregoing proceedings, do hereby certify that they are true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through any relationship with any of the parties at interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of August, 1999.



Eva M. Bridget
Verbatim Reporter

V I R G I N I A :

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

- - - - - x

COMMONWEALTH OF VIRGINIA, :
et al., :

Complainants, :

vs. Chancery No. 96-1241

LASZLO N. TAUBER, et al., :

Respondents. :

- - - - - x

August 30, 1999

Alexandria, Virginia

The above-entitled matter came on to be heard
before The Honorable Alfred Swersky, Judge, in and
for the Circuit Court for the City of Alexandria, 510
King Street, Courtroom 4, Alexandria, Virginia,
beginning at 9:05 a.m., before Misty Klapper,
stenographic reporter, when were present on behalf of
the respective parties:

JAPP. 2488

MISTY KLAPPER AND ASSOCIATES
(703) 780-9559

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1 (Thereupon, the Court Reporter was
2 sworn by the Court.)

3 P R O C E E D I N G S

4 MS. BEACH: Judge Swersky, we're here
5 this morning at my request. As the Court's probably
6 aware, I've taken a very minor role in this case. I
7 sat through the first trial and you've seen me here,
8 but you've never seen me at the podium before in this
9 case.

10 A couple of months ago, we were
11 leaving this courthouse and Mr. Bettius and I
12 were walking up the street together and he said
13 Barbara, I wish you'd take a look at what's going
14 on in this case. And, knowing Mr. Bettius the
15 way I do, I took it with a grain of salt, but I
16 couldn't discount it either.

17 So, Your Honor, I started to take a
18 more active role in this case. I started to
19 attend depositions. I noticed a Praecipe to be
20 able to be on the list to be receiving documents
21 and whatever, because I had some significant
22 concerns, based on what Mr. Bettius had said to
23 me, concerning how the case was going.

1 Your Honor, unfortunately, by
2 getting further involved in this case, several
3 irregularities have arisen. As a result of those
4 irregularities --

5 MR. BETTIUS: Your Honor, I have to
6 object. First of all, there's no motion pending in
7 this Court this morning. They've got problems with
8 their counsel. This isn't the place or the time to
9 address them. I understand Mr. Bono is leaving this
10 case, and I understand I'm being taken with a grain
11 of salt.

12 MS. BEACH: Your Honor, I'd like to
13 finish.

14 THE COURT: Just a minute. Let me hear
15 from Miss Beach, Mr. Bettius, and then I'll hear from
16 you. Let me hear from her.

17 MS. BEACH: Your Honor, we're here this
18 morning because we've got a problem in our case. And
19 I believe that I have a duty in this case, and
20 actually, to Mr. Bettius, to bring it to the Court's
21 attention.

22 The culmination of what my
23 involvement in this case has found is that we

1 have requested that Mr. Bono withdraw from the
2 case. What we did first is we got Mr. Cochran
3 involved in the case. Mr. Bono has been
4 presented with an Order to Withdraw that has not
5 been -- he's executing it and circulating it at
6 this time.

7 Mr. Cochran, who, Your Honor is
8 aware as of the last Court appearance, had
9 stepped in originally to be co-counsel in the
10 case, now will be the counsel taking over all
11 matters of the case.

12 And, Your Honor, I'm here today
13 because of two things:

14 One, I need -- I believe I have an
15 ethical duty to inform the Court and opposing
16 counsel -- which I did to Mr. Bettius very, very
17 cursory, when I asked him if he would please
18 attend a hearing, and I asked for this to be last
19 week but he was on vacation, so we continued it.
20 I felt I had a requirement to bring it to the
21 Court's attention as soon as possible because,
22 Your Honor, the irregularities that I have found
23 concern the accounting that were filed with this

1 Court. And I have asked Mr. Cochran to take a
2 major involvement, and I would like him to
3 discuss further with the Court what the problems
4 are.

5 Your Honor, it is an extremely fine
6 road to be walking right now. I'm secretary of a
7 disciplinary committee for this jurisdiction and
8 I have a very difficult time not disclosing any
9 attorney/client confidences and yet informing the
10 Court that we have had a major problem on our
11 side of the case.

12 And at this point, I'd like
13 Mr. Cochran to just --

14 THE COURT: Before I get into that, Miss
15 Beach, what are you asking?

16 MS. BEACH: Well, Your Honor --

17 THE COURT: I may treat it as an oral
18 motion, but what are you asking the Court to do?

19 MS. BEACH: Your Honor, I'm telling you
20 that the accounting that has been submitted is
21 significantly flawed. And, beyond telling you that
22 the accounting is an attorney's accounting, rather
23 than either the client's or an accountant's

1 accounting, I've never in 20 years, Your Honor, seen
2 an attorney do an accounting, particularly in the
3 magnitude of this case. But what Your Honor has in
4 the file, that Mr. Bettius has filed objections to,
5 is, in fact, an accounting that was done by counsel.

6 And, because of the magnitude of the
7 accounting in this case, we are going to be
8 asking to either -- we have one of two options,
9 Your Honor:

10 One is to re-file an accounting,
11 which I know Mr. Bettius is going to object to.
12 Mr. Bettius's accounting is due in just two days,
13 I believe, Your Honor. And -- or, Your Honor, as
14 a fallback, we would be having to file a rebuttal
15 accounting that would have to deal with our
16 positions.

17 I do not believe that is fair to
18 Mr. Bettius. And, believe me, Your Honor, I'm
19 very aware of how upset this is making
20 Mr. Bettius. If I was in his shoes, I would feel
21 exactly the same way, and I would rather be
22 anywhere else than standing here this morning,
23 Your Honor, with this information.

1 MR. BETTIUS: I'd like to be heard, sir.

2 THE COURT: All right. Let me hear from
3 Mr. Bettius and then, Mr. Cochran, I'll give you a
4 chance, if we're going to get into those kinds of
5 details. I'm not sure you are.

6 MR. BETTIUS: Your Honor, Miss Beach has
7 been a friend of mine for 20 years. And when I say
8 upsets me -- but I will tell you, she's counsel in
9 this case and has been on the pleadings and, as
10 counsel, had an ongoing responsibility for months.

11 In the INOVA case at about the same
12 juncture, Mr. Fiske was discarded by Dr. Tauber.
13 I came to this Court in March and told the
14 Court -- and I have the transcript, if the Court
15 wants to read it -- that this is precisely what
16 was going to happen.

17 We're not under any duty to account
18 for this case. We have a trial scheduled. I'm
19 reminded of a conversation I once heard in front
20 of Judge Bryant when Senator Ball said that he
21 had missed a statute and his client had no
22 remedy. And the Senator was promptly told you
23 have a remedy, you sue your lawyer.

1 But, more importantly, Your Honor,
2 we have since March informed this Court that
3 there were significant deficiencies. In March we
4 asked, because we knew -- the income of this case
5 is perfectly documented, and I've told the Court
6 that repeatedly. Fair warning is the term I
7 used. I'm issuing fair warning, if you respond
8 to discovery, respond to it. If you don't want
9 to, you don't.

10 I don't understand in an
11 accounting -- and my time with the Bar now is
12 reaching almost 40 years. Why do we have
13 experts? You file an accounting and it accounts
14 for receipts, disbursements and expenditures.
15 And that's what the Court's Order said.

16 Mr. Bono has filed what he filed.
17 Months ago I filed exceptions and a Motion to
18 Strike. And I pulled the Motion to Strike back
19 because I wanted to give everybody notice of what
20 was happening and nobody did anything.

21 Where we are at this juncture, Your
22 Honor, is we're about a half million dollars down
23 the road. Arthur Andersen is preparing to file

1 in two days an accounting. The Attorney
2 General's Office now calls me weekly about the
3 expenses in this case.

4 We are at a level of prejudice
5 that's extreme. And I'm going to suggest to the
6 Court what I think is an appropriate disposition
7 under the circumstances.

8 We are prepared to file a complete
9 and total accounting. Now, with respect to that
10 accounting, Your Honor, there has been peer
11 review at the highest level of Arthur Andersen,
12 at the partnership level, to check the accuracy,
13 appropriateness and the methodology employed, as
14 well as the results.

15 If they're dissatisfied with their
16 counsel and they're dissatisfied with their
17 accounting -- which they've been on notice about
18 for months, which they were told months ago to
19 produce the necessary documents -- I'm going to
20 suggest that they make available to this Court
21 sufficient funds for the Court to hire an expert
22 to review our accounting as to the
23 appropriateness, completeness and proprietary

1 nature and the propriety of what we've done.

2 Your Honor, if you look at the
3 scheduling situation we're in, we're due to file
4 within two days. We then -- both sides both have
5 at that point 60 days to file, in effect, their
6 responses to the other party's accounting, which
7 we're prepared to do. Then we're going to take a
8 few depositions and we're going to trial.

9 Your Honor has practiced law and sat
10 on this bench a long, long time. We're in an
11 accounting, not an adversary proceeding. And
12 what's literally happening here is the burden is
13 beginning to shift to the Commonwealth. And it's
14 being urged by fiduciaries who have been found to
15 be in breach who have had a year -- more than a
16 year to file an appropriate accounting for this
17 Court.

18 I don't understand how at this point
19 in time, while we're half a million dollars down
20 the road in this case, they want to trash the
21 record, trash their lawyer and so they want to
22 start this thing all over again.

23 We've got a trial date in February.

1 The accounting and our objections to it have been
2 sitting there for months. Miss Beach has been
3 aware of our objections for months.

4 We were in here in March telling
5 this Court exactly what the situation was. And
6 the Court said at that time, I'm not going to
7 permit this. You file what you are going to use;
8 I'm not going to be the arbiter. And I said,
9 Your Honor, that's fine. It's fair warning.

10 Now, I know Your Honor, who is a
11 Jurist, wants to cut a break for everybody in the
12 Court. Your Honor, the prejudice that results in
13 this case is so extreme and so inappropriate.

14 Dr. Tauber is a multi-millionaire
15 businessman. He picked his lawyer. He picked
16 his accountant. And you just can't take him off
17 at this juncture of the proceeding.

18 The prejudice is so extreme, and
19 it's so inappropriate. The unfairness to the
20 Commonwealth -- and I imagine Mr. Schweiker would
21 like to be heard on this issue -- the unfairness
22 is inherent in this. And it's typical of what's
23 happened in previous cases with the same

1 litigants in this Court.

2 Your Honor, I'm going to entreat
3 you, don't allow this to happen. We either filed
4 an appropriate accounting or not, and I think the
5 Court should hire an expert to look and see if
6 we've comprehensively dealt with the issues.

7 If this occurs, are we going to see
8 new documents, or are we going to see a new
9 theory of the case? Your Honor, you know this
10 record as well as I do. Thirty years ago, a
11 decision was made by Dr. Tauber and
12 Co-Respondents to structure the operating entity
13 so that if anyone ever sued them, there weren't
14 going to be any assets.

15 What they neglected to understand
16 was this operating entity that belonged to the
17 hospital generated tens of millions of dollars of
18 revenue in excess of expenditures over the years,
19 which they took.

20 And now, Your Honor, we're ready to
21 account for that. We asked them in March,
22 furnish us any expenditures we haven't seen. And
23 Your Honor said you weren't going to permit this.

1 And, Your Honor, if you do, half a million
2 dollars in a year has been lost.

3 And I'd like Mr. Schweiker to have
4 the opportunity, on behalf of the Attorney
5 General --

6 THE COURT: All right. Let me hear from
7 the Attorney General.

8 MR. SCHWEIKER: Your Honor, Richard
9 Schweiker. I'm the Assistant Attorney General with
10 the responsibility of working on this case as
11 co-counsel and supervising our outside counsel.

12 And I would just like to reiterate
13 everything that Mr. Bettius has said, but I'd
14 like to underscore and separately state that we
15 are very, very far along in this case, well past
16 the liability phase, and now far into the
17 accounting phase.

18 And what we have incurred in terms
19 of time and effort and money spent has been
20 enormous. And a lot of that, of course, is the
21 result of what was already filed four months ago
22 by the Respondents. So we're hundreds of
23 thousands of dollars down the road in terms of

1 our experts, and we just have a great concern
2 about any change in the schedule at this point
3 and what effect that will have to prejudice the
4 Commonwealth in terms not only of getting this
5 resolved in a speedy fashion, but also the costs
6 that we're incurring in order to do it.

7 And lastly, I think it is important
8 to stress what Mr. Bettius has already said, that
9 we're at a phase now where it's a fiduciary
10 accounting, where the Court's order was very
11 clear about what was to be done in the
12 accounting. And that, of course, was the
13 responsibility of the fiduciaries to present.

14 We feel that we've been cast in this
15 position where we're being forced to do the
16 accounting ourselves and now, at the last hour
17 before ours is to be filed, we have this turn of
18 events.

19 And I -- I -- I also would just add
20 I have come to the hearings and we've had folks
21 from our office here and Mr. Bettius has done a
22 very able job of putting the Respondents on
23 notice of what we were expecting and what we

1 weren't getting.

2 Thank you.

3 MR. COCHRAN: Your Honor, if I might
4 respond and put this somewhat in a better
5 perspective.

6 Miss Beach and I are both very
7 uncomfortable about the position we find
8 ourselves in, number one.

9 Number two, we're not suggesting to
10 the Court, nor are we proposing to the Court,
11 that we, you know, have found additional
12 financial information or additional documents
13 that, you know, should have been provided. That
14 is not the case. To my knowledge, everything has
15 been provided.

16 There are a couple of documents that
17 I haven't seen; but, to my knowledge, we're not
18 proposing that, oops, here's a whole new set of
19 figures. Their accounting is their accounting,
20 and their accounting need not be re-done.

21 The problem that we have is that the
22 accounting that was submitted by Mr. Bono was his
23 accounting. And Miss Beach asked me to get

1 involved in this case and look at that
2 accounting.

3 And Miss Beach and I, you know,
4 understand what a fiduciary accounting is. And,
5 as Mr. Bettius's objection suggested, that is not
6 a fiduciary accounting, you know, we reached that
7 same conclusion.

8 But what we need to file -- and we
9 can do it by rebuttal, and I think we can do it
10 without a significant prejudice to the
11 Commonwealth -- you know, is to file, you know,
12 not an advocacy document, which that, I think,
13 was, but an appropriate accounting.

14 The appropriate accounting is going
15 to be based upon the same facts and figures that
16 Mr. Bettius's own accounting is going to be based
17 upon. You know, what we want to do is, more than
18 anything else, put those in an appropriate
19 framework.

20 And we're all going to have this
21 agreement, as I suggested to the Court when we
22 were before the Court a number of weeks ago, as
23 to, you know, when we get to a fork in the road,

1 supposed to be rebutting over the next 60 days? In
2 effect, now we've been -- if we have to file, we
3 would have had done the accounting and I don't think
4 we should have to file anything.

5 THE COURT: I didn't say you had to,
6 Mr. Bettius. I said you could. But I'm going to
7 allow them to file a response or an additional -- I
8 thought you said everybody had 60 days to file, sort
9 of responses, anyway, and I'm just going to let them
10 do that.

11 And if they file something that
12 causes you some indigestion and you want to come
13 back and say Judge, things are so different now
14 that we have to go back to our experts, we have
15 to redo this, then I'll consider awarding
16 attorneys' fees for that.

17 MR. BETTIUS: My difficulty, Your Honor,
18 is if I have -- if I file the accounting, I have done
19 the accounting. They're supposed to do the
20 accounting.

21 THE COURT: I understand.

22 MR. BETTIUS: And they're going to be
23 responding to my accounting. And our accounting --

1 and, in effect, the whole burden of the case has been
2 turned upside down if that's true. If they -- they
3 were supposed to file the accounting.

4 And we're now supposed to be at
5 trial and taking expert depositions over the next
6 60 days and rebutting their accounting. In
7 effect, the Court will have, if it enters this
8 order, shifted the burden to the Commonwealth to
9 do their fiduciary accounting.

10 And then they're going to respond to
11 the only accounting that's filed, and that's
12 ours. We didn't do anything wrong, Your Honor.
13 We shouldn't have to file an accounting. And I
14 think that's just totally, totally inappropriate.

15 If there's a question about what we
16 file, they can respond to our accounting. But,
17 Your Honor, you're going to see a new expert, a
18 new accountant. And, in effect, I'm going to
19 tell you they're going to dump Mr. DenUyl like a
20 bad hat. And we're going to see a new accountant
21 in this case.

22 THE COURT: Well, if we do, Mr. Bettius,
23 I'm giving you a remedy; and that is, I will award

1 attorneys' and expert fees for any additional work
2 that that causes. I don't know what else I can do.

3 MR. BETTIUS: Well, I would like
4 permission not to have to file my accounting, because
5 then I'm the only one who has filed an accounting in
6 the case. And I don't have a duty to file an
7 accounting. I have a duty to file a rebuttal. And
8 that's my problem.

9 THE COURT: Mr. Cochran, what about
10 that?

11 MR. COCHRAN: Your Honor, in some ways,
12 I can understand Mr. Bettius's dilemma. But the fact
13 of the matter is, and what I don't think we should
14 lose track of, the numbers are there. The income,
15 the expenses, you know, everything -- the
16 disbursements are there and, to a large extent, it
17 is -- it is, you know, the analysis that one brings
18 to bear upon those facts and figures.

19 And so it's not like he's having to
20 start from scratch. Nothing that we say is going
21 to change anything any more than what we have
22 filed. He's going to ignore what we have filed.

23 THE COURT: How much time would it take

1 you from today's date to file what you want to file?

2 MR. COCHRAN: Thirty days.

3 THE COURT: I'll direct, then, that the
4 Plaintiffs withhold filing their accounting until
5 this so-called supplemental accounting is filed. And
6 then, Mr. Bettius, if there are problems that arise
7 that require additional work by either you, attorneys
8 or experts, then I'll consider attorneys' fees for
9 that.

10 MR. BETTIUS: I understand, Your Honor.

11 MR. COCHRAN: Thank you, Your Honor.

12 MS. BEACH: Thank you, Your Honor.

13 THE COURT: Thirty days.

14 MR. SCHWEIKER: Your Honor, just a point
15 of clarification. Also, I would assume with
16 attorneys' fees would be accountants' fees as well?

17 THE COURT: Oh, absolutely, attorneys'
18 and experts' fees as well.

19 MR. BETTIUS: Thank you, sir.

20 THE COURT: All right. We'll stand in
21 recess.

22 (Thereupon, at 9:25 a.m. the hearing
23 concluded.)

MISTY KLAPPER AND ASSOCIATES
(703) 780-9559

J.APP. 2508

1 CERTIFICATE OF NOTARY

2 I, MISTY KLAPPER, the officer before
3 whom the foregoing was taken, do hereby certify
4 that said proceedings is a true and complete
5 record; that I am neither counsel for, related
6 to, nor employed by any of the parties to the
7 action; and, further, that I am not a relative or
8 employee of any attorney or counsel employed by
9 the parties hereto, nor financially or otherwise
10 interested in the outcome of this action.

11 _____
12 Misty Klapper
13 Court Reporter
14
15
16
17
18
19
20
21
22
23

MISTY KLAPPER AND ASSOCIATES
(703) 780-9559

J.APP. 2509

ORIGINAL

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

----- -X
:
COMMONWEALTH OF VIRGINIA, et al., :
:
Complainants, :
:
v. : In Chancery
:
LASZLO N. TAUBER, et al., : No.: 96-1241
:
Respondents. :
----- -X

Alexandria, Virginia

Wednesday, October 13, 1999

The above-entitled matter came on for hearing
before the Honorable Alfred P. Swersky, Judge, in and
for the Circuit Court of the City of Alexandria,
Virginia, 520 King Street, Courtroom 4, Alexandria,
Virginia, beginning at 10:33 a.m., before Eva M.
Bridget, Verbatim Reporter, when there were present on
behalf of the respective parties:

J.APP. 2510

APPEARANCES:

On Behalf of the Complainants:

DEBORAH FITZGERALD-O'CONNELL, ESQ.
INA C. CHARVET, ESQ.
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Arlington, VA 22205

CHARLES F.B. MCALEER, JR., ESQ.
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Washington, DC 20005

On Behalf of the Respondents Tauber, et al.:

STEPHEN G. COCHRAN, ESQ.
The Jefferson Law Firm, P.L.C.
6862 Elm Street, 7th Floor
McLean, VA 22101

* * * * *

J.APP. 2511

P R O C E E D I N G S

(Whereupon, the Court Reporter was sworn by the Court.)

MR. COCHRAN: Your Honor, I'd like to pass up my proposed order that has handwritten in the things that Mr. Bettius and Ms. O'Connell have proposed.

MS. FITZGERALD-O'CONNELL: Your Honor, if I may first, I'm Deborah Fitzgerald-O'Connell. This is Mr. McAleer.

MR. MCALEER: May it please the Court, Charles McAleer for the Inova parties.

THE COURT: All right.

MR. MCALEER: The related 97-0488 matter.

THE COURT: Okay.

MS. FITZGERALD-O'CONNELL: My apologies. Mr. Bettius is very ill, and in the interest of public health we asked him to stay home today.

THE COURT: All right. Mr. Cochran?

MR. COCHRAN: Good morning, Your Honor. We were before you about a month ago on our request to file an amended accounting. At that time we talked in terms of simply bumping the schedule in accordance with the additional time the Court was gracious enough to

J.APP. 2512

1 grant us on the accounting.

2 I submitted to Mr. Bettius a proposed
3 scheduling order. We've been unable to resolve that.
4 I want to represent to the Court that Mr. Bettius had
5 been kind enough and courteous enough to grant us,
6 essentially, an additional week beyond what the Court
7 granted. So we filed our accounting last week on the
8 6th.

9 I think the critical issue that the Court
10 needs to address now is when does the Commonwealth have
11 to file its accounting. As I said when I was before
12 the Court the last time, and it bears repeating this
13 morning, I don't think the Commonwealth is proposing to
14 file an accounting in the nature of a rebuttal
15 accounting. The Court was originally inclined, as the
16 Court may recall, not to have the Commonwealth file its
17 accounting on September 1 as the original order
18 contemplated, with our filing our accounting at the end
19 of September.

20 Mr. Bettius prevailed upon Your Honor in the
21 spirit of fairness so we would not have the benefit of
22 their accounting before we submitted our accounting,
23 and I conceded we are the ones who have the burden of

J.APP.2513

1 submitting that accounting.

2 The fact of the matter is, the accounting
3 that we had submitted, as I suggested then and I will
4 inform the Court today, is not based upon anything new
5 or different. The facts and figures remain the same.
6 The data remains the same. It's essentially the view
7 that one takes with the data that you've got.

8 I don't have any reason to believe the
9 Commonwealth is going to submit a rebuttal to that.
10 From what I gather secondhand, their accounting is
11 going to be a completely different animal. I suspect
12 it was ready to go on September 1, and I suspect it's
13 ready to go today.

14 In the interest of moving this case forward
15 as efficiently and effectively as possible, I have
16 proposed that their accounting be submitted by October
17 22. I think everything else flows from that, with a
18 couple of exceptions. I have included a discovery
19 cutoff of December 15. Mr. Bettius has proposed that
20 there be an expert cutoff by that date, but, in fact,
21 the discovery cutoff is as of October 1.

22 I cannot tell the Court that I think there is
23 much fact discovery, but I believe there will be some

JAPP.2514

1 discovery related to the Fairfax Inova Hospital
2 settlement and it will probably be necessary, though I
3 don't think there is any reason to complete that at
4 this time. It's certainly not going to be significant
5 and won't affect the trial date.

6 I added a new provision, which is paragraph
7 6, regarding exchanging witnesses and exhibits by the
8 14th. Mr. Bettius appears to be of the thinking that
9 all of the exhibits that should be considered by this
10 Court were admitted into evidence at the first trial.

11 I think that is probably, in essence, a fair
12 statement, but I don't think it's appropriate to simply
13 say you're limited to that. There may be some
14 additional exhibits. Certainly the experts may be
15 relying on documents somewhat extraneous to the
16 litigation, but documents, you know, such as rate of
17 return documents and the like that would be appropriate
18 as new exhibits, and there may be some additional
19 exhibits.

20 This is a different ball game than what the
21 Court heard the first time around, so I don't think
22 there should be a prohibition to adding exhibits or
23 adding witnesses. I do think that it's appropriate to

J.APP.2515

1 have a cutoff for that so that counsel knows ahead of
2 time what's going on.

3 The final issue is paragraph 7. I don't know
4 that I have a strong objection to their language. The
5 Court did reserve the right to award attorney's fees,
6 and expert fees incurred in connection with responding
7 to or dealing with our amended accounting. I think
8 that's what my language says. I think Mr. Bettius
9 prefers his language.

10 There are other dates to establish, Your
11 Honor, but the other dates flow from the date that the
12 Commonwealth must submit its accounting. I think we
13 can address that once the Court solves that issue for
14 us.

15 THE COURT: Yes, ma'am?

16 MS. FITZGERALD-O'CONNELL: Thank you, Your
17 Honor. If I may pass up our proposed scheduling order,
18 I'll address some of the issues that Mr. Cochran
19 addressed. First of all, as far as us having only two
20 weeks to respond, he is correct. We were prepared to
21 move forward on September 1. The Court, you will
22 recall -- I understand Mr. Cochran was not in this
23 case, so he does not have the benefit of the history --

J.APP. 2516

1 the original accounting was filed on May 1.

2 The Court will recall we were here as early
3 as March 24 on motions to compel with Respondents to
4 give us Answers to Interrogatories, to give us
5 production of documents. We were having severe
6 difficulty with them providing us with documents.

7 The Court at that time said that in
8 anticipation of the filing of their accounting in May,
9 that the documents that were to be included were to be
10 included as part of that. The original order wisely
11 gave us four months to look at the document, have our
12 people look at the document and then prepare our
13 accounting.

14 Again, the burden is on them. The burden is
15 not on us. We moved forward under that anticipation.
16 As the Court will recall, August 30, two days before we
17 were to bring ours forward, they came in and asked to
18 be able to do another accounting. They got 30 days.
19 Now they want us to have two weeks to respond.

20 The difficulty with that is, Your Honor, that
21 ours is a rebuttal, in essence. We need to have
22 opportunity for our folks to look at that. We got it
23 late on Wednesday. We immediately sent it out to have

J.APP. 2517

1 it copied. We couriered the copies to our accountants
2 and to our experts.

3 These folks reserved an abundance of time for
4 us back in May when this was scheduled to go. Now
5 we're imposing an 81-plus-page document, plus 44
6 exhibits, plus all of the other exhibits on their
7 existing workloads for them to look at these and to see
8 what it is that they have prepared for us. We're
9 meeting with our accountants tomorrow. Two weeks would
10 not even give us time to meet with our accountants to
11 have a report, if we need to change ours and even get
12 it copied and turned around.

13 So our proposal, Your Honor, is that we have
14 30 days, which is November 6, to give us time to get
15 our people to look at it to make sure that what's been
16 filed will be responded to accordingly.

17 Then two weeks after that, either side, if
18 they wish to -- that's point number 2 and point number
19 3 -- respond over to the 15th or the 22nd of November,
20 and give both sides two weeks to respond if they want
21 to do a rebuttal. Those are our thoughts on that
22 subject.

23 We would like to have 30 days to give our

J.APP.2518

1 folks a chance to look at it and to respond as we need
2 to respond.

3 As far as discovery, Your Honor, back in
4 March -- again Mr. Cochran, I realize, does not have
5 the benefit of this -- Your Honor himself said in order
6 to preclude any surprises, that these folks had ample
7 time, with all of our discovery and all of our motions
8 to compel, to provide us with all of the documentation,
9 all of the facts that were going to be necessary.

10 On March 24 you imposed an October 1 fact
11 discovery cutoff. We would like to hold to that, Your
12 Honor. We do not believe additional facts need to be
13 presented to this Court. They had two bites of the
14 apple on their accounting. Any facts that the Court
15 needs to consider, they should have put those into
16 their accounting. We're asking that that hold fast.

17 Moving the discovery for experts to the 15th,
18 we can do all of our discovery, we can do all of our
19 depositions, which constitutes the discovery. So
20 that's why we propose to stay with the Court's original
21 ruling at large for October 1.

22 THE COURT: But the effect of that is if
23 there are any new issues raised by this amended

J.APP.2519

1 accounting, that all discovery is cut off for
2 everybody. Is that your understanding?

3 MS. FITZGERALD-O'CONNELL: That's our
4 understanding.

5 THE COURT: If October 1 has come and gone,
6 it's over?

7 MS. FITZGERALD-O'CONNELL: Yes, sir. It's
8 our position that other than what the experts
9 themselves respond to, these folks have had an
10 abundance of time.

11 We've been here many times, Your Honor. The
12 Court's purpose in saying that was what you did not
13 want to have happen -- we were in here saying we want
14 -- we have all their income, we have all the
15 information as far as income. Deductions were what we
16 were lacking. Part of the accounting is giving them
17 credit for the things that should have come off their
18 accounting.

19 What we did not want to happen, the Court
20 specifically said -- and I have the transcript for the
21 Court if you'd like -- that you did not want them to
22 come in one month, two months, two weeks before the
23 trial and say, oh, by the way, we found boxes and boxes

J.APP. 2520

1 and boxes of documents that are going to help us with
2 our accounting. We're going to change our accounting.

3 You specifically said I will deal with that.
4 I will impose a six-month cutoff of October 1. We
5 agree with that, Your Honor. These folks have had an
6 abundance of time to get everything out here that they
7 want the Court to consider. We would like to continue
8 that as well.

9 As far as the witnesses and the exhibits, I
10 did not want to mislead Mr. Cochran. Our position on
11 exhibits is all the exhibits that the Court needs to
12 consider are attached to the -- relative to the
13 accounting, everything, certainly, that the Court would
14 need is there. We do not feel like there needs to be
15 any exhibits exchanged and exhibit lists.

16 The same thing with witnesses. Other than
17 the experts that are coming in, and other than what the
18 Court would like to hear, I cannot imagine there would
19 be any witnesses that would be necessary to be
20 identified to come before this Court.

21 My proposal would be that when we have a
22 pretrial conference after the Court's had an
23 opportunity to consider what we're going to do at the

JAPP.2521

1 trial, if you would like for anyone to come in and
2 testify, then certainly -- other than the experts, we
3 could produce those witnesses.

4 But there does not seem to be any particular
5 reason -- this is an accounting. The trial phase of
6 this has gone on long before. There has been an
7 abundance of evidence that Your Honor heard. We don't
8 believe there are any other witnesses, other than the
9 experts, that need to be brought in or exchanged prior
10 to the trial.

11 That's our reason for, in number 5, when we
12 talked about discovery, and then number 6, we left out
13 exchange of exhibits or trial witnesses because we
14 don't feel there will be any additional trial witnesses
15 or any more opportunities there.

16 So that's the sum and substance of our
17 proposed order, Your Honor. We would like to have the
18 order entered as we have handed it up to you.

19 THE COURT: Briefly, Mr. Cochran.

20 MR. COCHRAN: Your Honor, if the Court
21 please, what I'm certain is going to happen here is I'm
22 going to receive their accounting, whether it's two
23 weeks from now or whether it's four weeks from now, and

J.APP.2522

1 their accounting, rather than being a rebuttal -- and
2 there's a provision in here for a rebuttal accounting
3 for both sides, so we're not talking about them being
4 barred from doing that, we're talking about a November
5 deadline -- I am absolutely certain that we're going to
6 see an accounting that says okay, we agree that your
7 income is fairly stated, but we want to challenge the
8 expenses that you've taken.

9 And in order for us to be in a position to
10 intelligently rebut and appropriately rebut what I'm
11 certain is going to be in their accounting, I'm sure
12 there's going to be factual issues that are going to be
13 issues as to whether the expense incurred or decision
14 made was a valid one, considering the fiduciary duties
15 of the parties involved.

16 So I think it would be -- it would be
17 borderline absurd, and certainly not in the interest of
18 justice, for us to be precluded, having not seen their
19 accounting, from putting on additional new factual
20 testimony.

21 I don't anticipate exhibits. Again, Ms.
22 O'Connell and Mr. Bettius seem to think we've got 50
23 boxes of documents. I said the last time around, and

J.APP.2523

1 it's true today, we didn't come up with new documents
2 to predicate the accounting upon. We came up with a
3 more appropriate analysis of the figures that were
4 already there.

5 While there are tons of exhibits to this new
6 accounting, there is, in essence, nothing new by way of
7 financial documentation. It's simply one complete
8 accounting that essentially incorporates a good part of
9 what Mr. Bono said back in May, so I don't think it
10 would be appropriate to bar us from fact discovery or
11 additional witnesses or exhibits, should it come up.

12 I don't anticipate documents, but I certainly
13 do anticipate when I see their accounting, if I can
14 believe the number that I've been told that their
15 accounting says is due, that the position is going to
16 be the significant expenses that we claim as valid
17 expenses are not appropriate expenses. So there will
18 be testimony that will be necessary for lay witnesses
19 to address that issue and perhaps discovery as well,
20 Your Honor.

21 THE COURT: Does this impact on Inova in that
22 matter at all?

23 MR. McALEER: Your Honor, my familiarity is

1 limited of the case, and it's my understanding that it
2 does not directly.

3 THE COURT: I didn't think so.

4 MR. McALEER: I will simply note for the
5 Court that we endorsed the Commonwealth's proposed
6 order, but it does not impact us directly.

7 THE COURT: What I'm going to do is I'm going
8 to grant the Complainant's request to file their
9 accounting on or before November 6th of 1999. I have
10 amended their order, however, and I have said all fact
11 discovery shall be concluded by November 30th of 1999.
12 That's about two weeks, Mr. Cochran, after you get
13 their accounting to do whatever it is you need to do.

14 I've also added to that order the provision
15 that on January 14 the parties shall exchange exhibits
16 and lists of witnesses.

17 Now, it comes up every motions day, and I
18 think I've got a case on the docket today, where people
19 think that the pretrial order is some sort of
20 substitute for discovery. It is not. There is still
21 the duty to supplement and to do complete discovery in
22 the case. The only thing the pretrial order does is
23 put everybody on notice who the witnesses are and what

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1 the exhibits are. It's not to be a substitute whereby
2 something new could be added.

3 So I'll do that and I'll enter the order as
4 amended.

5 Mr. Cochran, if you want to sign that -- I'll
6 have the bailiff hand it to you -- as objected to.

7 MR. McALEER: Your Honor, Charles McAleer for
8 the Inova parties. I have a procedural issue. It's my
9 understanding that in the prior proceedings before the
10 Court the Court had ruled that the two cases, Chancery
11 97-0488 and Chancery 96-1241, were consolidated by the
12 Court for all purposes.

13 Previously Mr. Trenga had circulated a
14 proposed order to counsel on August 25 and September 17
15 and requested endorsements, or in the alternative, any
16 objections and comments. We didn't receive any
17 objections or comments, but we also didn't receive an
18 endorsed order.

19 I have that here today and counsel for -- the
20 counsel that are present here have endorsed it and I
21 was wondering if I could hand that up.

22 THE COURT: If you hand that to the bailiff,
23 I'll enter it.

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THE COURT: All right.

MR. COCHRAN: Thank you very much, Your
Honor.

MS. FITZGERALD-O'CONNELL: Thank you, Your
Honor.

(Whereupon, at 10:50 a.m., the proceedings in
the above-entitled matter were concluded.)

* * * * *

J.APP. 2527

MISTY KLAPPER & ASSOCIATES

(703) 780-9559

COPY

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

3 - - - - - X
 4 COMMONWEALTH OF VIRGINIA, :
 et al., :
 5 :
 Complainants, :
 6 :
 vs. : In Chancery No. 961241
 7 :
 LASZLO N. TAUBER, et al., :
 8 :
 Respondents. :
 9 :
 - - - - - X

10
 11 Alexandria, Virginia

12 Wednesday, January 12, 2000

13 The proceedings commenced at 2:00 p.m.

14 BEFORE:

15 THE HONORABLE ALFRED D. SWERSKY.

16 APPEARANCES:

17 MARC E. BETTIUS, Esq., INA C. CHARVET, Esq.,
 and DEBRA FITZGERALD-O'CONNELL, Esq., Lawson
 18 & Frank, 6045 Wilson Boulevard, Suite 100,
 Arlington, Virginia 22205

19 and
 20 RICHARD S. SCHWEIKER, JR., Esq., Assistant
 Attorney General, Office of the Attorney
 General, 900 East Main Street, Richmond,
 21 Virginia 23219, counsel for the complainant
 Commonwealth of Virginia.
 22

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1 CHARLES F.B. MCALEER, JR., Esq., Miller &
2 Chevalier, 655 Fifteenth Street, Northwest,
3 Suite 900, Washington, D.C. 20005, counsel
for the complainants INOVA Health Care System
and INOVA Health System Foundation.

4 BARBARA P. BEACH, Esq., Beach & Associates, 416
5 Prince Street, Alexandria, Virginia 22314,
counsel for the respondent Tauber.

6 STEPHEN G. COCHRAN, Esq., The Jefferson Law
7 Firm, PLC, 6862 Elm Street, 7th Floor,
8 McLean, Virginia 22101, counsel for the
respondent Jefferson Memorial Hospital Joint
Venture.

9 GASPARE J. BONO, Esq., Long, Aldridge & Norman,
10 LLP, 701 Pennsylvania Avenue, Northwest,
11 Suite 600, Washington, D.C. 20004, counsel
for the respondents Tauber, Peters, Freedman
and Tauber Foundation.

12 WILLIAM E. O'NEILL, Esq., 2317 North Early
13 Street, Alexandria, Virginia 22302-1705,
counsel for the respondents Gondor, Iranyi,
14 Corrado, Feriozi and McManus.

15 DAVID J. KIYONAGA, Esq., Kiyonaga & Kiyonaga,
16 526 King Street, Suite 213, Alexandria,
Virginia 22314, counsel for the Estate of
James Scully.

17 THOMAS P. MAINS, JR., Esq., Mains & Mains, 6849
18 Old Dominion Drive, Suite 405, McLean,
Virginia 22101, counsel for the respondent
Burtoff.

19 KEVIN M. O'DONNELL, Esq., and BRUCE WAYNE
20 HENRY, Esq., Henry & O'Donnell, PC, 4103
21 Chain Bridge Road, Suite 100, Fairfax,
22 Virginia 22030.

P R O C E E D I N G S

(The court reporter was sworn.)

THE COURT: All right. Let's take up some of the administrative matters about who's in, who's out, who's counsel for whom, please.

MR. KIYONAGA: David Kiyonaga entering my appearance for the Estate of James Scully.

THE COURT: All right. I believe I've signed that order, Mr. Kiyonaga. I thought -- you presented an order before, didn't you?

MR. KIYONAGA: No, I hadn't presented an order, Your Honor. I just spoke to --

THE COURT: You noted your appearance?

MR. BETTIUS: I presented the order, Your Honor. In addition, has the order with respect to Ms. Burtoff been entered that appoints her as the administrator of the Burtoff estate?

MR. COCHRAN: I think that was submitted, Your Honor, and should have been entered --

MR. BETTIUS: That's the only housekeeping matter, Your Honor, that --

MR. COCHRAN: The Burtoff estate at this point

J.APP. 2530

1 in time, you know, has a personal representative. There
2 is some uncertainty as to who is going to be
3 representing the Burtoff estate, Your Honor.

4 MR. BETTIUS: In this case?

5 MR. COCHRAN: In this case; but for now I
6 represent the Burtoff estate, I think. But Mr. Farese
7 in Florida has not let me know quite what's going on on
8 the --

9 MR. BETTIUS: Your Honor, we have due process
10 issues. And in the absence of a clear and definite
11 statement I would ask the Court to appoint someone.

12 THE COURT: Well, we're all getting a little
13 bit ahead of ourselves. Let me deal with the question
14 of Mr. Kiyonaga first.

15 I have an order that was handed to me the last
16 time we were in court with a blank space to appoint an
17 administrator CTA for the estate of Dr. Scully.

18 Mr. Kiyonaga has now -- you've entered your
19 appearance as counsel?

20 MR. KIYONAGA: As counsel for the trial, Your
21 Honor, not as administrator.

22 THE COURT: All right.

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1 MR. KIYONAGA: I was contacted by Roger Scully,
2 the son, just recently. And he asked me to come in to
3 handle the trial but not as administrator. I mentioned
4 that to him yesterday. He knew nothing about that.

5 THE COURT: All right. Is there an
6 administrator of that estate and is that in Virginia or
7 where is that or do you know?

8 MR. KIYONAGA: The estate is in Maryland.

9 MR. BETTIUS: Your Honor, in the absence of an
10 appointment this gentleman has no standing in the case.

11 THE COURT: All right. What's next? I'll deal
12 with that in a minute. What's the next one?. I have --
13 there were several motions filed, I thought.

14 Mr. O'Neill had filed a motion. Mr. O'Donnell had filed
15 a motion. I've got a host of them here.

16 MR. COCHRAN: Your Honor, the next logical
17 motion is Mr. O'Donnell's motion for a continuance.
18 There are some issues surrounding the appropriateness
19 and the scope of that motion. And I think Mr. Bettius
20 has much stronger feelings about that than I do. So
21 I'll let him address it.

22 THE COURT: Well, I can put everybody at ease.

1 I have not read either the motion for a continuance nor
2 the opposition to the motion for a continuance because
3 of the rather frantic phone calls that reached my law
4 clerk about the contents of those motions. Judge
5 Haddock spent an hour yesterday trying to redact them.
6 And I just opted not to read them.

7 MR. BETTIUS: It would be a tragedy, Your
8 Honor, if this Court were disqualified at this stage of
9 the proceedings because of any discussions of settlement
10 negotiations, because there aren't any settlement
11 negotiations underway.

12 THE COURT: All right. Then let me hear from
13 Mr. O'Donnell.

14 MR. O'DONNELL: Your Honor, I guess I have to
15 be extremely cautious. We filed a joint motion to
16 substitute as counsel which was conditioned upon the
17 firm being able to obtain a reasonable continuance of
18 trial in order to permit us to intervene or substitute
19 on behalf of five respondents.

20 The substance of the motion indicates a
21 conflict that arose between the respondents that
22 necessitated Mr. Cochran giving notice on December 22nd

1 that he must request these individual respondents to
2 find replacement counsel.

3 Dr. Tauber individually advised them that
4 Mr. Cochran had only been retained to represent the
5 joint venture. I can't go into at this point because of
6 all of the brouhaha exactly what the nature of the
7 conflict is except to say in our defense, Your Honor, we
8 did not disclose any privileged discussions or
9 settlement negotiations; only identified, quite frankly,
10 in the pleading what the substance of the conflict was.

11 My firm has investigated -- undertaken a
12 reasonable due diligence investigation of the case, Your
13 Honor, in order to avail ourselves of enough knowledge
14 to know whether or not we can get in and be of
15 assistance to the respondents.

16 Our investigation leads us to believe, Your
17 Honor, that we simply cannot. And I don't know how
18 almost anybody could prepare in a two to three week
19 period for trial in this matter.

20 We had visited with the complainants' counsel,
21 with the respondents' counsel and with individual
22 respondents with the assistance of Mr. O'Neill. We are

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1 aware of the voluminous trial record, the fact that
2 there are at least eight volumes and over a thousand
3 trial exhibits, the fact that there has been many months
4 of expert testimony in preparation of reports.

5 And in order to come in, Your Honor, we simply
6 do not believe that it is appropriate nor do we believe
7 that the ethical rules permit our acceptance of that
8 engagement unless we can competently represent the
9 client.

10 Under the circumstances what we did was we
11 filed a motion with this Court that was a joint motion.
12 It asked that we substitute as counsel, because the
13 respondents had been advised that Mr. Cochran can no
14 longer represent their interest.

15 And I'll allow him to speak to that, because I
16 believe it's something that he has gone as far as to
17 check with the bar counsel to see what the conflict
18 requires.

19 We have also indicated in the motion, Your
20 Honor, that we do not believe it is capable to accept
21 that engagement and will not seek to substitute in this
22 case unless a reasonable trial continuance can be

J.APP. 2535

1 provided in order to allow us to get up to speed.

2 Now, the pleading went to other issues about
3 the respondents' intent to move the case forward. I
4 don't believe that it created any sort of conflict or
5 disseminated information that would have prevented this
6 Court from hearing the case in chief.

7 There is a vehement disagreement with regards
8 to that, Your Honor. And as a result there was
9 suggestions initially that the exhibits and portions of
10 it be redacted. As you say now, you haven't been able
11 to hear it.

12 I stand before you with my hands somewhat tied,
13 because in light of the -- Judge Haddock's attempts and
14 your inability to review the pleading I don't think I
15 have the liberty at this stage to be able to discuss the
16 substance of the rest of our pleading.

17 THE COURT: All right. Let me hear from
18 Mr. Cochran. Then I'll hear from Mr. Bettius.

19 MR. COCHRAN: Your Honor, I'm somewhat in an
20 uncomfortable position. Ms. Beach will address the
21 issue of the continuance on behalf of the respondents
22 other than the respondents that Mr. O'Neill represents.

J.APP. 2536

1 MR. BETTIUS: Your Honor, I don't have any
2 objection going into these issues as long as there's not
3 going to be a subsequent motion for Your Honor to recuse
4 himself. That's what I'm concerned about.

5 They can talk about whatever they want to talk
6 about as long as I don't hear that Your Honor can no
7 longer hear this case.

8 MR. COCHRAN: Your Honor, if Ms. Beach could
9 respond --

10 THE COURT: All right.

11 MR. COCHRAN: -- Your Honor, just for the
12 moment at least and take me off the horns of a nasty
13 dilemma.

14 THE COURT: All right.

15 MS. BEACH: Your Honor, again, I would like to
16 save a little bit of time here. First of all, there are
17 no problem with ethics. So let me put Your Honor's mind
18 at that.

19 And, Your Honor, you're probably going to hear
20 something from me that you will not hear from the rest
21 of this case. Mr. Bettius has filed a pleading that I
22 actually agree with. It is lengthy. And he has long

1 arguments. And -- I'm sorry. I don't mean to be --

2 MR. BETTIUS: I really don't --

3 MS. BEACH: Okay. If Mr. Bettius will go first
4 with his arguments, I believe I will stand up and tell
5 Your Honor that I concur with -- we are against the
6 continuance. Mr. Bettius has laid out the arguments.
7 And I would allow him to go ahead and --

8 THE COURT: Let me ask you this since this
9 record -- the state of this record -- who do you
10 represent?

11 MS. BEACH: I represent Dr. Tauber. And I have
12 all along, Your Honor.

13 THE COURT: Okay. All right. I just needed to
14 get that -- I can't keep the players straight, if you
15 want to know the truth. It's been very difficult.

16 MS. BEACH: Well, I have since the beginning of
17 this case represented Dr. Tauber. I have sat here --

18 THE COURT: Mr. Cochran then represents the
19 joint venture?

20 MS. BEACH: That's correct.

21 THE COURT: All right.

22 MR. O'DONNELL: May I, please? Mr. Cochran up

1 until December 22nd represented not just the joint
2 venture but the individual respondents except for
3 Dr. Tauber.

4 THE COURT: I understand. I understand. Okay.

5 MS. BEACH: Your Honor, that's not accurate.
6 The retainer letter was always with the partnership.
7 Your Honor, I'm not going to have a statement made in
8 this court that is not accurate.

9 MR. O'DONNELL: Then Mr. Cochran ought to speak
10 to that, Your Honor.

11 THE COURT: Go ahead. All right. Mr. Bettius,
12 let me hear from you.

13 MR. BETTIUS: This issue arose as early as
14 December. And in the course of the deposition I said
15 I'm tired of it, I really want to know who represents
16 who. Mr. Cochran has filed on behalf of respondents.
17 He's filed on behalf of the joint venture.

18 Your Honor, I have for the Court's
19 consideration a -- what we call a score card, who
20 represents who. If you read the precipes, some of these
21 people have three lawyers.

22 I've asked Mr. Bono to clarify in writing now

1 that he's coming back into the case are his precipes
2 cumulative or does he mean for them to be not
3 cumulative; but, with the Court's permission, I don't
4 know who represents --

5 THE COURT: We tried to do this ourselves,
6 quite frankly, with the pleadings. The law clerks and I
7 tried to do this ourselves. Show all counsel. Give
8 everybody a chance to look at that.

9 MR. BETTIUS: Your Honor, this case has a
10 six-year history. With respect to these alleged
11 conflicts that exist between the respondents, it's a lot
12 at this point like the folks that were on the Titanic
13 after it hit the iceberg.

14 After it first hit the iceberg a lot of people
15 said, gee, I wish I weren't on this boat, maybe I
16 shouldn't have bought a ticket. And the first life
17 boats, if you'll remember, Your Honor, went off half
18 empty.

19 Well, now we're on the verge of trial. And
20 it's taking on water. And it's really cold out there.
21 And, Your Honor, frankly, if there was a disagreement
22 between these respondents -- Your Honor laid out in a

1 decision almost three years ago what was going to happen
2 in this case in terms of an accounting.

3 If there were any conflicts or any discussions
4 to be pursued by these individuals, they should have
5 been pursued over the last three years. And, Your
6 Honor, I will tell you in as clear and as explicit a
7 language as I can there is no basis for discussions.
8 There's nothing on the table that forms the basis of
9 discussions.

10 We don't even know who's involved in the group
11 that's supposedly going to have these discussions. And,
12 Your Honor, we have told the respondents who discussed
13 this matter with us that we cannot discuss issues
14 piecemeal because of statutory prohibitions and release
15 of individuals, because the transactions go back to
16 1971. And I've tried to obfuscate the nature of those
17 discussions as best I can.

18 It is not appropriate especially in view of the
19 circumstances of this case on the eve of trial to say we
20 want to create some discussions, we want to come over
21 and have ancillary proceedings to remove Dr. Tauber so
22 that we can have discussions.

J.APP. 2541

1 Your Honor, very plainly, I want to review the
2 history of what's happened in this case so far.
3 Ms. Beach and Mr. Cochran stood before the Court and
4 indicated that the accounting filed by Mr. Bono
5 presented great difficulty for them, it really wasn't an
6 accounting and they were withdrawing.

7 The Court granted them a very, I think,
8 generous indulgence and put the complainants under an
9 enormous burden. Our time for response to their
10 accounting was shortened from four months to one month
11 to hold this trial date. Your Honor has indicated that
12 the case is going to go off and it's going to trial.

13 This issue of continuing the case so that they
14 can begin to have a basis to file another lawsuit to
15 remove Dr. Tauber, to come and have other discussions is
16 totally inappropriate.

17 If these actions were going to take place,
18 we're going to continue this case. It should have --
19 these discussions should have taken place three years
20 ago.

21 Now, on a personal note, Your Honor, I have
22 lived with this case day after day, month after month.

1 I can recite to you at this point because I'm ready to
2 go to trial every transaction month by month, year by
3 year. The enormity of the burden of preparation of the
4 case is enormous.

5 I'm going to ask Your Honor to look -- and if
6 we stop, what are we going to do? Are we going to do
7 new discovery? Will we have new accountings? The
8 Commonwealth is being severely importuned. And it's
9 interesting. For once Ms. Beach is right. Dr. Tauber
10 wants a resolution of this case. The partnership wants
11 a resolution.

12 And, Your Honor, I'm going to ask the Court to
13 go back and review the partnership agreement that was
14 entered into in 1975. They cloaked Dr. Tauber with
15 complete and full discretion to handle all matters of
16 the joint venture.

17 He didn't have to account to them. He didn't
18 have to tell them. He was in charge. He's been in
19 charge. And now two weeks before the trial starts
20 people want to change the rules.

21 Your Honor, they cast their lot with
22 Dr. Tauber. They got on Dr. Tauber's ship. And they're

1 either going to sink with it or they're going to do very
2 well with it, wherever that issue is.

3 A continuance of this case, Your Honor -- we're
4 all getting older. And you said in the last hearing you
5 wanted, I think, to be around at the end of the case.
6 Well, so do I. And, Your Honor, a continuance of this
7 case is absolutely absurd in the context of where we
8 are.

9 The major issues of liability have been
10 determined. We're here to talk about numbers. There
11 should be no division or conflict about those numbers.
12 Your Honor's already granted them leave to withdraw one
13 accounting and file what is supposed to be a new
14 accounting.

15 When you look at it, Your Honor, you'll find
16 substantively there's no difference hardly between
17 accounting one and two in terms of their theory; but
18 they've already had that indulgence, Your Honor.

19 I want to know what conflict there can be with
20 reference to evidence that's going to come in with
21 respect to this accounting unless the Court's going to
22 grant them leave to file yet another accounting.

J.APP. 2544

1 The Court's made it clear there are going to be
2 no new documents introduced into this case. The first
3 cut-off was as of, I think, October and then ultimately
4 extended that to November.

5 What are we going to do in terms of presenting
6 something in this case that's new? And what's the
7 conflict other than that some of the respondents now are
8 getting cold feet about coming to trial? That's really
9 what this issue is about.

10 Your Honor, if there is to be a productive
11 discussion looking towards termination of this case --
12 Judge Bryan used to find a great way to get cases
13 disposed of. Set them for trial, move them to trial and
14 let's have the trial.

15 THE COURT: Anybody want to respond?
16 Ms. Beach.

17 MS. BEACH: Yes, Your Honor, just very briefly.
18 I do agree with what Mr. Bettius says but for some of
19 the points on my client. None of us are getting older.
20 All of us want to see resolution of this.

21 This is a situation where nobody as a partner
22 has been left out of the loop. No information has been

1 put forward here, no accounting has been filed as far as
2 the final accounting that was filed without sharing that
3 information, without gathering that information from
4 every party that is standing before you today.

5 For those reasons, Your Honor, we do not
6 believe that a continuance is warranted. We would like
7 to get on with it. Mr. O'Neill has been involved with
8 this since day one as I have on two of the parties that
9 are part of this petition.

10 And the remaining three have had all the
11 information and all the opportunity to seek legal
12 advice. They have sought legal advice. They're now
13 saying they want formal legal advice.

14 We obviously don't object to that, but I do
15 agree with Mr. Bettius. This is an accounting phase of
16 this. We need to go forward. We need to reach
17 resolution which we believe will be favorable to the
18 partnership. And we need to get this thing resolved.
19 Thank you, Your Honor.

20 THE COURT: Anyone else? Mr. O'Donnell.

21 MR. O'DONNELL: Your Honor, I feel like Mickey
22 Mouse caught between Godzilla and Megatron. You know,

1 we're not here officially on behalf of any party as of
2 yet. We signed onto the pleading I filed along with
3 Mr. O'Neill who entered his precipe on behalf of the
4 five respondents on January 4th, just about a week, week
5 and a half ago.

6 And I think, although I wasn't here at that
7 hearing, Mr. O'Neill indicated that that was a temporary
8 measure and that they were seeking replacement counsel
9 at that time.

10 Much ado is being made about the fact that the
11 doctors who have thrown their lot in with Dr. Tauber
12 need to proceed to trial and have known all along that
13 this was going to trial and need to move forward with
14 it.

15 The doctors, Your Honor, were advised on
16 December 22nd that they needed to obtain replacement
17 counsel. They had up until December 22nd relied upon
18 Mr. Cochran. And they've been riding whatever boat that
19 may be, whether it be the Tauber boat or the JV boat or
20 whatever it may be.

21 But they have been being represented by
22 Mr. Cochran and have been providing him with individual

J.APP. 2547

1 instructions that Mr. Cochran determined created an
2 absolute conflict requiring his withdrawal. That is
3 what necessitates their need for new counsel. And that
4 is what necessitates a request for a continuance.

5 I have to tell you that I think myself -- and
6 Mr. Henry is here in the courtroom, also. We both came
7 today to be able to be available to address any
8 questions, but I think that the parties involved here
9 would be able to tell you that we've at least undertaken
10 a reasonable due diligence investigation of the case.

11 We've tried to meet with the parties, talk to
12 them, understand it. We've tried to get our hands
13 wrapped around what is an amorphous, an enormous set of
14 factual circumstances and history going back into the
15 mid '60s or early '60s.

16 It is our conclusion, Your Honor,
17 notwithstanding that we are both competent trial counsel
18 that we simply can't prepare for this case in three
19 weeks. And we're not ethically permitted to accept that
20 representation if we are forced into a trial on February
21 1.

22 The doctors have been told they have to get new

J.APP. 2548

1 counsel. Now, I am again still troubled. Mr. Bettius
2 made some representations to some facts that were taken
3 out of the pleading.

4 I hear Mr. Bettius saying that he doesn't have
5 any problems with your considering our motion and all of
6 the elements of it so long as there's no motion for
7 recusal. I don't know if I can get the same
8 representation from this side of the table.

9 I think what would be appropriate would be to
10 have you review the entire pleading with the two
11 exhibits to it so that you can understand that on
12 December 22nd the respondents were given formal notice
13 by letter that they had to get new counsel.

14 That letter came from Mr. Cochran who has
15 determined what in his professional responsibility he
16 has to do and then was followed up by a letter from
17 Dr. Tauber who takes a different position.

18 And it's sort of interesting. It's not that
19 Mr. Cochran is withdrawing as your counsel. He, in
20 trying to protect, I think, the ability of Mr. Cochran
21 to continue in the case, has said he has never
22 represented you. He's only represented the JV. You

J.APP. 2549

1 guys need to get your own counsel. And I've had my own
2 counsel throughout the entire case.

3 Well, these individual respondents, Your Honor,
4 I can say have never understood that to be the case. I
5 don't think Mr. Cochran has. Mr. Bettius's accounting
6 or sheet here indicates that Mr. Cochran did enter his
7 appearance on behalf of the respondents. And I think
8 most of the parties have been presuming that that, in
9 fact, is the case including Mr. Cochran.

10 There is a division within the respondents at
11 this point that Mr. Cochran has felt in good conscience,
12 in discharge of his ethical and professional duties --
13 and I must say quite appropriately -- requires him to
14 withdraw as counsel to the five named respondents and
15 maybe some others.

16 At this time we're simply asking the Court to
17 determine whether or not we can have enough time to
18 prepare for trial such that we can justifiably enter an
19 appearance and represent these entities who now are
20 before the Court without counsel save for Mr. O'Neill.

21 With all due respect, Your Honor, Mr. O'Neill
22 is somebody I have known and I know this Court has a

J.APP. 2550

1 great deal of knowledge of and a great deal of respect
2 for.

3 When he entered his appearance -- and I will
4 allow him to speak for himself -- I believe he indicated
5 that it was temporary in nature and that he had no
6 intention of serving as trial counsel to any of these
7 respondents.

8 I don't know what else to say. I would be
9 happy, Your Honor, to submit a clean copy of our
10 pleading with the exhibits if the parties would agree
11 that no one will force or seek recusal of Your Honor as
12 a result of your considering this motion; but other than
13 that, I'm available to answer any questions as my
14 partner is if you have any.

15 THE COURT: Let me hear from anybody else from
16 the respondents. Mr. Bono? Mr. O'Neill?

17 MR. KIYONAGA: Your Honor, can I address you
18 from here?

19 THE COURT: Yes, sir.

20 MR. KIYONAGA: On behalf of the estate of James
21 Scully I join in the motion for a continuance. This
22 conflict which has existed for a long time became

1 official December 22nd. And Roger Scully, the son,
2 contacted me immediately. I need time. I know very
3 little about this case.

4 Let me also note my objection to any unilateral
5 appointment of an administrator for this estate. The
6 family or any of the personal representatives knew
7 nothing of it. Dr. Scully died during this litigation.
8 There may be some issues. So I just note my objection
9 to any appointment of an administrator.

10 THE COURT: All right. Mr. O'Neill.

11 MR. O'NEILL: Yes, sir. If Your Honor please,
12 I think that I made it abundantly clear that we were in
13 this case, I was in this case on January 4 only for the
14 purpose of obtaining other counsel and attempting at
15 least to resolve some of the problems that arose in the
16 course of that.

17 It's been stated here today that I've been in
18 this case from the beginning. I really haven't been in
19 since the beginning; but it's close to the beginning, at
20 least four or five years now.

21 And under the circumstances what I've been
22 doing is monitoring this case to report back to one of

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1 the respondents. And that's what I've been here for.

2 I haven't been representing anyone as such.
3 I've made no appearances in the case other than that
4 until January 4th for purposes of obtaining other
5 counsel. And that's it. Thank you, sir.

6 THE COURT: All right. Anybody else?

7 MR. BONO: Your Honor, I just want to clarify
8 who I am representing in the case for the Court, Your
9 Honor. I represent Drs. Tauber, Peters and Freedman
10 individually and the Tauber foundation. I do not
11 represent --

12 THE COURT: I'm sorry. Give me those again.

13 MR. BONO: Drs. Tauber, Peters and Freedman who
14 are all sued individually in this matter. And I also
15 represent the Tauber Foundation.

16 THE COURT: They're not a party.

17 MR. BONO: They're not a party; but, as Your
18 Honor knows, the Tauber Foundation is an owner of the
19 land and has interests. And I do not represent, Your
20 Honor, Drs. Corrado, McManus and Feriozi.

21 THE COURT: Okay.

22 MR. BONO: I do not. I wanted to clarify for

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1 the Court. Thank you, Your Honor.

2 THE COURT: All right. Anybody else? All
3 right. Mr. Bettius.

4 MR. BETTIUS: Your Honor, I do want to focus on
5 what we're doing here. We're here for an accounting.
6 The first accounting was withdrawn. And the second
7 accounting was filed by Mr. Cochran on behalf of all
8 respondents. And that accounting is here before the
9 Court. And that's what we're going to talk about.

10 In a deposition on Thursday, December 9th,
11 Mr. Bettius, let me tell you for purposes of today's
12 deposition -- are you authorized to represent all of the
13 respondents? Mr. Cochran, I am. Or some of them? I'm
14 here on behalf of all of the respondents.

15 Am I hearing, Your Honor, that these potential
16 interveners want to file yet another accounting after
17 filing two previous accountings?

18 What is the conflict that Mr. Cochran has?
19 Mr. Cochran submitted the accounting on behalf of all
20 the respondents. I don't think there's going to be yet
21 a new accounting that's to be filed on behalf of the
22 respondents.

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1 What is being discussed here in the nature of a
2 conflict is that some of the respondents want to start
3 having discussions with the Attorney General on issues
4 collateral to this accounting.

5 We have informed the respondents that we are
6 not disposed to do that and there is no conflict in the
7 absence of having such discussions.

8 There can be no piecemeal discussions, Your
9 Honor, with the individual respondents as groups or as
10 sections of groups and as a joint venture apart from the
11 respondents.

12 Mr. Cochran, if he has a conflict with
13 reference to the accounting and the proceeding, I want
14 him to tell me what that is, because Your Honor has
15 already -- I've got the flu, Your Honor. And I know I'm
16 a little incoherent. Your Honor has already allowed
17 them to withdraw one accounting on the urging that you
18 were going to get a second accounting.

19 Is it the respondents' position now that they
20 don't like yet the second accounting? Because if
21 there's a dispute about that, that's something that I
22 think the Court needs to address, because you've already

1 given them leave to withdraw one.

2 Are we now going to start discovery again? Is
3 the Commonwealth going to be put to having to pay
4 expenses to go through yet another accounting procedure?

5 Your Honor, the Court entered an order more
6 than a year ago that we were going to have this
7 accounting. And there is no conflict.

8 THE COURT: Anyone else? Mr. Mains.

9 MR. MAINS: Very briefly, Your Honor. You're
10 being very kind to hear from everybody. And you know I
11 have a motion pending to intervene on behalf of my
12 client in this matter which to my knowledge has not been
13 acted upon by the Court.

14 I simply want to clarify, because -- and maybe
15 it has been; but if it has, I'm not aware of it. In any
16 event, assuming that the Court were to grant that motion
17 to intervene in this case, it is not our position that
18 we would take part in what's going to happen in this
19 courtroom on February 1.

20 What Mr. Bettius says is what I essentially
21 agree with. This is an accounting procedure. The issue
22 before the Court, as I understand it, will be the value

1 of the assets.

2 And then there will be some determination as to
3 how those assets will be either collected or disbursed
4 or whose -- in other words, whose ox is going to get
5 gored.

6 And as I see the dispute here that's the issue
7 that troubles the people that want to intervene. And,
8 of course, that's what troubles Dr. Burtoff.

9 Mr. Bettius is fully capable in my judgment of
10 representing the Commonwealth in terms of valuation. I
11 certainly think that Dr. Tauber has done everything he
12 needs to do. And his counsel have to address that issue
13 from their standpoint.

14 So we don't have, to use a vernacular, a dog in
15 that fight. All we're trying to do is to protect
16 Dr. Burtoff's interest in how this plays out.

17 And it occurs to me that that's exactly what
18 the other people that are in here are trying to do and
19 probably really also don't have any oar in the water on
20 what happens on the 1st of February.

21 THE COURT: Okay.

22 MR. COCHRAN: Your Honor, I'm the source of all

J.APP.2557

1 the trouble. So I really need to address one issue
2 particularly in light of Mr. Bettius's comments.

3 There was a conflict that arose. It arose in
4 the context of discussions as to possible ways to handle
5 a settlement. And those possible ways have now been
6 rendered impossible, but the conflict arose at that time
7 and in that context.

8 And I have no question -- and I've consulted
9 with bar counsel -- that I have a conflict. And I have
10 advised the respondents as to that. And I don't know
11 that a continuance is appropriate. To some extent
12 there's not much they can do. I can't imagine they're
13 going to submit a new accounting.

14 But the bottom line is the conflict is a real
15 conflict. And I feel very badly that they are in a
16 situation that's created by that conflict, but I think
17 the case can go forward. And I don't think they're
18 going to be prejudiced if it does.

19 THE COURT: All right. Everybody is sort of
20 beating around the bush. What I'm going to do is I'm
21 going to read the full, unexpurgated versions of the
22 pleadings that were filed with regard to entrance of

J.APP. 2558

1 appearance by Mr. O'Donnell and the continuance.

2 And I'm just going to let the chips fall where
3 they may on the question of recusal; but I can tell you
4 if anybody is thinking about that, regardless of what I
5 read that's going to be a very, very tough road to hoe
6 to get me out of this case after all these years.

7 I have them, Mr. O'Donnell. We kept the
8 originals separate. And I'm just going to look at it to
9 make sure I can make an informed decision on this
10 matter, because everybody is kind of -- there's a lot of
11 circular reasoning going on here. And I'll take a short
12 recess. I want to read them.

13 MR. BETTIUS: Your Honor, now that you're going
14 to do that there's something I want you to know. There
15 is no settlement proposal on the table.

16 THE COURT: I understand.

17 MR. BETTIUS: No one has been identified. And
18 we've indicated we will not entertain piecemeal
19 settlements.

20 THE COURT: All right.

21 MR. O'DONNELL: Your Honor, your version does
22 not have the two letter exhibits. May I hand that up?

1 THE COURT: All right. We'll take a short
2 recess.

3 (A short recess was taken.)

4 THE COURT: The Court is going to deny the
5 request for a continuance. And we're going to try this
6 matter on the assigned trial date.

7 I have read the unredacted versions of the
8 motions and, quite frankly, find nothing in there that I
9 feel would disqualify me from hearing the issues in the
10 case.

11 However, that's not before me now. And if any
12 of the parties feel there's a problem with it, they're
13 certainly free to file whatever motions they can freely
14 and voluntarily.

15 I will also say that any counsel who wish to
16 appear at the trial and represent the interests of any
17 of the respondents, the individually named respondents,
18 are free to do so.

19 They can examine, cross-examine witnesses and
20 present whatever evidence they wish to present on behalf
21 of the individual respondents. And if there are counsel
22 or respondents who wish to engage in settlement

J.APP. 2560

1 negotiations with the complainant, they're free to do
2 that.

3 I don't want to hear anything about it, but
4 they're certainly free to do that; but this case is
5 going to proceed on the assigned trial date. I will
6 note the objections of everyone to that other than the
7 complainant.

8 All right. Mr. O'Donnell, a couple of other
9 matters. Mr. O'Donnell, I'm not sure where that leaves
10 you. And, quite frankly, I'm having a problem with
11 these conditional entries of appearance. In the old
12 days you either were in or out.

13 And I need to know from you either now or
14 within a reasonable time what your status is going to
15 be, because I -- again, as I said, I'm having trouble
16 keeping track of who is who.

17 MR. O'DONNELL: I don't think our carrier would
18 permit us to get in under these circumstances, Your
19 Honor, with all due respect. I think we are going to
20 end up declining the representation. If that changes, I
21 will advise the Court by the close of business on
22 Friday.

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1 THE COURT: Either way.

2 MR. O'DONNELL: I will do so, Your Honor.

3 THE COURT: All right.

4 MR. O'DONNELL: Thank you.

5 THE COURT: All right. Mr. Kiyonaga, with
6 respect to your situation my recollection of the --
7 we've got to have somebody in Virginia.

8 My recollection was that a few years ago the
9 legislature changed the statute on non-resident
10 fiduciaries, the executors and administrators, to say
11 that you could have non-residents provided they
12 designated someone in Virginia to receive service of
13 process and notice.

14 I'm going to give you the choice. I'll either
15 say you're the person designated to receive notice and
16 will substitute the administrator in Maryland as a named
17 respondent or I'm going to designate an administrator
18 CTA, but we've got to have some connection to Virginia.

19 MR. KIYONAGA: All right.

20 THE COURT: Think about that. And let me know,
21 again, by the close of business Friday.

22 MR. KIYONAGA: Yes.

J.APP.2562

1 THE COURT: All right.

2 MR. KIYONAGA: Thank you, Your Honor.

3 MR. BETTIUS: We need disposition on the
4 Burtoff estate as well, Your Honor.

5 THE COURT: Well, Mr. Mains --

6 MR. BETTIUS: That's Cochran.

7 MR. COCHRAN: You're not talking about
8 Mr. Mains's motion?

9 MR. BETTIUS: No.

10 THE COURT: I'm sorry. I've just lost track.

11 MR. BETTIUS: I was talking about an
12 administrator for Burtoff, the deceased Mr. Burtoff.

13 THE COURT: I see. I'm sorry..

14 MR. COCHRAN: The problem with Burtoff has
15 been, Your Honor, there was a fight as to who would be
16 the personal representative in Florida.

17 THE COURT: I remember now.

18 MR. COCHRAN: That's now clarified. And I will
19 find out -- you know, they're going to have to get new
20 counsel. And I will recommend to them that they name
21 counsel as a co-administrator so that we meet the
22 requirements of the statute. And I'll handle that.

J.APP. 2563

1 THE COURT: How much time do you want to do
2 that? We're going to set deadlines for this.

3 MR. COCHRAN: Your Honor, I'll get to
4 Mr. Farese right away. He was, you know, looking
5 forward to hearing what was going to happen today. So I
6 will get a response from him right away.

7 THE COURT: All right. All right. What else?

8 MR. COCHRAN: Your Honor, the next issue is my
9 motion in limine. And at the risk of conceding lots of
10 time to Mr. Bettius who tends to be somewhat more
11 long-winded than I am, if I could insult him in a very
12 mild fashion, you know, I filed a very brief motion in
13 limine. And my argument is brief, because I think in
14 many ways it's a fairly simple issue.

15 The motion relates to, you know, whether the
16 Commonwealth is entitled to go beyond '71 and go back to
17 some of the land transfers of the mid '60s, the early
18 '70s and do anything about that, seek to set them aside
19 or otherwise.

20 And I think it's important to put this in its
21 proper perspective. And that's looking at what the
22 Commonwealth has sought, look at what you gave them and

J.APP. 2564

1 look at what the Supreme Court agreed that you gave
2 them.

3 And there is a -- there is a distinction in
4 each of those three categories, Your Honor. You know,
5 the Commonwealth sought in the declaration that the
6 merger never took place and that subsequent purported
7 transfers were null and void.

8 They sought legal title or a declaration that
9 legal title remained with JMHI, the charitable entity.
10 They asked for an imposition of a constructive trust.
11 And they sought an accounting.

12 What you gave them was a declaration that the
13 merger never took place and subsequent transfers, you
14 know, were either null and void or voidable. And I
15 underline the word subsequent, because that's what they
16 asked for. And that's what they got.

17 You told them that the assets and liabilities
18 reside and remain with the respondents as trustees.
19 They weren't trustees until April 18, 1973. And there
20 was a constructive trust that was imposed on the assets
21 that they held as trustees. And you ordered the
22 accounting.

J.APP. 2565

1 So what they sought and what they got was
2 somewhat different. And I think the Supreme Court
3 pretty much summed it up as accurately as they could,
4 you know, in noting with approval as to your ruling.

5 The court says on pages 11 and 12 of their
6 decision that you properly exercised your authority to
7 ensure that these assets now held by the respondents as
8 trustees in liquidation are distributed in accord with
9 the charitable purposes as to which they had been
10 devoted.

11 So, again, the Supreme Court has looked at your
12 decision, you know, as have I coming in cold to this
13 case. And what they're saying is we're looking at the
14 assets that they hold or held as trustees in the
15 liquidation. They didn't become those trustees until
16 the dissolution of any -- I think in April of 1973.

17 You know, everything that the Commonwealth is
18 entitled to flows from that time. You know, they were
19 trustees in the dissolution on that date, not before
20 that. Their obligation to account begins as of that
21 date. And they're only accountable for those assets
22 which they, you know, had at that time or thereafter.

J.APP. 2566

1 So I think the Court can save considerable
2 trial time, considerable fuss and bother ruling in
3 limine that your ruling says what I submit to the Court
4 it says and what the Supreme Court thought it says. And
5 that is that April 18, 1973, is the beginning point.

6 You know, there certainly were lots of
7 comments, Your Honor, and your ruling and comments that
8 were adopted with some degree of emphasis by the Supreme
9 Court as to transactions that occurred in the '60s,
10 transactions that occurred in 1970.

11 But as I said in the motion in limine, you
12 know, those weren't findings of fact or conclusions of
13 law. That was simply statements of the history of this
14 somewhat bizarre situation, you know, by way of context.

15 But the magic act was declaring the merger null
16 and void which then permitted this Court to rule if the
17 merger was null and void, you know, when each charter
18 was dissolved on April 18, 1973, the directors became
19 trustees in liquidation.

20 So I would ask the Court to rule at this point
21 in limine that the Commonwealth is barred from putting
22 on evidence of transactions prior to 19 -- actually

J.APP. 2567

1 prior to 1973 other than the merger which has already
2 been deemed to be a nullity, be beyond the scope of the
3 trial.

4 THE COURT: Let me ask. Do any other
5 respondents' counsel wish to be heard on that issue?
6 All right. Mr. Bettius.

7 MR. BETTIUS: Your Honor, Mr. Cochran is right.
8 I have a great deal to say about this issue if the Court
9 is going to entertain the argument at all.

10 First of all, Your Honor, there was extensive
11 testimony -- and there's no limitation in our pleading
12 that limits the findings to that period of time. And
13 definitely the Court's opinion doesn't.

14 What the Court has directed is that there be
15 a -- and I'm going to read directly from the order;
16 shall prepare and submit under oath a full and complete
17 accounting of all -- all assets and liabilities that are
18 the subject of this decree within 60 days hereof. And
19 it goes on.

20 Your Honor, what occurred was that from the
21 very beginning there was a controversy about on-record,
22 off-record conveyances. And in order to do an

J.APP. 2568

1 accounting the accountants have to know what the
2 beginning balances are and what the assets are.

3 Whenever you try to do something like
4 respondents are suggesting today, they're going to find
5 themselves in a worse conundrum than they're in. And it
6 requires some history.

7 If Your Honor will recall, they elected with
8 respect to ownership of the assets to rely on a quiet
9 title action they filed. We were shocked that they did
10 that, but they did. And the Court ultimately said we
11 weren't bound by that quiet title action. And what did
12 that quiet title action go to? Ownership of the land
13 and improvements. So that's been an issue in this case.

14 Celeste Burns Vella's testimony and the records
15 of the respondents themselves clearly indicate a
16 different scenario. We prepared for Your Honor as an
17 exhibit Ms. Vella's testimony so the Court will have it
18 together with an abstract, but let me go back and recite
19 for the Court where we find ourselves with respect to
20 the assets.

21 Ms. Vella testified under any number of grounds
22 that the real estate and improvements reside in the

J.APP. 2569

1 respondents. The Court did make dispositive findings.

2 If Your Honor will recall, Gondor himself never
3 received a deed. There was this letter out there that
4 was twice sent, sent once in December, ultimately sent
5 again in January. When they sent the letter in December
6 the charity hadn't even been conveyed the assets.

7 It was a tax gimmick, Your Honor, because they
8 have taken tax deductions for the on-record charitable
9 deductions and then subsequently never by deed but by
10 these unrecorded documents purported to start shifting
11 the assets around.

12 When we get to the period of 1970 the court
13 made a very dispositive finding. He said that
14 conveyance attempted to dilute what was a 65 percent
15 undivided interest.

16 And what the court did and the Supreme Court
17 followed it was to say, look, once you take capital
18 contributions for the contribution of this land, once
19 you take these, put them on the books this way, we're
20 not going to be bound by unrecorded deeds.

21 And the court said a transaction illustrative
22 of the foregoing conclusions involves a subdivision of

1 the hospital's real estate in 1970. And the court found
2 that prior to that there was an undivided 65 percent.

3 Now, that means the court -- and this Court has
4 already said we're not going to be bound by those; but
5 let's go on. If we take the title as Mr. Cochran -- and
6 I'm surprised Mr. Bono didn't jump up and down and
7 object to that.

8 The merger may never have occurred, Your Honor,
9 but there was an independent transaction that occurred
10 in 1971 that was totally outside the merger. JMHA
11 conveyed its rights to the title and the assets to the
12 operating entity, JMHC.

13 If you leave it there, if you leave it there,
14 the assets never come out and they're owned by the
15 operating entity which is, as the Court has, I think,
16 found -- JMHC was just JMHI.

17 If that's the case, we stop accounting. And
18 all the revenue is ours, because if Your Honor will
19 note, you voided the sale and lease-back as beyond
20 corporate authority and a self-interested transaction in
21 '75.

22 And whenever you start to fool with

1 transactions and you don't accurately deal with them,
2 you find yourself in a position that absolutely destroys
3 where they are.

4 Why don't we accept that? Because it's
5 necessary, Your Honor. And we've had to create, you
6 know, in our own accounting the following scenario.

7 If Your Honor will look at what happened, not
8 only did they transfer title to the operating entity,
9 the operating entity took advantage of the loss carry
10 forwards. It took depreciation as owner of the
11 building. And if you take the voided transaction in
12 '75, they never got it back. So the respondents aren't
13 entitled to a dime.

14 In order to do an accounting you have to
15 actually take the business records of the respondents as
16 they existed. It's obvious, Your Honor, that had we had
17 our accountants assume that the property had
18 transferred, the business records would never make any
19 sense after that.

20 So what we did was we went back and had our
21 accountants assume for purposes of logical orientation
22 of the records that the '66 lease was still in effect,

J.APP. 2572

1 because that's the only document that hasn't been
2 voided.

3 And what we did, because it putatively at least
4 represented the realistic economic expectations of the
5 parties, because Tauber said he never wanted to make a
6 profit; just wanted his rent -- we extended their right
7 to that lease all the way forward.

8 Your Honor knows at this point in the
9 proceedings that JMHI was never wound up. They just
10 assumed its assets and ran the business as if it were
11 their own. This allows us in the post '75 period to at
12 least have some rational basis for accounting between
13 the parties for the assets.

14 Our accounting specifically says that Your
15 Honor is going to have to make a subsequent
16 determination with respect to who owns the real estate
17 as to the right to receive the income that's divided
18 between the parties.

19 Everything they did, Your Honor, after 1975
20 is -- basically everything they did was to take the
21 profits of the operating entity off by lease increases
22 or by having the operating entity which is JMHI pay for

J.APP.2573

1 expenses.

2 They have very serious problems in their
3 accounting, because their accounting does never account
4 for the purported transaction that got the real estate
5 back. Their accountants are literally unaware that a
6 stock issue in '72 was converted as the basis for the
7 retransfer of the assets.

8 If you do what Mr. Cochran says, you find
9 yourself with a set of books that were being accounted
10 for that make literally no sense. And you find the
11 operating entity owning the property.

12 I think it's terribly inappropriate to try to
13 deal with this in the context of a motion in limine.
14 Your Honor has got to go back, get back into the
15 accountings, re-acquaint himself with the facts of how
16 the transactions went down and where the various
17 operating entities were.

18 But I will tell you, Your Honor, if this motion
19 in limine is granted, the operating entity owned and
20 continues to own now and all the way into the future the
21 hospital land and improvements. And they have no right
22 to any entitlement of any sums at all.

J.APP. 2574

1 I don't know how this Court with all the
2 matters at hand is in a position to make a decision on
3 this issue other than to say, Your Honor, anyone who
4 attended that first trial watched more than a day of
5 testimony about who owned the improvements all the way
6 back to 1965.

7 If you're going to do an accounting, Your
8 Honor, you have to have a beginning balance of assets,
9 tangible, intangible, real and personal. And that's
10 what we had to do.

11 And that's what the Court did. The Court took
12 a presentation of evidence with respect to the ownership
13 of all the various assets and made specific findings
14 that were before 1970 -- '73.

15 For instance, you voided the '71 merger. And
16 you commented on -- and made specific rulings with
17 respect to the '70 land transaction.

18 If you don't start with a beginning balance of
19 assets and you don't find some rational basis to make
20 the respondents' books at least fit the transactions
21 they purportedly undertook, it doesn't make any sense.

22 THE COURT: All right.

1 MR. COCHRAN: Your Honor, I profess to be
2 sufficiently new to this case even after six months of
3 participation that I still don't know that I follow what
4 Mr. Bettius was saying; but both accountings, as I point
5 out in the motion in limine, employ the same
6 methodologies. That's not the issue.

7 Whether we're starting in '71 or '73 -- to some
8 extent to see what the money was that was made which is
9 what the accountings are going to show you have to go
10 back to the beginning. You can't start in the middle.
11 And that's not the issue here.

12 The experts agree. Mr. Wilson and Mr. Cobb
13 have done it almost exactly the same way. You know,
14 what's at issue is are we going to do something more
15 than look at the financial statements and determine what
16 the profit was or what the loss was from '65 to whatever
17 date in time.

18 And I think that the \$64,000 question for this
19 Court is at what point in time do you stop the
20 accounting, you know, if at all; but that's what we're
21 doing. That's what their accounting does. And their
22 accounting does not seek, as Mr. Bettius says, to deal

1 with the issues of the property.

2 If you look at their bill of complaint -- and
3 I've got excerpts of the bill of complaint if the Court
4 would like to look at them; but if you look at their
5 prayer for relief, you know, count one on page 28, you
6 know, is asking the respondents to account for
7 charitable assets which they took, usurped or sold in
8 '71 and/or '74 through '75; same in count two.

9 And they then ask the Court to trace these
10 assets. You know, count three is asking the Court to
11 declare that the corporate opportunities were usurped
12 and require the respondents to account for them and
13 impress a judgment on future sums.

14 Their own pleadings set out consistent with
15 this Court's ruling and the ruling of the Supreme Court
16 that their focus was the merger, the putative merger, in
17 '71, the '74, '75 time frame, you know.

18 And they're all hooked together. They don't go
19 back in time beyond putting it in historical
20 perspective, what happened here. I don't think your
21 ruling does that. I don't think their prayer for relief
22 does that.

J.APP. 2577

1 And it's not that difficult an issue, Your
2 Honor. You know, either everything that happened before
3 '71 is at issue in this case, you know, which makes this
4 trial, you know, an exceedingly difficult and cumbersome
5 trial, you know, or the trial will relate to the issues
6 that you said it should; account for what you did with
7 that hospital from April 18, 1973, forward. That's what
8 both sides have done. And that should be the focus of
9 this trial.

10 THE COURT: The Court is going to deny the
11 motion in limine. However, the denial will be without
12 prejudice to the right of the respondents to raise these
13 issues before the Court at trial. All right.

14 MR. BETTIUS: Nothing further, Your Honor.

15 THE COURT: Anything else?

16 MR. BONO: Your Honor, I just have a final
17 housekeeping matter.

18 THE COURT: All right.

19 MR. BONO: I hate to raise it, but who does
20 Mr. Cochran represent going forward now that these
21 individuals apparently don't have counsel? I just
22 thought maybe we ought to clarify it going forward at

1 this basis.

2 I don't know. And I just raise it, because in
3 light of what Mr. O'Donnell says it appears the
4 individual doctors do not have counsel. That's all I --
5 I guess I just want to know.

6 THE COURT: I suppose that's an
7 inter-respondent problem. I'm going to be here ready to
8 proceed on whatever the trial date is. And I assume
9 there will be people here representing the interests of
10 everyone or not.

11 I mean, it's just -- you know, Mr. Cochran and
12 you perhaps can confer, Mr. Bono, and try to resolve
13 that.

14 MR. COCHRAN: We will do that, Your Honor.

15 THE COURT: All right.

16 MR. BETTIUS: Your Honor, we were going to do
17 some pretrial things today. Do I understand that we're
18 going to have four or five people examining witnesses on
19 their side?

20 THE COURT: I said any respondent who wishes
21 counsel to appear at the trial of this matter can appear
22 and be represented.

J.APP.2579

1 MR. BETTIUS: All right, sir.

2 THE COURT: All right. Anything else?

3 MR. COCHRAN: No, sir.

4 THE COURT: All right. Court stands adjourned.

5 (At 3:10 p.m., the proceedings in the
6 above-entitled matter were concluded.)
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J.APP. 2580

CERTIFICATE OF REPORTER

I, Carol A. Lowe, do hereby certify that the foregoing proceedings were taken by me in stenotype and thereafter reduced to typewriting; that this transcript is a true record of said proceedings; that I am neither counsel for, related to, nor employed by any of the parties to this action; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

Given under my hand this 24th day of January 2000.



Carol A. Lowe,
Registered Professional Reporter

J.APP. 2581

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

-----X
COMMONWEALTH OF VIRGINIA, et al.,
Complainants,
v.
LASZLO N. TAUBER, et al.,
Respondents.
-----X

In Chancery
No.: 96-1241

ORIGINAL

Alexandria, Virginia

Friday, July 7, 2000

The above-entitled matter came on for hearing
before the Honorable Alfred P. Swersky, Judge, in and
for the Circuit Court of the City of Alexandria,
Virginia, 520 King Street, Courtroom 4, Alexandria,
Virginia, beginning at 9:00 a.m., before Eva M.
Bridget, Verbatim Reporter, when there were present on
behalf of the respective parties:

J.APP. 2582

APPEARANCES:

On Behalf of the Complainants:

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On Behalf of the Respondents Tauber, et al.:

GASPARE J. BONO, ESQ.
Long, Aldridge & Norman, L.L.P.
701 Pennsylvania Avenue, N.W.
Suite 600
Washington, DC 20004

* * * * *

J.APP. 2583

P R O C E E D I N G S

(Whereupon, the Court Reporter was sworn by the Court.)

* * * * *

MR. BETTIUS: Your Honor, there's an order we'd like to hand up to be entered. The problem that we had confronted was that the order was for May. If you recall the situation was with respect to the May order, refreshing the Court's perspective and recollection, they were either going to pay the money into the court or post bond.

Somehow the order didn't get circulated among all of the Respondents. That money has never been paid into the court and there's been no bond.

This order provides, and I think Mr. Bono knows that in this order they are willing to provide the bond; is that correct?

MR. BONO: Let me clarify.

Your Honor, we have no problem with this order. It specifies that either we will post the bond to cover the May and July payments or we will pay those payments into the court. There is a procedure, as I understand in this order, that -- basically so we don't

J.APP. 2584

1 have to do this every month. It specifies the same
2 procedure.

3 THE COURT: You're not going to have to do it
4 much past next week, I can tell you that.

5 MR. BONO: Very well, Your Honor. We have no
6 objection.

7 THE COURT: All right.

8 MR. BETTIUS: Your Honor, we all, every day,
9 worry about the Court's good health and continued --

10 THE COURT: That's one way I keep you all
11 concerned about me. Everybody's out there wishing me
12 well, I assume.

13 MR. BETTIUS: We worried about you on the 4th
14 of July and we hope it isn't Labor Day.

15 Your Honor, from all counsel, if there's
16 anything we can do to assist, this is a tough one --

17 THE COURT: Next week.

18 MR. BETTIUS: Thank you, Your Honor.

19 THE COURT: I was going to tell you that I
20 have a draft of it on my desk, but I don't want to get
21 you all nervous over the weekend.

22 MR. BETTIUS: Thank you, Judge.

23 THE COURT: Would you all do me a favor? I

1 talked with Mr. Simoney a while back and he has some
2 concerns about whether the amount of money that he has,
3 either in terms of cash or bond, is equal to the
4 amounts provided for in the orders.

5 MR. BETTIUS: We'll do a reconciliation.

6 THE COURT: He's got it, because I've got a
7 copy of what he's done. If you all would talk with him
8 to make sure there's no problem about that, he has
9 concerns about it.

10 MR. BETTIUS: We'll see to it, Your Honor.

11 THE COURT: I've entered the order.

12 MR. BETTIUS: Thank, you, sir.

13 MR. BONO: Thank you.

14 THE COURT: All right.

15 (Whereupon, at 9:03 a.m., the proceedings in
16 the above-entitled matter were concluded.)

17 * * * * *

CERTIFICATE OF REPORTER

I, Eva M. Bridget, the Stenomask Reporter who was duly sworn to well and truly report the foregoing proceedings, do hereby certify that they are true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through any relationship with any of the parties at interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 18th day of July, 2000.

Eva M. Bridget
Eva M. Bridget
Verbatim Reporter

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

-----X
COMMONWEALTH OF VIRGINIA, et al.,
Complainants,
v.
LASZLO N. TAUBER, et al.,
Respondents.
-----X

ORIGINAL

In Chancery
No.: 96-1241

Alexandria, Virginia

Monday, November 13, 2000

The above-entitled matter came on for hearing
before the Honorable Alfred D. Swersky, Judge, in and
for the Circuit Court of the City of Alexandria,
Virginia, 520 King Street, Courtroom 4, Alexandria,
Virginia, beginning at 10:05 a.m., before Eva M.
Bridget, Verbatim Reporter, when there were present on
behalf of the respective parties:

J.APP. 2588

APPEARANCES:

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J.APP. 2590

P R O C E E D I N G S

(Whereupon, the Court Reporter was sworn by
the Clerk of the Court.)

* * * * *

MR. BETTIUS: Good morning, Your Honor.

MR. BONO: Good morning.

THE COURT: I understand there's evidence to
be taken on some of the issues today; is that correct?

MR. BETTIUS: That's correct, sir.

THE COURT: Is there a request for a rule on
the witnesses?

MR. BETTIUS: Your Honor, there hasn't been a
rule in the case to date.

THE COURT: I'm sorry?

MR. BETTIUS: Your Honor, there's been no
rule in the case to date.

MR. HIRSCHKOP: I request a rule.

THE COURT: All those of you who are going to
testify, please step outside the courtroom until you
are called. Please do not discuss your testimony with
one another. All witnesses.

All right.

J.APP. 2591

MR. BONO: Your Honor, may I request as to

1 what issue the evidence is going to be presented?

2 THE COURT: Sure.

3 MR. BETTIUS: Unless there's a stipulation as
4 to the reasonableness of our attorney's fees, I don't
5 think that's an issue. We're going to put on evidence
6 of where the title is in the case. I think the Court
7 needs to know where title is.

8 THE COURT: All right, sir.

9 MR. BETTIUS: Where title to the property
10 resides of record, and that's the limit of our
11 evidence.

12 MR. BONO: Your Honor, I'd like to be heard
13 with respect to the issue of attorney's fees before
14 there is any evidence presented.

15 THE COURT: All right. Let me hear from you
16 then.

17 MR. BONO: Your Honor, may it please the
18 Court, an extensive memorandum of law --

19 THE COURT: I haven't had a chance to read
20 anything in this case. I'll tell you all that right
21 now.

22 MR. BONO: All right. Well then, I'll have
23 to take a little more time.

1 THE COURT: All right.

2 MR. BONO: Your Honor, we thoroughly
3 researched the law of Virginia and, based upon the --
4 in fact, two most recent Supreme Court of Virginia
5 cases, it is our position that there is no authority in
6 this Court for an award of attorney's fees.

7 Your Honor, the Supreme Court of Virginia has
8 made it clear that the Commonwealth adheres very
9 strictly to the American rule with respect to the award
10 of attorney's fees, and the Supreme Court of the United
11 States in the Alieska case, which we have cited, has
12 made it clear that in this country there is no award of
13 attorney's fees unless it is provided by statute or
14 specifically by contract.

15 The Supreme Court of Virginia in the Prospect
16 Development Company v. Bershader (ph), 515 SE 2d 291,
17 last year, a 1999 case, did a thorough analysis of the
18 issue of whether attorney's fees may be awarded in a
19 case. The Supreme Court of Virginia again steadfastly
20 adhered to the rule that attorney's fees cannot be
21 awarded unless they are provided specifically by
22 statute or by contract. The Court said, quote, the
23 general rule in this Commonwealth is that in the

1 absence of a statute or contract to the contrary, a
2 court may not award attorney's fees to the prevailing
3 party.

4 The Supreme Court of Virginia in that case,
5 at page 300, then reviewed the very few exceptions
6 which have been recognized in Virginia with respect to
7 the award of attorney's fees. None of those exceptions
8 come even close to being applicable in this case, and
9 none of those exceptions have any applicability here.

10 The Virginia Supreme Court said that Virginia
11 has recognized that -- the award of attorney's fees in
12 cases of malicious prosecution, false imprisonment,
13 alimony and support disputes and in that case in a
14 specific fraud action. None of those exceptions
15 applies in this case.

16 Last year -- I'm sorry, Your Honor. This
17 year the Virginia Supreme Court again addressed the
18 issue of attorney's fees and whether they could be
19 awarded, in January of this year in Russell County
20 Department of Social Services v. O'Quinn; the case is
21 523 SE 2d 492. Again, the Supreme Court of Virginia
22 made it, again, absolutely clear that attorney's fees
23 are not to be awarded and that an equity court, in

JAPP.2594

1 particular -- an equity court such as this, may not, in
2 its discretion, award attorney's fees, and that the
3 only way attorney's fees are awardable in the
4 Commonwealth is if there is a statute or contract or if
5 the narrow exceptions recognized in this Commonwealth
6 apply.

7 In that proceeding, Your Honor, an equity
8 court awarded attorney's fees, and in its decrees
9 stated, quote, the Court sitting in equity is vested
10 with the authority and discretion to award reasonable
11 attorney's fees. The Virginia Supreme Court
12 specifically reversed that finding and held that unless
13 there is a specific statute or contract, or one of the
14 narrow exceptions which it had recognized previously
15 applied, that the Court was not free to exercise
16 discretion to award attorney's fees.

17 Your Honor, I respectfully submit that these
18 two cases are controlling and that any award of
19 attorney's fees in this lawsuit is beyond the authority
20 of this Court and that there is no need for us to take
21 evidence as to the reasonableness of attorney's fees,
22 since they may not be awarded in this case. J.APP.2595

23 MR. BETTIUS: Your Honor, in response to the

1 brief, Mr. Bono's attention is respectfully called to
2 2623 of the Code of Virginia, which deals with
3 fiduciaries and their failure to account. In addition
4 to the Prospect case which he relies on is the case in
5 which the Court did find that a chancellor, within the
6 realm of his discretion, can award attorney's fees.

7 It's fascinating to me that in his brief Mr.
8 Bono would cite the case of White versus Thompson,
9 which held -- and I'm quoting from his brief -- except
10 in rare instances, the power of the Court to require
11 one party to contribute to the fees of counsel of
12 another party much be confined to cases where the
13 plaintiff suing on behalf of himself and others of the
14 same class discovers or creates a fund which inures to
15 the common benefit of all; that the discretion vested
16 in the Court should never be exercised in the case
17 where the interest of the party whose fund is to be
18 charged are antagonistic to those for whose benefit the
19 suit is prosecuted.

20 That's exactly the case we deal with here.
21 We discovered a fund, we pursued the fund. We have no
22 interest in the fund. We're here in a representative
23 capacity. Section 2623 of the Code specifically

1 provides for the award of costs against the defaulting
2 fiduciary.

3 Let's go back and review the history of this
4 case.

5 THE COURT: Let's not do that, Mr. Bettius.

6 MR. BETTIUS: Briefly. On two separate
7 occasions these Respondents were given the opportunity
8 to account in this case. They have steadfastly denied
9 -- steadfastly denied and continue to deny it today.
10 Your Honor, they seek 60-some million dollars in
11 compensation for the property. Gondor has the nerve to
12 stand before the Court and ask for \$3 million today in
13 compensation.

14 They come to this Court bloody, but unbowed.
15 The Court's award in your order specifically finds for
16 costs and fees in this case as appropriate. Your Honor
17 issued fair warning throughout this case. I call to
18 the Court's attention the issue of attorney's fees has
19 been in this case from the very beginning. One of the
20 assignments of error entertained by the Supreme Court
21 in this case was the propriety of the contingency fee
22 entered into by the Commonwealth.

J.APP. 2597

23 The Court overruled any objection to that and

1 affirmed this Court's ruling in every respect. Your
2 Honor, we respectfully submit that under 2623, under
3 general principles of equity jurisprudence, the
4 Commonwealth has discovered and prosecuted a fund for
5 the benefit of no other people based upon constructive
6 fraud of these fiduciaries who have refused to account.

7 There could be no clearer case for the
8 imposition of the equitable powers of this Court to
9 impose attorney's fees.

10 MR. McALEER: May it please the Court,
11 Charles McAleer for Inova. Your Honor, it was not
12 clear from Mr. Bono's comments whether --

13 THE COURT: He wasn't talking about your
14 fees. He was talking about Mr. Bettius' fees, from
15 what I gathered.

16 MR. McALEER: I just wanted to make that
17 clear for the record.

18 THE COURT: Briefly, Mr. Hirschkop...

19 MR. HIRSCHKOP: Yes, Your Honor.

20 I would second the argument made by Mr. Bono
21 on the law, Your Honor. I point out, also, J.APP.2598
22 procedurally this thing is in a terrible situation. In
23 the brief that was filed by the Commonwealth at the end

1 of the hearing, after our February hearing, they say in
2 circumstances much like the present case, the Virginia
3 Supreme Court recently affirmed the award of
4 Plaintiff's attorney's fees that occurred as a result
5 of Defendant's fraudulent acts.

6 This is not a case of fraud, and there's no
7 fraud been found here. They mentioned no statutes in
8 seeking attorney's fees. They've never filed a
9 petition for attorney's fees. Mr. Bettius argues the
10 White case, but in White it was awarded from the
11 corpus, from what had been set aside, from what the
12 trust was.

13 They also cite Brown v. George in their brief
14 that was filed after the trial, and also that was fees
15 ordered from the trust fund itself. It wasn't fees on
16 behalf of the prevailing party against the non-
17 prevailing party, which would directly violate the
18 recent opinions of the Virginia Supreme Court, and
19 particularly their Russell County opinion which came
20 down this year.

21 I'd also point out, Your Honor, they've never
22 filed an application for fees. They've never filed for
23 an amount of fees. They've never filed any

1 documentation on the fees. I received from them on
2 Wednesday of this past week, while I was in federal
3 trial in D.C., the bottom folder there, about four to
4 five inches of legal bills. I've had no chance to
5 prepare to go through them, give them to an expert and
6 get any evidence on.

7 So both substantively and procedurally I
8 would object to going forward on the fees, Your Honor.

9 THE COURT: I'm going to hear the evidence
10 and I'm going to take under advisement the question of
11 the source of the fees, whether they come out of the
12 fund that has been created or whether it's an
13 additional charge to the Defendants. I'll hear the
14 evidence.

15 MR. BETTIUS: Your Honor, I have some opening
16 remarks.

17 THE COURT: Let's hear them.

18 MR. BETTIUS: The Court has heard exhaustive
19 evidence in this case from experts who purportedly
20 sought to account on behalf of the Respondents and the
21 Court has summarily rejected and appropriately rejected
22 those accountings. One thing remains clear from that
23 evidence. We have never been able in this case to

1 trace any capital contribution by any Respondent to the
2 assets of this hospital.

3 The evidence, Your Honor, clearly indicates
4 that the hospital operations paid for all expenses of
5 construction, of land -- acquisition of land,
6 improvements. Your Honor, I go back to the very
7 inception of the transaction in 1965. There is a memo
8 that describes exactly how the hospital was financed.

9 There was an \$800,000 trust placed against
10 the property, and the trust was amortized -- the trust
11 was encompassing both the acquisition of land and the
12 construction of improvements. What we find in the
13 record of the case, and all of these records are
14 authored by the Respondents themselves, is that they
15 provided for the repayment of that mortgage, plus a 10
16 percent profit.

17 In addition, they charged the hospital for
18 extra capital costs, which they made the hospital pay
19 for in bonds at eight percent. Their overreaching was
20 so pernicious with respect to items of cost and
21 construction, not only of land and buildings, but also
22 in terms of equipment, that it resulted in a revocation
23 of the 501(c)(3) status of this organization in 1970.

J.APP.2601

1 If that weren't enough, Your Honor, we
2 demonstrated that there was an addition to the hospital
3 which was paid for, again, by a 10 percent increase in
4 rent.

5 Your Honor, you need to go back and review
6 the putative transaction which occurred in 1971.
7 Supposedly 240,000 shares of stock were issued for the
8 acquisition of the hospital by the operating entity.
9 Significantly, Your Honor, this transaction was ignored
10 by the parties in 1975. The 240,000 shares of stock
11 were left outstanding.

12 But if you'll recall the testimony of Mr.
13 Richards, he was unaware of the putative merger in '71.
14 So there was never any consideration, if Your Honor
15 will look at the transaction, for the issuance of the
16 240,000 shares. If Your Honor will recall, in order to
17 regain control of the land and buildings in 1975, the
18 Respondents awarded to themselves a dividend, in
19 effect, of bonds which they issued at 6 percent to
20 redeem stock issued in 1972, which purportedly was paid
21 for at \$4 per share. That was the consideration.

22 So these 240,000 shares of stock remain
23 outstanding with no basis for the issuance if, in fact,

1 that transaction is ignored. What we do find, however,
2 Your Honor, is in the HG transaction in 1982, the
3 Respondents redeemed more than \$1.2 million worth of
4 the stock for which no consideration was ever given,
5 if, in fact, the hospital didn't transfer.

6 Today they say -- stand in court and say JMHI
7 never received the hospital. So there's absolutely no
8 consideration. So they've been paid that \$800,000
9 twice, Your Honor, the overreaching on the lease
10 payments where the hospital paid for it, and again in
11 the redemption of this stock.

12 Now, let's talk about the '78 addition.
13 Again, if Your Honor will recall, in 1975, purportedly
14 there was an assumption of the mortgage by the JV.
15 Well, that never occurred, Your Honor. The hospital
16 remained liable on the mortgage. In fact, when we got
17 to the addition in 1978 and '79, we found that the
18 hospital went out and borrowed \$1,400,000 for the new
19 addition, and to pay off the old mortgage.

20 Who was made liable on that mortgage? The
21 hospital. So again, Your Honor, all of the operating
22 revenues -- and in their brief they say they only paid
23 -- the hospital only paid that mortgage for four years.

1 Well, that's an outright distortion, because what
2 occurred in 1982 in the health care -- in the Tennessee
3 transaction was that they assumed the mortgage only so
4 long as they took the \$900,000 in additional rent,
5 which they then modified the lease to provide for
6 themselves.

7 They took the additional money from the HG
8 transaction and built the fourth floor of the hospital.
9 Now, Your Honor, they've been paid for this land and
10 improvements no less than three times, over and over
11 and over again.

12 This is a transaction in which we purportedly
13 did an accounting. I ask you to examine the testimony
14 of Mr. Cobb and Mr. DenUyl; both admit they can show no
15 infusion of capital by these Respondents.

16 Now I want to turn to Gondor's claim, which
17 we're seeing today. Your Honor, I'm going to offer to
18 you Dr. Gondor's only sworn testimony in this case.
19 Dr. Gondor, in 1964 -- '64, for the first time was a
20 recipient of a letter that said he was going to buy a
21 half interest in the land. This is a conflicted
22 transaction from the get-go. There is no consideration
23 of fairness to the hospital.

1 In terms of what he was to be paid for rent,
2 and, incidentally, Your Honor, the hospital didn't own
3 the land at that time. They were so anxious to allow
4 this to happen that this letter was written before
5 there was ever a transaction in which the hospital
6 obtained its 65 percent of the land.

7 Recognizing this, shortly thereafter they
8 again wrote the same letter signed by a different
9 person. There has never been a deed. There has never
10 been a conveyance to Dr. Gondor. He stands, at best,
11 as a general creditor in a conflicted transaction with
12 a corporation in which he is a trustee earning a
13 profit.

14 What did Dr. Gondor receive? What has Dr.
15 Gondor received and what has he failed to account for
16 in this transaction? Dr. Gondor received in rent as a
17 general creditor -- as rent, for this purported rent
18 for land he didn't own, \$20,000 a year, Your Honor. He
19 has received that rent every year up to and including
20 this month, as far as we know, \$20,000. He has been
21 repaid that debt with interest.

J.APP.2605

22 What's his liability? His liability as he
23 stands before the Court today is to -- if the

1 Commonwealth chooses to pursue it, is to disgorge every
2 cent that he got as a conflicted director of this
3 corporation beyond the sum that he advanced, if the
4 Court were to see fit to give him credit for that, in
5 view of the fact that, pursuant to equitable remedies,
6 this Court has reduced the \$50 million judgment to \$20
7 million.

8 Dr. Gondor has been paid over the course of
9 time more than \$600,000 in connection with the -- not
10 the \$150,000, and that's the most fascinating point
11 about this. Dr. Gondor received half of it. He's put
12 in a claim today for \$150,000, when his own sworn
13 testimony and the records themselves indicate he took
14 half of it and he only ever paid \$61,000. We're going
15 to offer his deposition.

16 Dr. Gondor has been handsomely repaid and
17 owes the Commonwealth, if we take interest on the sums
18 which he has received, more than \$1 million. Whether
19 the Commonwealth will elect to pursue that claim
20 against him in a proceeding independent from Jefferson
21 remains to be seen.

JAPP.2606

22 But there is no equitable entitlement on
23 behalf of a man who has a non -- we have to look at the

1 further transactions, and then I'll sum up on this
2 issue, Your Honor. In 1970, fearing that they were
3 going to be examined by the IRS, that they were going
4 go be revoked by the IRS, they did a putative
5 subdivision, which both this Court and the Supreme
6 Court has said is invalid.

7 In 1992, Dr. Gondor issued a 99-year lease to
8 Dr. Tauber, which is still in effect for the land. He
9 receives today from Dr. Tauber a rent which is to
10 continue for 99 years, and Dr. Tauber has a right to
11 buy the land from Dr. Gondor for \$500,000. Dr. Gondor
12 is pursuing his claim against the wrong party in this
13 Court.

14 What's unconscionable on behalf of both of
15 these parties is their capital contributions never made
16 it to this hospital. Mr. Bono, in his brief, asked for
17 60-some million to be paid for the hospital. He claims
18 we don't own the hospital. Well, if that's the case,
19 Your Honor, if that is the case, that the Commonwealth
20 isn't entitled to this land and these buildings, then
21 we ask Your Honor to revisit your opinion.

J.APP.2607

22 Your Honor, I want to know what equitable
23 principle protects these people who have failed to

1 account, who, again, come into this Court and ask for
2 60-some million dollars on land and buildings that they
3 never paid for in the first instance.

4 Our level of proof in this case, and -- we
5 believe, Your Honor, this is the last day that we'll
6 deal with the Respondents in this Court. We feel that
7 after the Court enters an order in the amount of the
8 judgment -- and I want to address what you think that
9 order should say -- that they have no further standing
10 in this proceeding and that this Court can get on with
11 the business of making the decision as to how these
12 funds are going to be disbursed.

13 One of the critical issues, Your Honor, is
14 obviously the Court has found that a constructive trust
15 attaches to the Inova -- to the Inova funds. We're
16 going to ask the Court in its order to provide that the
17 funds from the Inova settlement will henceforth be paid
18 to the receiver, or whoever this Court elects -- it
19 will be paid to the receiver until this Court makes an
20 election as to distribution, and that they will be paid
21 to this Court until such time as the judgment is fully
22 discharged.

J.APP.2608

23 We've seen the ability of these Respondents

1 to use the Bankruptcy Court. Well, there is a direct
2 lien on that fund and we ask the Court to preserve it.
3 With respect to attorney's fees, you've heard the
4 argument with respect to costs.

5 But I'd say one thing in this respect, Your
6 Honor. We'd be perfectly willing -- we've asked Mr.
7 Bono to supply us with his fees in this matter. We'd
8 be delighted to settle for whatever he's billed, be it
9 less, be it more, in terms of the reasonableness of our
10 own fees. I think the decisions of this Court clearly
11 indicate that that's a fair benchmark of fees.

12 If there's any question about the fees that
13 have been charged in this case, we'd like the
14 Respondents to furnish that information.

15 In short, Your Honor, this has been a long,
16 protracted case. I've participated in it for seven
17 years without compensation. The Commonwealth has
18 expended hundreds of thousands of dollars to protect
19 the interests of the citizens of Alexandria. This
20 Court has been more than patient in listening to us in
21 terms of the many pleas, motions and arguments. J.APP.2609

22 One thing remains fairly clear. There has
23 been a complete avoidance of responsibility. A

1 complete unwillingness on behalf of these Respondents
2 to own up, to assume responsibility for their actions,
3 and continued claims which become absurd in their
4 promulgation.

5 To come to this Court today on behalf of
6 Gondor and ask for \$3 million, and on behalf of
7 Jefferson to ask for \$60 million -- Your Honor, do
8 everyone in this case an extreme, extreme favor and
9 give them the hospital, give them the land and give us
10 what we're entitled to.

11 Your Honor, give us what Your Honor found to
12 be the appropriate diversion in this case, \$26 million
13 over the course of the years that have ensued and the
14 remainder of the Inova money, and everyone will remain
15 whole.

16 If they're really serious about this, this
17 Court in terms of fashioning this equitable remedy did
18 so, as I understand it, because the land and buildings
19 are going to be conveyed to the Commonwealth.

20 Your Honor, seriously, they say we don't own
21 them and they take that position in the brief. Give us
22 what we are entitled to for the citizens of this county
23 -- the citizens of this city and the surrounding

1 counties.

2 There is a fund of money here that can be
3 used for years into the future to assist people, and
4 this Court will have the ability to control and direct
5 it. There is today in the arguments that you're going
6 to hear a total unwillingness to accept responsibility
7 for years of misconduct, for years of misappropriation,
8 for years of timely wasteful proceedings.

9 Your Honor, they deserve the equity that they
10 asked for. Give them their land and buildings and give
11 us the money.

12 MR. O'DONNELL: Your Honor, if I might
13 respond briefly.

14 THE COURT: Let me hear Mr. O'Donnell first,
15 Mr. Bono, and then I'll hear you.

16 MR. BETTIUS: Your Honor, before Mr.
17 O'Donnell starts, I'd like to tender Dr. Gondor's
18 deposition.

19 MR. O'DONNELL: Your Honor, I'm going to
20 object. It hasn't been presented to me. It was not
21 presented in the initial phase of this proceeding. Dr.
22 Gondor has been available for testimony. He is not
23 unavailable. Under rules of evidence in Virginia, it

J.APP.2611

1 is only admissible if the witness is unavailable and
2 Mr. Bettius has made no attempt to depose him for the
3 purposes of this hearing, to give notice of the intent
4 to present the deposition, or to subpoena him for
5 testimony today. It is simply not admissible.

6 MR. BETTIUS: I'm shocked at that argument,
7 Your Honor. He was precluded, we believe, by virtue of
8 the Court's first opinion with respect to that. He
9 wasn't offered at trial. In order to expedite the
10 proceedings, the Court allowed Gondor to make a proffer
11 of some evidence.

12 Your Honor, this is an accounting proceeding.
13 I'm going to tell you with respect to Mr. O'Donnell's
14 argument in order to have a fair approximation of any
15 claim, he has to put on what he received. This is an
16 accounting proceeding and he has not produced any
17 evidence of what Dr. Gondor has received, nor has he
18 made any claim with respect thereto. I have the sworn
19 testimony from Dr. Gondor that he has received the
20 \$21,000 a year and that he only put \$61,000 into this
21 transaction.

22 THE COURT: Did you intend to put on any
23 evidence, Mr. O'Donnell?

1 MR. O'DONNELL: No, Your Honor. The evidence
2 is in in the form of a stipulation and exhibits which
3 are before the Court, which I will reference.

4 THE COURT: All right..

5 MR. O'DONNELL: The deposition transcript of
6 Dr. Gondor, as a matter of evidence, is not admissible.
7 I would ask that the Court not accept that. If you
8 give me a couple of minutes, I'd like to make a
9 response to Mr. Bettius' argument.

10 MR. BETTIUS: This is an accounting
11 proceeding, Your Honor.

12 THE COURT: All right. The deposition will
13 be excluded.

14 MR. O'DONNELL: Your Honor, I really wasn't
15 going to make an opening, but, quite frankly, Mr.
16 Bettius' argument sounded so much like a closing
17 argument, I feel compelled to address at least a couple
18 of issues. I know you're tired of hearing argument. I
19 will be very brief.

20 What seems absolutely clear is that if this
21 Court adheres to its letter opinion issued earlier this
22 year in July, the 50 percent interest in the land that
23 Dr. Gondor holds title to at this time will be

1 reconveyed. It will be directed in the decree to be
2 reconveyed to the Commonwealth pursuant to this
3 Court's final resolution.

4 What is also absolutely clear is that Dr.
5 Gondor paid \$150,000 in 1965 dollars to purchase that
6 property from the non-profit. If you recall the
7 testimony, Your Honor and the proffer to this Court, we
8 gave the Court a copy of the letter which is already in
9 evidence. There were actually two letters, Your Honor,
10 a December 21, '64 letter and a January 2, 1965 letter.
11 Both of them had been submitted into evidence and are
12 before the Court, but I have additional copies which I
13 can hand up today as supplemental exhibits.

14 They describe the deal in which Dr. Gondor
15 agrees to purchase 50 percent of the land for \$150,000.
16 Cash of \$88,572, which was stipulated by Mr. Bettius
17 and the Commonwealth, was paid to the non-profit in
18 January of 1965. The remainder of the consideration,
19 which was about \$62,000, was paid in the form of Dr.
20 Gondor's payment of one-half of the then existing
21 mortgage. The mortgage at that time was \$122,856. At
22 stipulation during the accounting phase of this trial,
23 the Commonwealth stipulated that the letter agreement

1 was entered into between the Joint -- between Inc. And
2 Dr. Gondor in 1965; that Dr. Gondor paid his \$88,000
3 and that he paid one-half of the then outstanding
4 mortgage for total consideration of \$150,000.

5 Now, how does that relate to today's hearing?
6 Your Honor, if you're going to follow through with your
7 letter opinion and decree that the land must be given
8 back, Dr. Gondor is entitled to a credit for the
9 consideration he gave to the non-profit for the
10 acquisition of that interest in the land, because the
11 testimony, which was uncontroverted at that time by Dr.
12 Tauber, was that Inc. needed the money to open up its
13 doors and get the hospital going.

14 Nobody else was willing to pay that for the
15 property and it constituted roughly twice the amount of
16 the purchase price of the property less than a few
17 years earlier.

18 I want to make sure that the Court
19 understands what's fact and what's fiction with respect
20 to Mr. Bettius' argument, because he stands here and
21 insists that Dr. Gondor got, Dr. Gondor got.

J.APP.2615

22 The fact is, during the accounting phase of
23 this trial the Commonwealth specifically refrained from

1 identifying distributions of specific monies to any of
2 the individual Respondents. Their approach to the
3 accounting was to say here's all of the income that was
4 generated by the Joint Venture from 1971 to the
5 present. You need to take all of that income, compute
6 present value factor, and award that to the
7 Commonwealth as the ill-gotten gains. We don't have to
8 trace to an individual party.

9 Now, the Court, in its equity jurisdiction,
10 has said I'm taking the accounting of the Complainants.
11 I'm taking all of that money and I'm applying some
12 interest factor and I'm going to award something around
13 \$20 million as fair and equitable compensation for the
14 money that was taken.

15 If you now take Dr. Gondor's credit which
16 he's due and also deduct monies that he received from
17 the entity, we're double counting. Mr. Bettius wants
18 credit for all of the money in the context of the \$20
19 million judgement that the Court is set to impose, and
20 then also wants to viscerate any argument for credit
21 premised upon the fact that Dr. Gondor may have gotten
22 some of that money.

J.APP. 2616

23 Now, I would represent to you, because Mr.

1 Bettius has made arguments about facts which are not in
2 evidence, that the representation of rent is not
3 accurate. In fact, the rental agreement that existed
4 and is in the record in this Court, provided for Dr.
5 Gondor to get \$9,700 a year, and that stayed the same
6 up until sometime in the mid '80s and then changed to
7 \$20,000 a year. But Dr. Gondor, if he testified, would
8 tell the Court that he forgave many of those initial
9 years, because the company and business didn't have
10 enough money to make it.

11 There's no evidence of that in the record,
12 Your Honor, and it's not required, because the Court,
13 in awarding \$20 million or whatever its final figure is
14 going to be, ultimately has taken into consideration
15 all transfers made. And to give Mr. Bettius credit for
16 his argument this morning would be to double count.

17 All Dr. Gondor is entitled to, and quite
18 frankly, it's the Respondents, it should be a credit
19 against the judgment for the value of the \$150,000 that
20 was paid in 1965, because the Commonwealth has
21 stipulated to that.

J.APP.2617

22 It was not an issue that was a bone of
23 contention and that's why the stipulation was made. It

1 wasn't because Dr. Gondor didn't want to come and
2 testify. There wasn't any argument about that fact.
3 Dr. Gondor is entitled to a credit. The Respondents
4 are entitled to a credit for that portion of the
5 acquisition costs, with some interest factor applied to
6 it.

7 Now, I would tell you, Your Honor, if you
8 take that to present value on the interest factors that
9 have been applied before this Court, it comes out to
10 \$3.5 million. Now, I'm not standing here today to tell
11 you that that number ought to be 3.5 or it shouldn't be
12 3.5. But there should be some present value factor
13 applied to that, the same as the Court has applied to
14 the diversion of what this Court has found was
15 wrongfully appropriated funds, which the Commonwealth
16 represents was all of the income of the entity from
17 1971 to present.

18 MR. BETTIUS: Your Honor, I --

19 THE COURT: Sit down, Mr. Bettius. Who is
20 next? Mr. Bono?

21 MR. BONO: Thank you, Your Honor.

22 Your Honor, I didn't realize that Mr. Bettius
23 was going to address the property and buildings.

1 Again, I would mention we filed a memorandum. I know
2 Your Honor said you didn't look at it, but I would like
3 Your Honor's indulgence for a few minutes, because most
4 of what Mr. Bettius said is fantasy and is not in the
5 record, nor is it applicable in terms of the facts and
6 the law that would apply here.

7 If the Commonwealth wishes to waive or
8 withdraw its claim to the buildings and land, things
9 would be, I represent, a lot simpler in this case,
10 since we wouldn't have any issues that we're going to
11 be facing in terms of credits and partitions and all
12 these other issues.

13 But I would like to address the buildings and
14 the land point, Your Honor, because it's important for
15 the Court to understand the facts at hand here.

16 Your Honor, first of all, Your Honor's
17 opinion did not mention the Medical Office Building.
18 Although we addressed it in our brief, it is unclear to
19 Respondents whether Your Honor meant to include the
20 Medical Office Building in Your Honor's decision or
21 meant to exclude it.

22 Your Honor's opinion mentions the hospital
23 building and improvements in the Beauregard Building

J.APP.2619

1 and not the Medical Office Building. However, we have
2 addressed that in any event, in our brief, and I'll
3 address it in my arguments, because I understand the
4 Commonwealth has taken the position that Your Honor did
5 include it in the award.

6 Your Honor, with respect to the buildings,
7 there are three buildings. One is the hospital
8 building. The facts in the case showed, and it's
9 undisputed, that the hospital building was never owned
10 by JMHI. The hospital building was built privately
11 from the partnership, JMHA, Associates, and the --
12 there was never any ownership interest in the hospital
13 building by the charity at any time. The records show
14 that the partnership, JMHA, which solely owned the
15 hospital building, transferred the building to JMHC,
16 Corporation, the for-profit Delaware corporation,
17 which, in turn, then transferred it to the partnership
18 JMHJV, which is the current partnership.

19 At no time in any of those transactions did
20 Inc., the charity, have any ownership claim. The
21 building never passed through that ownership in any
22 way, shape or form. The Commonwealth put on no
23 evidence during the trial -- at either trial, to show

JAPP.2620

1 that. And, in fact, Mr. Wilson, their expert, agreed
2 that the building was not owned by the charity and that
3 the partnership was free to transfer it to the
4 corporation and the corporation, likewise, to transfer
5 it to JV.

6 I would respectfully submit I don't see any
7 possible way that the hospital building falls within a
8 charitable trust of JMHI. The funds used to build the
9 building were costs -- it's undisputed, \$1,055,000,
10 were private funds put in by the doctors and financed
11 by the doctors separately. No part of that was taken
12 from the charity and, therefore, I would respectfully
13 submit that there is no basis for the hospital building
14 to be part of this charitable trust.

15 It simply wasn't part of the assets that
16 transferred to the trustees at the dissolution of JMHI
17 which occurred in 1973.

18 Now, with respect to the Medical Office
19 Building, the Medical Office Building was built in
20 1979, and, again, it was built with private assets of
21 the partners. The building cost over \$2.5 million.
22 There was a mortgage placed, a blanket mortgage in the
23 testimony, on the hospital building and on the new

J.APP.2621

1 Medical Office Building.

2 Again, the hospital building was never part
3 of Inc., and placing a blanket mortgage on the real
4 estate did not implicate the charity in any way. In
5 addition, over \$1 million was invested privately by the
6 doctors. That testimony is, again, undisputed. And,
7 therefore, there is no basis for the Medical Office
8 Building to be part of the charitable assets.

9 Mr. Bettius has argued that for four years
10 the Corp.'s rent was used to pay off the mortgage.
11 Your Honor, the Commonwealth presented no evidence
12 whatsoever that the rent paid by Corp. for the hospital
13 building was other than fair market value rent. Your
14 Honor, this was a post-1978 transaction. Regardless of
15 Your Honor's ruling, that 1971 common law applied to
16 the initial conversion.

17 In 1978, the Commonwealth of Virginia passed
18 a statute in the corporation law which said that any
19 insider transactions which are fair to the corporation
20 cannot be voided. There's been no evidence to show
21 that the rent money paid by Corporation for the
22 hospital building during that time period was other
23 than fair market value rent or below.

J.APP. 2622

1 So, therefore, there's no basis for the
2 Commonwealth to pull in the Medical Office Building to
3 the charity. As I said, I did not read Your Honor's
4 opinion to include that.

5 Lastly, with respect to the Beauregard
6 Building, that building was, again, built by private
7 funds of the doctors in 1982. Approximately \$755,000
8 were expended, and there was no evidence presented at
9 the trial that those funds expended by the doctors were
10 charitable funds or were traceable to any asset of
11 JMHI.

12 Your Honor, that was -- and as Mr. O'Donnell
13 said, to now say that those monies that the doctors may
14 have made should be included to take the building in
15 would be double counting, because all of the income
16 that was made was part of Your Honor's decision in
17 awarding the \$20 million award, which I said when I
18 first stood in front of this Court post your verdict.
19 The Respondents respect that decision, Your Honor.
20 We're not here today in any way challenging that aspect
21 of the Court's opinion.

22 Your Honor, for those three reasons we do not
23 see that any of the buildings should be part of this

JAPP.2623

1 charitable trust. With respect to the land and Dr.
2 Gondor and the Berman lot, we understand that that land
3 did pass through the charity, because at one point that
4 land had been donated to the charity, and we have
5 submitted in our brief the acquisition costs of both
6 those parcels and have put forth the credit that we
7 believe should be given.

8 Now, let me mention here at the outset, Mr.
9 Bettius -- and I knew he would do this, Your Honor --
10 in order to prejudice our position in front of this
11 Court, stands up here and says the Respondents have the
12 audacity to come into this Court and ask for a \$60
13 million credit. We have not done any such thing. I
14 specifically in my brief did not ask for that amount of
15 money. I said we should be entitled to a substantial
16 credit in the Court's discretion. I simply presented
17 to the Court the numerical calculation of present value
18 so Your Honor could take that into consideration. And
19 I can't help the fact that these monies and capital
20 were expended 30, 35 years ago.

21 But the law, as we have cited in our brief,
22 Your Honor, and in the cases -- from the Kessler case,
23 which Your Honor used in Your Honor's first opinion,
J.APP.2624

1 made it clear, as well as the other cases we have cited
2 from the Supreme Court of Virginia, that when you void
3 a transaction and consideration has been paid for a
4 building, for stock, for land, the parties are entitled
5 to be put back in the position they were in.

6 That is to be paid back, the acquisition
7 costs, plus interest. I appreciate that in this
8 particular case, given Your Honor's discretionary
9 award, that the interest should not be worked out in
10 absolute terms, but there should be, as Mr. O'Donnell
11 said, some credit given and some credit toward the
12 present value calculation in this award.

13 But if the Commonwealth wishes to avoid all
14 of this issue and is now not making a claim to the
15 buildings, then none of that has to be addressed in a
16 going forward basis.

17 Thank you, Your Honor.

18 THE COURT: Mr. Hirschkop?

19 MR. HIRSCHKOP: The nice part about
20 commercial litigation as opposed to humanistic
21 litigation is you don't get all the emotion in
22 commercial litigation. I don't know where it comes
23 from here. I take exception to some of the pejorative

JAPP.2625

1 language of Mr. Bettius, unconscionable, bloody and
2 shocking and absurd. It is a commercial matter.

3 With regard to Mr. Bettius's assertion there
4 are no capital contributions, Your Honor knows as a
5 practical matter someone paid to build these buildings.
6 You know with absolute certainty it wasn't the
7 Commonwealth of Virginia, it wasn't the people of the
8 City of Alexandria. It wasn't by raised charity funds.
9 It wasn't by solicitations. It was paid for by these
10 Respondents as a class and some others who are not
11 directly named respondents.

12 The land was purchased by these Respondents
13 and others associated with them, a few others. The
14 punishment that he seeks is misplaced in this
15 proceeding. Your Honor has decided that, in point of
16 fact, as a matter of law, a constructive trust was
17 established. You haven't decided there was fraud here;
18 quite the contrary. By rejecting damages in the first
19 opinion, you seemed to preclude that. But at any
20 rate -- and he cited Thorpe Richards testimony, which I
21 read carefully a couple of weeks ago, thinking that
22 this might happen.

J.APP.2626

23 I ask you to keep in mind, Your Honor, these

1 doctors consulted established corporate counsel in
2 1970, and said what do we do now. They had the IRS to
3 deal with, and the IRS claim was, like, \$6,000 or
4 \$8,000. That evidence was presented before. They
5 could have contested the 501(c)(3), they could have
6 appealed it, they could have settled it. They were
7 advised by corporate counsel that they should let the
8 corporation just pass, the Maryland corporation, be
9 dissolved and convert to a not-for-profit.

10 Indeed, in 1974, I believe it was, they then
11 consulted Thorpe Richards. Dr. Tauber, my client, was
12 ill and Dr. Friedman was acting as president, and told
13 them straight out if there are any corporate problems.
14 They've asserted over and over again that somehow
15 Thorpe was deceived. That's not Mr. Richards'
16 testimony at all, Your Honor.

17 He said I didn't know they had allowed the
18 corporation to become dissolved by operation of law. I
19 submit he should have known that. But whether he knew
20 or not, you made a finding that, regardless,
21 technically as a matter of law, it became a
22 constructive trust and that's where we are. The
23 Supreme Court has said you were correct, the Supreme

J.APP.2627

1 Court of Virginia.

2 But these doctors, in operating this thing,
3 their seeking profit, believed they had a for-profit
4 group. So I don't know what that has to do with this
5 anyhow in determining where we are. I raise it because
6 I have a different problem. I represent an individual
7 in the case, just Dr. Tauber.

8 In Your Honor's letter opinion, you say the
9 Respondents are responsible. Your Honor did not
10 address -- and I assume by not addressing it you denied
11 it -- our position that the individuals couldn't be
12 responsible under the safe harbor provisions that a
13 director has. A director may rely, and Virginia law is
14 fairly conclusive on this, on the advice of accountants
15 and attorneys.

16 THE COURT: I'm not going back and retry this
17 case, Mr. Hirschkop, if that's what you're asking me to
18 do.

19 MR. HIRSCHKOP: No, sir.

20 THE COURT: It sounds like it.

21 MR. HIRSCHKOP: No, sir. I'm raising my
22 point just on whether and to what degree Dr. Tauber
23 will be liable for whatever you're going to do. You
J.APP.2628

1 have decided there's a constructive trust and I'm not
2 rearguing that at all.

3 You have not given us anything that we can
4 interpret in your letter opinion as to what degree the
5 individuals may or may not be liable on the property
6 transfers or on the amount of money that may be due the
7 state, as you ultimately decide it, nor am I clear,
8 then, on where I stand in terms of standing of this
9 question of property transfer. I do seek to preserve
10 that point and, to the extent you have included
11 individuals or may include individuals, because your
12 letter opinion merely says Respondents, we have briefed
13 it in our prior brief. I'm not going to repeat the
14 law. Note my exception to that if that's where it's
15 going to go.

16 Lastly, I join, as my two prior counsel
17 argued, I interpret Mr. Bettius' remarks as a tender
18 that they weren't going to -- well, I don't take it
19 that way. He suggested that perhaps we shouldn't get
20 into the property. If that's the position, we're to
21 clear that up now and save everyone a lot of time.

22 Thank you, Your Honor.

23 THE COURT: First witness, Mr. Bettius?

JAPP.2629

1 MR. BETTIUS: Your Honor, am I permitted at
2 least to --

3 THE COURT: No. Do it at the end either by
4 argument or by brief.

5 MR. BETTIUS: Pardon me, sir?

6 THE COURT: We'll do it at the end of the
7 evidence either by argument or by brief.

8 MR. BETTIUS: I call Mr. Foster.

9 MR. HIRSCHKOP: Your Honor, may I have a
10 standing exception to the procedural aspect?

11 THE COURT: Yes, sir.

12 MR. HIRSCHKOP: We were given no notice of
13 these people.

14 THE COURT: All right.

15 MR. BETTIUS: Your Honor, we're perfectly
16 content to let the Court rule that the property is
17 ours. We don't have a problem with that. We were
18 going to put on evidence -- I'm going to put on some
19 evidence anyway, I think, Your Honor, as to where this
20 title is.

21 THE COURT: All right.

22 MR. BETTIUS: I think the Court would like to
23 know that. We're going to have to do some deeds.

J.APP.2630

1 THE COURT: All right. Call your witness.

2 MR. BETTIUS: Take the stand, sir.

3 THE COURT: Come forward to the witness
4 stand, please.

5 Whereupon,

6 KIRK FOSTER

7 was called as a witness and, after having been first
8 duly sworn by the Clerk of the Court, was examined and
9 testified as follows:

10 DIRECT EXAMINATION

11 BY MR. BETTIUS:

12 Q What's your profession or occupation, sir?

13 A My name's Kirk Foster. I'm the president of
14 Northern Virginia Land Title.

15 Q What do you do in that capacity, sir?

16 A I do real estate settlements, I underwrite
17 title insurance, I do title examinations.

18 Q How long have you examined titles in the
19 Commonwealth of Virginia?

20 A Twenty-four years.

21 Q Have you ever testified as an expert?

22 A Yes.

23 Q In what courts, sir?

J.APP.2631

1 A Fairfax and -- I believe it was Alexandria --
2 federal court in Alexandria.

3 Q And have you, at our request, undertaken the
4 examination of the title to this property?

5 A Yes.

6 Q Sir, in any of your searches did you ever
7 find the existence of a deed to a Dr. Gondor? Does any
8 such deed exist?

9 A To a Dr. Gondor?

10 Q Yes, sir.

11 A Yes.

12 Q When was that deed recorded?

13 A I believe it was around 1970.

14 Q All right. Was that part of a subdivision,
15 sir?

16 A Yes.

17 Q And did you find any irregularities in
18 connection with that subdivision?

19 A Yes. In the subdivision that was recorded,
20 deed book 707 at page 584, it was recorded 3/7/70, and
21 we find the irregularity that the lenders didn't join
22 in the document that had a beneficial interest in it,
23 the trustees and the lenders weren't included in there.

JAPP.2632

1 There were deeds of trust against the property at that
2 time.

3 MR. BETTIUS: Your Honor, we would also point
4 out that that conveyance was invalidated, we believe,
5 both by this Court and the Supreme Court in its
6 previous decision.

7 BY MR. BETTIUS:

8 Q At present, sir, who is the record owner of
9 the -- first of all, would you tell us what the --
10 would you give us a description of the property for
11 which you caused titled to be examined?

12 A The property consists of a 2.5639 acre
13 parcel, a 0.5698 acre parcel and a parcel containing
14 1.2218 acres.

15 Q Did you do a diagram of that parcel to aid
16 the Court?

17 A Yes, I did. There is a plat that I have that
18 I've drawn showing the different parcels and also
19 showing where the buildings are located on those
20 parcels.

21 Q Do you have a copy for opposing counsel as
22 well?

23 A Yes.

J.APP. 2633

1 Q All right. Let me have those, sir.

2 A She has one over there. I have one.

3 MR. BETTIUS: We ask, Your Honor, that this
4 be identified as Exhibit 1 for the purposes of this
5 hearing.

6 (Whereupon, Complainant's Exhibit
7 No. 1 was marked for
8 identification.)

9 THE COURT: All right.

10 BY MR. BETTIUS:

11 Q Now, the property, is that what's outlined on
12 this chart, on the graphic exhibit, sir?

13 A Yes.

14 Q And will you tell us at present who the
15 record owners are of the property?

16 A Currently, the record owner of the property
17 that I have, I have a 65 percent undivided interest in
18 Jefferson Memorial Hospital, Incorporated, which is
19 JMHI, and a 35 percent undivided interest to Laszlo N.
20 Tauber, Trustee.

21 Q All right, sir. Now, in terms of the various
22 parcels and buildings, have you identified the various
23 buildings?

J.APP.2634

1 A Yes, I have.

2 Q That area which is identified in orange,
3 would you tell the Court what that is?

4 A That would be the Jefferson Memorial
5 Hospital Office Condominium at this point.

6 Q You previously testified the title is a 65
7 percent undivided interest; is that correct?

8 A Yes.

9 Q Now, does that building lay strictly on fee
10 simple ground or is there also leased ground included?

11 A There is leased ground on that property
12 there. To the left side, where you see the Hopkins in
13 yellow, that yellow would also go through that building
14 there. That property will be leased under Hopkins.

15 Q All right, sir. Now, I notice back here you
16 have a reference. It says Gondor leased to Tauber.
17 Could you tell us what that indication is?

18 A That would be the remaining property of the
19 Gondor lease. There was a lease from Gondor to Tauber,
20 and that would be the property that the nursing wing
21 would be sitting on, also part of the property that was
22 conveyed to Gondor in the invalid deed subsequent to
23 the deed of subdivision.

JAPP.2635

1 Q Do you find any other conveyance to Gondor,
2 other than that which you've described as invalid in
3 1970?

4 A No.

5 Q All right, sir. Now, the building in green,
6 what is that?

7 A That would be the actual hospital building.

8 Q Does that lie entirely on fee simple ground?

9 A Yes, it does.

10 Q And are there any interests shown of record,
11 other than the 35 and 65 percent that you've already
12 testified to?

13 A No.

14 Q All right. Now, you've described the nurse's
15 wing. What is this building located on the left side
16 of the exhibit, the condo?

17 A That would be the Beauregard Medical Office
18 Building condominium.

19 Q All right. It's located on fee simple or
20 leased ground, sir?

21 A A portion of it is on the Hopkins lease, as
22 you can see on the plat, shown in yellow there. The
23 rest of the building would be on fee simple.

J.APP.2636

1 Q Now, with respect to the condo regimes, do
2 they encompass any land other than the actual footprint
3 upon which the building resides?

4 A No. The only land that was submitted when
5 the condominiums were created was the actual buildings
6 themselves and the land they sit on.

7 Q Who submitted the land?

8 A I believe it was Tauber, trustee for
9 Jefferson Joint Venture.

10 Q Now, in terms of the condo building and the
11 office building, do they have any parking associated
12 with them that -- on the adjacent ground that's subject
13 to anything of record that you can determine? Are
14 there any parking rights?

15 A No, I could not find anything in the parking
16 for either building.

17 Q All right, sir. Now, with respect to these
18 condo declarations, do you find that JMHI ever joined
19 in any of the declarations?

20 A No, we could not find any evidence of that.

21 Q Can you find any validity to these
22 associations, absent joinder by the owner of 65 percent
23 of the land?

J.APP.2637

1 A No.

2 Q The parcel that you've indicated in blue,
3 what is that, sir?

4 A That would be a parcel that came out of the
5 2.5639 and .5698 acre parcels. It's strictly land with
6 no buildings on it owned by the 35-65 percent that I
7 mentioned.

8 Q Do you find any indication of consideration
9 paid for the purported condos?

10 A No. In reviewing the deeds that came out of
11 Jefferson, there was no -- they were all pursuant to a
12 Code section.

13 Q Sir, have you provided or have you prepared
14 an exhibit list of those people who were owners,
15 purported owners, of condominiums in the professional
16 office building?

17 A Yes, I have.

18 Q Would you submit, sir?

19 A I think you have my copy of it.

20 MR. BETTIUS: I'll exhibit it to counsel first.

21 BY MR. BETTIUS:

22 Q Do you find any evidence of consideration in
23 connection with these deeds?

JAPP.2638

1 A No, I don't believe so. I think there might
2 have been one deed, the Beauregard Building, that was
3 recently done as early as this year that has
4 consideration mentioned on it. I believe that was the
5 only one. I believe it was Unit C of the Beauregard
6 Building that had a consideration of \$275,000.

7 Q Who was the grantee?

8 A Mohammed Ali.

9 Q Mohammed Ali is the owner of one of the
10 condominium units in the Beauregard Building?

11 A That is correct.

12 Q Who, of record, is the owner of the other
13 two?

14 A I believe it was Drs. Friedman and others,
15 and Beauregard Associates.

16 MR. BETTIUS: We're going to submit the list
17 with respect to the professional office building as 2,
18 Your Honor. We'd ask that be received in evidence.

19 (Whereupon, Complainant's Exhibit

20 No. 2 was marked for

21 identification.)

22 MR. O'DONNELL: Your Honor, the only thing I
23 guess I have a question about is I'm not sure what the

JAPP.2639

1 relevance is, but is the witness testifying as an
2 expert that there was no consideration for any of these
3 deeds?

4 MR. BETTIUS: These are --

5 THE COURT: Just a minute, Mr. Bettius. I
6 thought that's what he said.

7 MR. O'DONNELL: I want to object to --

8 THE COURT: You can cross-examine him on it.

9 MR. O'DONNELL: I'll cross. I just -- Your
10 Honor, I would ask to have a standing objection as to
11 the document initially, because I think there's an
12 estoppel by deed argument and I want the opportunity to
13 cross-examine the witness on it.

14 THE COURT: I'll give you that. You can
15 cross-examine.

16 BY MR. BETTIUS:

17 Q Now, for purposes of Mr. O'Donnell's
18 objection, I want to ask you one other question. Do
19 you find -- again, I think I asked you this. Do you
20 find any conveyance at any time to a Dr. Gondor in 1964
21 or 1965?

22 A No.

23 Q Now, you subsequently found a lease from Dr.

JAPP. 2640

1 Gondor to Tauber Trustee?

2 A That is correct.

3 Q Would you tell the Court when that lease was
4 put of record?

5 A January 1, 1966.

6 Q Now, that lease was joined in by how many
7 other parties?

8 A I believe that lease included Burtoff, Gondor
9 and the Foundation, and -- I don't have a copy of it in
10 front of me. I think that was it. There may be one
11 other entity also.

12 Q As a bona fide purchase of value, searching
13 this title did you find any evidence of any ownership
14 that would support this lease by Gondor or Burtoff?

15 A No.

16 MR. BETTIUS: Your Honor, we're going to --

17 BY MR. BETTIUS:

18 Q I want to ask you one other question. Do you
19 find in terms of these condo deeds references to any
20 Code sections that would evidence that they're exempt
21 from recordation by virtue of being charitable
22 conveyances?

23 A Yes. I believe that was what the Code J.APP.2641

1 section was that was on the deeds.

2 Q What deeds were those that had this
3 charitable section appended to them?

4 A Those were the deeds of the conveyances of
5 the Jefferson Memorial Office Condominium, the
6 individual units.

7 Q And these were made in the period of 1977
8 to -- '78, '79, sir?

9 A Those deeds, I believe, were -- 1994, I
10 believe.

11 Q 1994?

12 A I think the conveyances from the Jefferson
13 Memorial Office Building were 1994.

14 Q All right. Let me give you the deeds so you
15 can --

16 MR. HIRSCHKOP: Your Honor, I would object.
17 For the record, Counsel's handing him -- a stack of
18 documents to the witness. He walked up and gave them
19 to him and I have no idea what they are.

20 MR. BETTIUS: Let me show them to you.

21 BY MR. BETTIUS:

22 Q These are the deeds that you made reference
23 to in your previous testimony?

J.APP.2642

1 A Yes.

2 Q What dates do they bear, sir?

3 A Most of the deeds are dated October 1, 1994.

4 Q And the grantor is who?

5 A Jefferson Memorial Hospital Joint Venture, a
6 Virginia general partnership.

7 Q And they claim exemption by virtue of
8 charity?

9 A Yes, Code section 58.1-811(a)(1).

10 Q What's the second group of deeds here?

11 A This would be -- the documents you just
12 handed me would be the Declaration creating the
13 condominium of Jefferson Memorial Hospital Office
14 Condominium with a corrective amendment.

15 MR. BETTIUS: Your Honor, we move those as,
16 collectively, Exhibit 3.

17 (Whereupon, Complainant's Exhibit
18 No. 3 was marked for
19 identification.)

20 THE COURT: They'll be marked, but we'll
21 await cross-examination before they're admitted.

22 MR. O'DONNELL: There looks to be, you know,
23 something in the neighborhood of 50 deeds. Are we

J.APP.2643

1 marking them individually or as a --

2 MR. BETTIUS: I moved them as a collective
3 exhibit.

4 THE COURT: Do you know an exact number, Mr.
5 Bettius?

6 BY MR. BETTIUS:

7 Q Do you have an exact number?

8 A I believe -- there's been some corrections of
9 the deeds, but I believe it's in the neighborhood of
10 35.

11 THE COURT: They'll be marked as
12 Complainant's 3 for purposes of identification.

13 MR. BETTIUS: All right, sir.

14 BY MR. BETTIUS:

15 Q I'm going to show you this group of exhibits
16 and ask you to identify them.

17 A This would be the Declaration of the
18 Beauregard Building Office Condominium and the copies
19 of the deeds of the three conveyances out of that
20 condominium for the units.

21 MR. BETTIUS: Move those as Exhibit 4.

22 (Whereupon, Complainant's Exhibit

23 No. 4 was marked for

J.APP.2644

1 identification.)

2 THE COURT: They'll be marked.

3 MR. BETTIUS: No further questions.

4 MR. HIRSCHKOP: Pardon me. Could I ask that
5 the Commonwealth at least supply subsequently,
6 obviously they can't do that today, but a list of what
7 deeds so the record is clear what was put in? It's
8 just a pile of paper right now, the deeds, and that
9 Counsel be supplied with a copy of those exhibits
10 subsequently? He doesn't have them now.

11 MR. BETTIUS: Absolutely. We'll be glad to
12 supply a copy of the exhibit, Your Honor.

13 THE COURT: Questions?

14 MR. BONO: Your Honor, before I begin I would
15 like to state my objection for the record to this
16 witness and to the manner in which the Commonwealth has
17 presented the testimony. We were given no notice that
18 there would be this expert testimony presented today.
19 We've been given no expert report. We've been given no
20 proffer of any expert testimony. We've been given no
21 documents before this proceeding. If I had done this
22 to the Commonwealth, they'd be jumping up and down
23 screaming.

J.APP.2645

1 THE COURT: All I can tell you, gentlemen, is
2 I recall -- I'm sorry -- ma'am and gentlemen, that I
3 recall the last time we were here I said set a date,
4 we'll have an evidentiary hearing. You all present
5 whatever evidence you want the Court to consider on the
6 remaining issues. That's the way it was left. I don't
7 believe there was ever a pretrial order entered that
8 had any discovery or cutoff dates or anything else.

9 MR. BONO: Regardless of that, Your Honor, I
10 think we were entitled to be presented with notice and
11 not be expected in this important matter to stand up
12 here and on the fly cross-examine an expert witness
13 when we were given no notice. We have been prejudiced
14 and I respectfully submit that this is a violation of
15 due process.

16 I cannot effectively cross-examine this
17 witness, given the fact that they have sprung him on
18 Respondents as a total surprise. I again reiterate
19 that if I and my colleagues had done this to the
20 Commonwealth, they'd be screaming to this Court for
21 improprieties. So I'm making the objection for the
22 record and I'll ask the witness, with Your Honor's
23 permission, a few questions based upon what I can react

J.APP. 2646

1 to this morning in light of the surprise

2 THE COURT: All right.

3 CROSS-EXAMINATION

4 BY MR. BONO:

5 Q Mr. Foster, are you an expert on contract
6 law?

7 A No, I'm not an attorney.

8 Q Okay. And so you have no idea, do you, on
9 what these legalities are with respect to consideration
10 for contract law, do you?

11 A I wasn't asked to be here for that.

12 MR. BETTIUS: Objection. Objection. He
13 wasn't offered for that.

14 THE COURT: Objection's overruled. He can
15 answer the question.

16 BY MR. BONO:

17 Q Now, Mr. Foster, you mentioned the 1970
18 subdivision in your testimony. Do you know what
19 attorney handled that?

20 A No, I don't.

21 Q Were you ever informed that Mr. Thorpe
22 Richards handled that transaction?

23 MR. BETTIUS: Objection, relevance, Your
J.APP. 2647

1 Honor.

2 THE COURT: Objection's overruled.

3 THE WITNESS: Repeat the question.

4 BY MR. BONO:

5 Q Were you ever informed that Mr. Thorpe
6 Richards handled that transaction?

7 A No.

8 Q And you mentioned that there was an
9 irregularity in that transaction. Is that an
10 irregularity that you believe an attorney should have
11 accomplished?

12 A No, that's a common --

13 MR. BETTIUS: Continuing objection, Your
14 Honor.

15 THE COURT: I'll sustain that one. That's
16 way beyond his expertise.

17 BY MR. BONO:

18 Q You mentioned in your testimony that JMHI did
19 not join in the condominium declaration. Do you recall
20 that?

21 A yes.

22 Q When were these condominium declarations
23 supposedly made?

J.APP.2648

1 A The recorded date on the Jefferson would have
2 been September 19, 1994, and on the Beauregard
3 condominium, it would have been recorded on September
4 11th of '95.

5 Q Now, were you aware, sir, that JMHI was
6 dissolved by the State of Maryland on April 18, 1973,
7 more than 20 years prior to that?

8 MR. BETTIUS: Objection, relevance, Your
9 Honor. I don't care if --

10 THE COURT: That's argumentative, Mr. Bono.
11 Isn't that your argument, that the reason they're not a
12 part of the declaration is they didn't exist? I mean,
13 that's obviously part of your argument.

14 MR. BETTIUS: I mean, Your Honor, you've
15 still got record owner as the joint entity. You've got
16 to explain that of record.

17 THE COURT: I'll sustain the objection, but I
18 think that's your argument, Mr. Bono. It may be a good
19 one, but we'll see.

20 MR. BONO: I have no further questions.

21 THE COURT: Mr. O'Donnell?

22 MR. O'DONNELL: Just very briefly, Your
23 Honor.

J.APP. 2649

1 CROSS-EXAMINATION

2 BY MR. O'DONNELL:

3 Q Mr. Foster, the large stack of 35 deeds in
4 front of you which were marked as Exhibit 3, if you
5 would look at the top one for a moment, would you read
6 -- right after the witnesseth would you read the
7 introductory language that deals with consideration
8 there briefly?

9 A Yes. And in consideration of the sum of \$109
10 cash in hand paid, and other good and valuable
11 consideration, the receipt of which is hereby
12 acknowledged, the grantor is hereby granting conveyance
13 with special warranty unto the grantee the following
14 described property located in the City of Alexandria.

15 Q That's fine. And that language is consistent
16 with the remaining deeds in that package; is it not?

17 A I believe so.

18 Q Okay. And you've not undertaken to contact
19 any of the purchasers or principles to determine what,
20 if any, compensation or consideration they have paid or
21 given with respect to these various conveyances, have
22 you?

23 A No.

J.APP.2650

1 MR. O'DONNELL: Thank you.

2 THE COURT: Any questions, Mr. Hirschkop?

3 MR. HIRSCHKOP: Your Honor, without having
4 seen the documents in advance and consulting an expert,
5 I could not competently examine this witness.

6 THE COURT: All right. Anything else?

7 MR. BETTIUS: Very briefly.

8 REDIRECT EXAMINATION

9 BY MR. BETTIUS:

10 Q In terms of recordation of deeds, when you
11 say there's no statement of consideration, does that
12 refer to the recording statutes, sir?

13 A Yes.

14 Q And how is that normally reflected on the
15 deeds, sir, in terms of consideration?

16 A Normally, in the City of Alexandria, the
17 consideration would be -- if there's any consideration
18 paid, it would be listed on the margin of the document,
19 if there was any consideration paid.

20 Q For purposes of assessing a recordation?

21 A Absolutely. The clerk requires that to
22 assess the taxes.

JAPP.2651

23 Q And you do find that in the Ali deed, don't

1 you?

2 A Yes, I do.

3 Q Now, with respect to dissolved corporations,
4 isn't there a method for handling that in terms of
5 recording deeds?

6 MR. BONO: Objection, Your Honor.

7 THE COURT: Objection sustained.

8 MR. BETTIUS: Nothing further.

9 THE COURT: Sir, if you'll just leave those
10 exhibits there, you're excused or free to go.

11 What I'll do, gentleman, is I'll direct the
12 Complainant to furnish you all with copies of these
13 exhibits. After you get those and have had a chance to
14 study them, if you wish to re-call this witness for
15 further cross-examination, I'll permit it.

16 MR. BETTIUS: With all due respect, Your
17 Honor, they're exhibits in the case, all the deeds to
18 this property.

19 THE COURT: I understand that, Mr. Bettius.

20 MR. BETTIUS: They've long been exhibits to
21 this case. We'll identify them by exhibit number.
22 They've been in here for seven years.

J.APP. 2652

23 MR. HIRSCHKOP: I don't ask for the record to

1 be complete or clear, but can they submit as part of
2 the record a listing of what deeds are in the package?

3 MR. BETTIUS: Sure.

4 THE COURT: You're going to summarize them?

5 MR. BETTIUS: We'll summarize them, because
6 they've already been in the case for a number of years.

7 THE COURT: I understand that, Mr. Bettius.
8 So have about 8 billion others.

9 Anything else, Mr. Bettius? Any other
10 evidence?

11 MR. BETTIUS: Yes. I'd like to call Mr.
12 Hanes, Grayson Hanes.

13 This witness may be excused, Your Honor?

14 THE COURT: Yes, indeed.

15 THE BAILIFF: He's stepped down the hall.

16 THE COURT: Do you have someone else, Mr.
17 Bettius?

18 MR. BETTIUS: Call Tom Reed, Your Honor.

19 THE COURT: Which one do you want first, Mr.
20 Bettius? I just saw Mr. Hanes come back.

21 MR. BETTIUS: We'll call Mr. Hanes, Your
22 Honor.

J.APP.2653

23 THE COURT: Sir, if you'll come forward to

1 the witness stand up here, please.

2 MR. BETTIUS: Your Honor, this is evidence
3 with respect to the attorney's fees in the case.

4 THE COURT: I understand.

5 MR. BETTIUS: We're going to present two
6 scenarios, Your Honor. One is the contingency and the
7 other is the actual hours expended in the case.

8 THE COURT: Swear the witness.

9 Whereupon,

10 GRAYSON HANES

11 was called as a witness and, after having been first
12 duly sworn by the Clerk of the Court, was examined and
13 testified as follows:

14 DIRECT EXAMINATION

15 BY MR. BETTIUS:

16 Q Will you state your name, Mr. Hanes?

17 A Grayson Hanes.

18 Q What is your profession or occupation, sir?

19 A I'm an attorney.

20 Q How long have you practiced that profession?

21 A A little bit over 37 years.

22 Q Has there been a principal geographic focus
23 to your practice, sir?

J.APP.2654

1 A Primarily Northern Virginia.

2 Q Are you acquainted with fees customarily
3 charged by lawyers in this area with reference to
4 experience such as that of counsel in this case?

5 A Yes, sir, both here and in the Richmond area.

6 MR. BETTIUS: All right, sir.

7 I'm going to offer Mr. Hanes.

8 THE COURT: Counsel wish to inquire as to the
9 qualifications of the expert?

10 MR. O'DONNELL: I'll stipulate, Your Honor.

11 MR. BONO: Stipulate, Your Honor

12 BY MR. BETTIUS:

13 Q Mr. Hanes, have you been given a copy of the
14 billings that were presented by Counsel in this case?

15 A Yes, sir.

16 Q And they encompass what particular groups of
17 attorneys, Mr. Hanes?

18 A Actually, three groups of attorneys, one
19 being your firm, Lawson and Frank, the second being
20 McCandlish and Lillard, the third being time records
21 for the Attorney General's office.

JAPP.2655

22 Q All right, sir. And have you examined the
23 pleadings and the proceedings that took place in this

1 matter?

2 A I have reviewed pleadings and reviewed orders
3 by this Court.

4 Q All right, sir. And in terms of the fees,
5 did you find all of the fees to be appropriately
6 charged or were there some that you raised a question
7 to, sir?

8 A I had problems with some of them.

9 Q Would you tell the Court, first of all, the
10 amounts for the respective parties that you found to be
11 reasonable?

12 A I'll have to refer to the various time
13 records. I believe they're -- although they're Bates
14 stamped, I don't know whether they're in evidence or
15 not.

16 Q Yes, sir.

17 A Based on hours and reasonableness of the
18 fees, for the Attorney General's Office, their time
19 records show a total of \$387,638.75. I reduced those
20 to \$379,676.25. McCandlish and Lillard's total fees
21 were \$830,780.50 and I reduced those to \$821,326.50.
22 Lawson and Frank, the total of the time and fees,
23 \$1,209,570, that was reduced to \$1,198,170. JAPP.2656

1 Q All right, sir. Now -- excuse me.

2 A Grand total -- do you want those?

3 Q Yes, sir.

4 A The original fees shown on the time billing
5 records for all of these were \$2,427,989.25. With the
6 reductions, \$2,399,172.75.

7 Q Would you describe to the Court the
8 particular time that you found not properly charged to
9 the case?

10 A Yes, sir. With respect to the Attorney
11 General's Office, they had a billing person named
12 William G. Sigfried. He was an investigator and a
13 paralegal. His total time was \$7,962.50. After
14 reviewing with the Attorney General's Office and
15 reviewing the work that he did, I deleted all of his
16 time.

17 With McCandlish and Lillard, it was indicated
18 -- there was a total reduction of \$9,454. I can run
19 through each attorney and the pages of the bills, if
20 you'd like.

21 Q Would you do that, sir?

22 A Sure. William M. Arnold, on pages 2 and 36
23 of their bills, \$495. That was for review of JAPP.2657

1 pleadings, preparation of subpoenas. I talked to some
2 of the people at that firm. In reviewing the bill in
3 toto, I thought that should be stricken. Mr. Loftus,
4 pages 6, 9, 11 and 41, for conferences with you,
5 reviewing tax returns, talking about strategy, I wrote
6 his time off. It was a \$1 million -- excuse me --
7 \$1,165.50. Jack Rust, entries on pages 12 and 29. I
8 wrote all of that time off, \$517 for reviewing a
9 memorandum, preparation of a file template. I didn't
10 know what a file template was.

11 Pat Pickett, pages 3, 6, 8, 9, 10, 13, 16,
12 38, a total of \$5,439 for research, Shepardizing,
13 reviewing and revising memoranda and conferences. I
14 struck that. Randy Sutliff, I marked off \$270 on pages
15 11, 14, and 15, conferences with you. Daniel Lyon,
16 pages 32, 34, \$780. Then there was a charge by Hayden
17 Fox for appearing the first day of the accounting
18 trial, I think it was February 1st. I wrote all of
19 that time off, \$787.50.

20 On Lawson and Frank, I cut your time on June
21 5 through June 24 for the preparation of the various
22 briefs, about \$6,000. I cut Tina Charvet's time for
23 editing on December 11, \$3,600. I cut Deb O'Connell's

JAPP.2658

1 time and Tina Charvet's time for appearing at the
2 bankruptcy hearing on June 21, \$1,800.

3 I then reviewed the various elements for
4 reasonableness of fees and the Code of Professional
5 Responsibility, section 1.5. There were eight items.
6 I went through all of those. I also did some research
7 on the law regarding reasonableness of fees. The
8 leading case would be Carlyle, decided in 1986. It was
9 both contingency fees and reasonableness of attorney's
10 fees held by the Virginia Supreme Court. I applied
11 those particular criteria to these fees and I feel that
12 a number like that is reasonable.

13 Q I'm going to show you, sir, a copy of the
14 contingency agreement dated August 23, 1995, and
15 another addendum to that dated November 18, 1997, and
16 ask you if examined that agreement?

17 A I was provided with --

18 Q Mr. Hanes, Counsel hasn't had an opportunity
19 to look at it.

20 A Sure.

21 MR. BETTIUS: Your Honor, we have a copy for
22 the Court. May I approach?

23 THE COURT: All right.

J.APP.2659

1 MR. BETTIUS: I proffer to the Court, Your
2 Honor, an agreement has been reached between McCandlish
3 and Lillard and Lawson and Frank and myself with
4 respect to the division of the contingency fee.

5 THE COURT: All right.

6 BY MR. BETTIUS:

7 Q Mr. Hanes, have you reviewed that contingency
8 fee agreement?

9 A I have.

10 Q In your review of the time, nature and
11 complexity of the case, and the recovery, do you find
12 that fee to be reasonable and appropriate?

13 A I do, in addition to the risk being taken by
14 the attorneys. I do.

15 Q What factors did you consider, sir?

16 A Again, I looked at section 1.5 of the Code --
17 Virginia Code of Professional Responsibility. I also
18 looked at the risk involved in the case as to whether
19 or not any fees would ever be paid. I looked at the
20 issue regarding the fact that this contingency fee must
21 be approved by the Court, and if not approved by the
22 Court, as I read it, you get absolutely nothing.

23 With those risks and with the sophistication
JAPP.2660

1 of the issues, the possibility of not recovering
2 anything, the length of time, the effect upon the
3 attorneys for not being able to take other cases during
4 this period of time they're carrying this case, I felt
5 that this was a reasonable fee.

6 Q Mr. Hanes, were you aware of how this claim
7 came to the attention of the Attorney General's Office?

8 A I am.

9 Q Would you tell the Court about that, sir?

10 A My recollection, it arose out of a case
11 dealing with Inova and Dr. Tauber and litigation over
12 the prospective sale or leaseback of the particular
13 hospital.

14 Q Do you recall who --

15 MR. HIRSCHKOP: Your Honor, if it will save
16 time, on behalf of Dr. Tauber we take no position on
17 this issue. It doesn't require an objection by us.
18 Whatever the Commonwealth wants to hear from Mr.
19 Bettius' compatriots is fine with us.

20 THE COURT: The question is the source of the
21 payment, whether Respondents have to pay additional
22 attorney's fees or whether the contingency contract, if
23 approved by the Court, comes out of the fund. That's
JAPP.2661

1 what I thought the issue was.

2 MR. BETTIUS: That's where I'm going with it,
3 Your Honor. The Court's going to make a decision about
4 that.

5 THE COURT: All right.

6 BY MR. BETTIUS:

7 Q Did you consider any of the factors known as
8 loadstar factors, Mr. Hanes, in federal cases?

9 A I looked at that briefly. I didn't pay a lot
10 of attention to that.

11 MR. BETTIUS: No further questions, Your
12 Honor.

13 THE COURT: Any questions, gentlemen?

14 MR. BONO: Briefly, Your Honor.

15 MR. BETTIUS: I'm sorry.

16 BY MR. BETTIUS:

17 Q You note -- I asked you also to review costs
18 and expenses in connection with this case, Mr. Hanes.

19 A I did.

20 Q Can you tell us what documents you looked at
21 in that connection?

22 MR. BONO: Objection, Your Honor. Your Honor
23 did not award costs.

JAPP.2662

1 MR. BETTIUS: Your Honor, in previous orders
2 the Court went way beyond that and said of course we'd
3 be entitled to costs.

4 THE COURT: I'll hear the evidence and then
5 make the decision. I'll note your objection.

6 THE WITNESS: I was provided with a document
7 entitled Expenses for Commonwealth v. Tauber, Office of
8 the Attorney General, listing numerous costs that
9 included expert fees, court costs, deposition costs,
10 Court Reporters, copying costs. I was also provided
11 the entire file of backup of all of these costs. I
12 went through all of these. I reviewed the experts'
13 curriculum vitae. I reviewed what they did to the
14 cases -- in the case, and various aspects of it, their
15 depositions and time, and as a result of that, I felt
16 that these fees were reasonable fees.

17 BY MR. BETTIUS:

18 Q Did you understand, Mr. Hanes --

19 A Costs, I should say, rather than fees.

20 Q Did you understand, Mr. Hanes, that the
21 accounting which was done by the Commonwealth
22 encompassed a period of more than 30 years?

23 A Yes, sir.

J.APP. 2663

1 Q And are you also aware that the only
2 accounting ever furnished in this case was undertaken
3 and furnished by the Commonwealth?

4 A I understood that one was presented and
5 refused.

6 Q All right, sir. And the total amount of
7 those costs and expenses was what, sir?

8 A Six hundred and forty-six thousand eight
9 thirty-two twenty-four.

10 Q In terms of the complexity and the nature of
11 this case, do you find those charges to be reasonable?

12 A I do.

13 MR. BETTIUS: Thank you, sir.

14 THE COURT: Any questions?

15 MR. BETTIUS: One second, Your Honor.

16 THE COURT: You forgot something else?

17 MR. BETTIUS: Your Honor, these are the
18 exhibits, and I think we'd better -- that support that,
19 and I'm going to offer those for the Court's
20 consideration.

21 THE COURT: Hang onto them for a moment.

22 MR. BETTIUS: Yes, sir.

23 THE COURT: Any questions?

J.APP.2664

1 Mr. BONO: Yes, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. BONO:

4 Q Mr. Hanes, when did you begin reviewing the
5 records in this matter?

6 A I was contacted by Mr. Bettius approximately
7 a month ago. Most of the work was performed in the
8 last week to ten days.

9 Q How much time did you spend in the last week
10 to ten days?

11 A I was billing at a rate of \$275 per hour,
12 with a cap of \$6,600, and I far exceeded that. I can't
13 tell you the exact amount of time.

14 Q You don't know how much time you spent?

15 A Two hundred seventy-five times --

16 Q My question was simply how much time. I
17 don't want to know about your rate.

18 A I can't give you an exact number right now.

19 Q But you only did that in the last week to
20 week and a half, is that right, sir?

21 A Yes, sir.

J.APP. 2665

22 Q Now, you mentioned Mr. Fox, that you deleted
23 that. Was that in response to the memorandum that

1 Respondents filed pointing that out, that Mr. Fox sat
2 in this courtroom and the Commonwealth decided to seek
3 his fees?

4 A I saw that and the response and I thought
5 that was correct.

6 Q And it was only after you saw the response
7 that you decided to do that; is that right?

8 A No. I also --

9 Q Had you made that determination --

10 THE COURT: Let him finish answering.

11 MR. BONO: I'm sorry.

12 THE WITNESS: I saw that and I was provided
13 that by Mr. Bettius' office. I also spoke to his
14 associate about that and they both agreed to that.

15 BY MR. BONO:

16 Q Did you do that after you received the
17 response?

18 A Yes.

19 Q Now, with respect to the hours submitted from
20 the Attorney General's Office itself, these were the
21 hours of salaried employees of the Commonwealth of
22 Virginia; is that not correct?

23 A That's correct.

J.APP. 2666

1 Q Did you ascertain what the annual salaries
2 were of these individuals?

3 A I did. I also investigated these particular
4 attorneys with respect to their competence and hours.
5 I have an office in Richmond. I reviewed them with
6 people who have left the Attorney General's Office and
7 I also reviewed with the Attorney General --

8 Q I'm sorry. Please just answer my questions.

9 MR. BETTIUS: He's just being responsive.

10 THE COURT: The question was their annual
11 salaries. That was the question.

12 THE WITNESS: Yes.

13 BY MR. BONO:

14 Q And you did ascertain their annual salaries?

15 A I did.

16 Q And what was the annual salary of Mr. Nolby?

17 A I do not recall what -- any of those annual
18 salaries sitting here today.

19 Q Now, do you know -- did you ascertain how
20 many hours each of these individuals, in effect, record
21 on an annual basis, on average?

22 A No.

JAPP.2667

23 Q So you don't know, for example, with respect

1 to Mr. Nolby, he has 348.25 hours, you don't know what
2 percentage of his time on an annual basis that
3 represents, do you?

4 A I do not.

5 Q Now, the annual -- strike that. I'm sorry,
6 Your Honor.

7 The hourly rate that was listed here, is that
8 the hourly rate that these individuals charged the
9 Commonwealth for their time?

10 A No.

11 Q Do you know where that hourly rate came from?

12 A My understanding is that they create an
13 hourly rate for all the assistant attorneys general so
14 that they can charge to appropriate cases.

15 Q Who is the they, sir? Did you ascertain who
16 the they is that created these hourly rates?

17 A The Attorney General.

18 Q Do you know -- the Attorney General himself,
19 Mr. Early?

20 A Well, that office changes from time to time,
21 due to politics, and I think the people who are there
22 over a period of time have created it. It changes.

23 Q So you don't know who, then, created these

J.APP.2668

1 hourly rates, do you?

2 A The Attorney General's office. I can't give
3 you the specifics.

4 Q Did you ever seek to ascertain who selected
5 those hourly rates?

6 A No.

7 Q And did you ever ascertain what factors went
8 into making that -- creating that hourly rate for this
9 case?

10 A I checked those hourly rates with people of
11 the same competence throughout Richmond. I checked
12 with three of those firms. Based on their experience,
13 based upon their graduation from law school, based upon
14 their competence.

15 Q Mr. Hanes, my question was did you ascertain
16 the factors that were, in fact, used to create these
17 hourly rates by the Attorney General's office?

18 A No.

19 Q Do you know whether the Attorney General's
20 office incurred for these individuals any additional
21 expenses during the cost -- cause -- during the course
22 of this case, other than the salaries of these
23 individuals?

JAPP.2669

1 A My understanding is they wrote off 324 hours
2 of attorneys' time. But other costs, I do not know of
3 any.

4 Q You don't know of any. And do you know that
5 -- whether, regardless of this case, that the salaries
6 of these individuals would have been paid in any event
7 by the Commonwealth?

8 A I would assume that they would have been;
9 they're salaried.

10 Q Now, when you reviewed the costs in this
11 case, other than looking at the summary of the costs,
12 did you look at the underlying backup documents?

13 A Yes, sir. I looked at every entry.

14 Q Did you do anything else, other than look at
15 this summary or the backup documents?

16 A I reviewed some of these people's testimony,
17 reviewed it with Mr. Bettius' office. I also looked at
18 some documents, who they were, what they did, how they
19 qualified, what they testified to.

20 Q Who are you --

21 A As far as the other backup, included in that,
22 of course, are costs for Court Reporters, transcripts,
23 things of that type. I looked into every piece of

J.APP.2670

1 paper.

2 Q Did you -- with respect to the expert
3 services that were included in these costs, did you
4 determine which part of these expert costs related to
5 which experts in particular?

6 A Yes.

7 Q And did you exclude out -- any of these
8 expert costs?

9 A No.

10 Q Now, were you aware of an expert by the name
11 of Mr. Kettler?

12 A Yes, sir, one that was stricken and not
13 allowed to qualify.

14 Q Right. Did you ascertain whether his costs
15 were in this summary?

16 A They were.

17 Q And you did not exclude that, did you?

18 A I did not.

19 Q Did not?

20 A Did not.

21 Q Okay. Now, Mr. Riley, his costs and expert
22 fees are included in this; is that correct?

23 A That's correct.

J.APP.2671

1 Q And Mr. Riley -- his testimony was rejected
2 by this Court.

3 MR. BETTIUS: That's not true, Your Honor and
4 I object to that. His testimony wasn't rejected at
5 all.

6 THE COURT: Mr. Bono?

7 MR. BONO: I'll rephrase, Your Honor.

8 BY MR. BONO:

9 Q Are you aware, Mr. Hanes, that this Court
10 found that the Respondents' experts were more
11 persuasive in the liability trial, and that they had
12 met their burden in that first trial?

13 MR. BETTIUS: Your Honor, there was no such
14 finding. The finding was with respect to a very
15 specific aspect of assets and liabilities. It's Your
16 Honor's decision.

17 THE COURT: I have no independent
18 recollection of it. I'm sorry I can't help you.

19 Can you rephrase the question again?

20 MR. BONO: I guess, Your Honor, we all assume
21 Your Honor would know as much about this case as we do.
22 I apologize.

23 THE COURT: All right.

J.APP.2672

1 BY MR. BONO:

2 Q Well, Mr. Hanes, were you aware that Judge
3 Swersky wrote in his opinion the following --

4 A Which opinion is that?

5 MR. BETTIUS: February 7?

6 MR. BONO: February 7, 1997 opinion.

7 THE WITNESS: Okay. I did see that.

8 BY MR. BONO:

9 Q All right. And in that opinion the Court
10 wrote, quote, Respondents' experts are the more
11 persuasive and the Court finds that Respondents have
12 carried their burden of showing that the value of the
13 corporation did not exceed its liabilities, unquote.

14 MR. BETTIUS: No objection to that question.

15 THE WITNESS: I am aware of that. I have
16 reviewed the opinion.

17 BY MR. BONO:

18 Q And were you -- you were aware that Mr. Riley
19 was the Commonwealth's expert in that first trial?

20 A I am.

21 Q And so his opinion was not accepted by this
22 Court; isn't that right?

J.APP. 2673

23 MR. BETTIUS: I object to that conclusion,

1 Your Honor. He expressed many opinions. That was on
2 the issue of the balance sheet.

3 THE COURT: He can testify as to what his
4 understanding was and what he concluded.

5 THE WITNESS: My understanding was the Court
6 chose the other parties' expert opinion.

7 BY MR. BONO:

8 Q Now, did you exclude out Mr. Riley's fees
9 from this cost summary?

10 A I did not. Those fees were not on a
11 contingent basis.

12 Q You didn't exclude them, right?

13 A I did not.

14 Q Now, did you exclude any of the fees that
15 were expert fees that were submitted here by Mr. Wilson
16 or Ms. Moore?

17 A I did not.

18 Q Were you aware that this Court did not accept
19 their testimony either?

20 MR. BETTIUS: That's just --

21 THE COURT: Ask him what his understanding
22 is.

23 MR. BONO: All right.

J.APP.2674

1 BY MR. BONO:

2 Q What was your understanding as to what the
3 Court ruled with respect to their testimony, Mr. Wilson
4 and Ms. Moore?

5 A My understanding is, again, the Court chose
6 the other opinions over theirs.

7 Q And you did not exclude their fees, correct?

8 A I did not.

9 Q Now, in the attorney's fees that you
10 reviewed, what was your understanding of the date upon
11 which the responsibility for this case transferred from
12 McCandlish and Lillard to Lawson and Frank?

13 A Well, that occurred really prior to the
14 retention letter that you have there. My recollection,
15 it transferred in the early part of -- I think it was
16 '97 or '98. Let me look at my dates here. Early part
17 of '97.

18 Q Did you exclude from your assessment of
19 attorney's fees the attorney's fees which have been
20 requested by McCandlish and Lillard subsequent to the
21 time that they were no longer retained in this lawsuit
22 by the Commonwealth?

J.APP.2675

23 A No, I don't think that they've ever been

1 relieved of being retained in this case.

2 Q But, nevertheless, you didn't exclude any of
3 that time after Lawson and Frank took over the
4 principal responsibility for this case, did you?

5 A I did not.

6 Q Now, in your assessment of attorney's fees,
7 did you exclude the time of the separate law firm Gold,
8 Morrison, who are the bankruptcy counsel for the
9 Commonwealth?

10 A No.

11 Q So all of their time is included in this as
12 well?

13 A Yes, sir.

14 Q Now, in your review of these fees, did you
15 make any analysis of how many attorneys representing
16 the Commonwealth attended, say, hearings or
17 depositions?

18 A Yes.

19 Q And did you happen to notice that on several
20 occasions three or more attorneys representing the
21 Commonwealth would attend depositions repeatedly?

22 A I did. I don't know if it was repeatedly,
23 but I went through these bills, and my first reaction

JAPP.2676

1 was why were there three attorneys attending
2 depositions. I then inquired of the attorneys what
3 they were doing, the sophistication of the issues in
4 the depositions, the documents, as you know and I guess
5 everybody in this courtroom knows, involved with this
6 case, a heavily documented case. I felt after
7 reviewing it with the attorneys involved and the fact
8 that there were just usually that many attorneys on the
9 other side, I felt it was reasonable to have three
10 attorneys.

11 Q Who told you that there were that many
12 attorneys on the other side? Was that Mr. Bettius?

13 A Mr. Bettius, yes, sir.

14 Q Did you ever verify that statement with
15 anyone?

16 A When Mr. Bettius tells me something, that's
17 usually the truth, sir.

18 Q All right. And -- but you didn't go any
19 further than that?

20 A I did not.

21 Q Now, did you -- and who told you that it was
22 necessary to have three lawyers at a deposition? Was
23 that Mr. Bettius also?

J.APP.2677

1 A Mr. Bettius, his associate. I inquired about
2 what the issues were and the documents.

3 Q Were you aware that through the -- 90 percent
4 of those depositions that these other attorneys simply
5 sat in the room and listened --

6 MR. BETTIUS: I'm going to object to that,
7 Your Honor.

8 THE COURT: Objection sustained.

9 MR. BONO: No further questions, Your Honor.

10 THE COURT: Mr. Hirschkop?

11 MR. BETTIUS: Were you aware --

12 THE COURT: Just a minute, Mr. Bettius.

13 MR. BETTIUS: I'm sorry.

14 THE WITNESS: Good morning.

15 CROSS-EXAMINATION

16 BY MR. HIRSCHKOP:

17 Q Good morning, Mr. Hanes. How are you, sir?

18 A I'm fine. How are you?

19 Q Fine. Thank you. Mr. Hanes, what firm are
20 you a member of?

21 A It's called Reed, Smith. J.APP.2678

22 Q Reed, Smith. And Reed, Smith -- the firm you
23 previously were with was Hazel and Thomas; is that

1 correct?

2 A Yes, sir.

3 Q And was Inova a major client of Hazel and
4 Thomas?

5 A It was a client.

6 Q It paid hundreds of thousands of dollars, at
7 least, in fees?

8 MR. BETTIUS: Your Honor, what's the
9 relevance of this?

10 THE COURT: What's the purpose of it?

11 MR. HIRSCHKOP: It certainly goes to bias,
12 Your Honor. I know where this case started, with
13 Inova. That's in the record here. It seems like two
14 counts for Inova before the Court right now.

15 MR. McALEER: Your Honor, Charles McAleer for
16 Inova. I register an objection to the extent that this
17 inquiry goes any further to substantive matters that
18 might be issues protected by the attorney-client
19 privilege.

20 THE COURT: Mr. Hirschkop, aren't we getting
21 a little bit far afield? I'll tell you what, on the
22 cost issue there is a very recent Virginia
23 Supreme Court case that covers it. It's Vance Marine

J.APP.2679

1 versus PRC, in which they define what costs are
2 awardable, even in civil conspiracies. So I'm not sure
3 you're getting very far on the cost thing. Isn't this
4 a little bit far afield?

5 MR. HIRSCHKOP: Well, I was actually only
6 going to examine on the costs, so maybe I'm just
7 wasting the Court's time.

8 THE COURT: If you all want to look at that
9 case, I mean, that's the one that says costs of filing
10 and serving and that's about it.

11 MR. BETTIUS: Your Honor, we asked the Court
12 to look at 2623.

13 THE COURT: I understand.

14 MR. BETTIUS: -- which is an entirely
15 different matter when a fiduciary fails to account.

16 MR. HIRSCHKOP: Your Honor, just --

17 THE COURT: Go ahead, Mr. Hirschkop. If you
18 want to inquire about that, I suppose if you think it
19 somehow goes to the bias or prejudice, that's a
20 wide-open area. I've got to give you some latitude. I
21 don't know that Mr. Hanes is -- well, I won't say
22 anything. Go ahead.

JAPP.2680

23 BY MR. HIRSCHKOP:

1 Q And your firm has represented Inova in
2 several major areas; isn't that correct, in malpractice
3 cases?

4 A Correct.

5 Q In health care cases involving disciplinary
6 actions against doctors and the various hospitals?

7 A That's my understanding.

8 Q And in other services for the hospitals;
9 isn't that correct?

10 A I think so.

11 Q With regard to the costs, I notice
12 Willamette Management has several entries. There's a
13 \$12,000 entry on October 31, '96, and \$26,000 -- this
14 is rounded off, Your Honor -- on November 15, '96, and
15 \$16,000 November 30th and \$9,000 on 12/15 and then
16 there's \$15,000 and \$20,000 and \$2,000 in '97, just on
17 this one page.

18 How many personnel were involved in that
19 billing, do you know?

20 A I do not.

21 Q Do you know which personnel were involved in
22 that billing?

J.APP.2681

23 A Well, I have all of the backups for all those

1 bills, and I can't tell you the exact number, but I can
2 go through, and I did go through, their computer
3 readout that went with each of their bills. Sometimes
4 there were five to ten hours of computer work.

5 Q You didn't look at the substantive work,
6 though, did you?

7 A I did not see the substantive work.

8 Q Would that be true, also, other than looking
9 at some testimony for Arthur Andersen, which has bills
10 for \$92,000, \$175,000 and \$6,000 that I spot? Looking
11 very quickly, there are a couple of others. What were
12 the total number of people for Arthur Andersen that
13 worked on the matter?

14 A The number of people, I can't -- it's all in
15 the back-up that I reviewed. I can't tell you sitting
16 here whether there were five or ten or six or seven,
17 but it was in that range.

18 Q Did you review the qualifications of each
19 person that was billed in those bills?

20 A I reviewed the qualifications of those people
21 who gave depositions and testified.

22 Q But there were many others who did back-up
23 work; isn't that correct?

J.APP.2682

1. A Sure.

2 Q And did you review their qualifications?

3 A No.

4 Q Did you review the breakdown of their hours
5 versus the other hours?

6 A Yes.

7 Q Did you consult any expert accountants as to
8 the reasonableness of those bills?

9 A No.

10 MR. HIRSCHKOP: Nothing further, Your Honor.

11 As I say, Your Honor, I cannot question the
12 legal bills. I only received them Wednesday while I
13 was in another trial this past week. Thank you.

14 THE COURT: Mr. O'Donnell, do you have any
15 questions?

16 MR. O'DONNELL: Nothing, Your Honor.

17 THE COURT: Anything further, Mr. Bettius?

18 REDIRECT EXAMINATION

19 BY MR. BETTIUS:

20 Q While you were examining these bills, did the
21 thought that you had ever represented Inova -- that
22 your firm had represented Inova ever cross your mind,
23 Mr. Hanes?

J.APP.2683

1 A It did initially as to whether or not I would
2 have any conflict in this case. I looked at it for
3 that purpose. Other than that, no.

4 Q How did you resolve that issue?

5 A I felt we had no conflict at all. I was
6 testifying as to the reasonableness of fees and costs.

7 Q I'm going to show you a document, which is
8 the bill from Arthur Andersen, and ask you if you were
9 cognizant of the fact that Arthur Andersen wrote Mr.
10 Kettler's time off? I'll show you the document as soon
11 as they've examined it.

12 MR. BONO: Your Honor, I'm going to object to
13 this question. There's no foundation.

14 THE COURT: He asked him if he knew.

15 THE WITNESS: Yes, I've seen that.

16 MR. BONO: Your Honor, there is a handwritten
17 note on that document that was just shown to me that
18 says Kettler write-off. We don't know who put the note
19 on there. We don't know whether it's all of his time
20 or part of this time.

21 MR. BETTIUS: I withdraw it, Your Honor.

22 THE COURT: All right. It's withdrawn.

23 Anything else, Mr. Bettius?

J.APP.2684

1 MR. BETTIUS: Nothing.

2 THE COURT: Thank you, Mr. Hanes. You're
3 excused and free to go.

4 MR. BETTIUS: Call Mr. Reed.

5 MR. HIRSCHKOP: Your Honor, while Mr. Reed's
6 coming in, I understand from Marc that Mr. Reed's here
7 for the current value of the properties.

8 MR. BETTIUS: That's correct.

9 MR. HIRSCHKOP: I would object to that in
10 terms of I think that's just outside of what your
11 letter opinion was. There's nothing about the current
12 values of the property. You said the title set off --

13 THE COURT: I've got to tell you, you all --
14 everybody in this -- almost everybody in this room has
15 invited me to reexamine the real estate issues in this
16 case, Mr. Hirschkop. One of the things I'm very
17 interested in, because I'm going to do that, is the
18 current value of that property. So let's just say it's
19 for my own information.

20 MR. BETTIUS: Also the reasonableness of the
21 contingency, Your Honor.

22 MR. HIRSCHKOP: Well, I don't -- whatever the
23 Commonwealth wants to tell you, that's between them and
JAPP.2685

1 Your Honor. But if Your Honor wants to hear it --

2 THE COURT: Everybody in here, just about,
3 has asked me to revisit that real estate issue.

4 MR. BETTIUS: Your Honor, they have a
5 value --

6 THE COURT: I'll tell you right now, I plan
7 on doing that.

8 MR. BETTIUS: They have a value of \$12.8
9 million. That's what they said. If they went to
10 stipulate to that, I'll do it.

11 MR. BONO: On which buildings, Your Honor?

12 MR. BETTIUS: All of them.

13 MR. BONO: I don't if that value --

14 MR. BETTIUS: Well, fine. We'll put Mr. Reed
15 on.

16 THE COURT: We'll put Mr. Reed on. As I say,
17 I want to give you all a chance. I mean, I'm trying to
18 give everybody -- Mr. Reed, if you'll come forward to
19 the witness stand over here, please.

20 I'll give everybody a chance to respond
21 further.

22 Come on up, sir.

23 Whereupon,

J.APP.2686

1 THOMAS A. REED

2 was called as a witness and, after having been first
3 duly sworn by the Clerk of the Court, was examined and
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MR. BETTIUS:

7 Q State your name, Mr. Reed.

8 A Thomas A. Reed.

9 Q Do you have a profession or occupation that
10 you practice in the Commonwealth?

11 A Yes, sir. I'm a licensed appraiser and
12 realtor.

13 Q In terms of your appraisal expertise, how
14 long have you been appraiser?

15 A I've had my own business since 1964.
16 However, I worked eight or ten years prior to that.

17 MR. BETTIUS: The Court's well-acquainted
18 with Mr. Reed. Do you have any objection to him as an
19 expert?

20 MR. BONO: No objection.

21 MR. O'DONNELL: I'll stipulate as to the
22 expert qualifications. I've known Mr. Reed a long
23 time. My concern is that I don't think there's a

J.APP.2687

1 report. I think there may be some objection to
2 testimony based upon that.

3 THE COURT: All right. He's qualified.

4 BY MR. BETTIUS

5 Q Now, Mr. Reed, when did you initially begin
6 to look at this property for purposes of furnishing a
7 value, a value appraisal?

8 A It would have been late last year. I would
9 say last fall.

10 Q In that connection, are you aware of a
11 gentleman -- are you aware of an appraiser named Scott
12 Humphrey?

13 A Yes, sir.

14 Q Was he also conducting an investigation of
15 the value of this property at that time?

16 A I don't know if I was fully aware that he was
17 conducting an investigation at the time that I started,
18 but as the case moved along and different events
19 transpired, we did come together to work on this case.

20 Q Now, who did you understand he was doing a
21 valuation for?

22 A Pardon?

23 Q Who did you understand that --

J.APP.2688

1 MR. O'DONNELL: I'm going to object, Your
2 Honor, as to the relevance. This doesn't go to -- he's
3 capable of testifying to hearsay as long as it supports
4 his valuation opinion. Hearsay for the purpose of
5 introducing factual testimony to this Court is not
6 appropriate through this witness.

7 THE COURT: What's the purpose of it?

8 MR. BETTIUS: I frankly want to show that
9 both parties, that is the Respondents in this case,
10 invited the two appraisers to come to a common value,
11 and that's exactly what they did. It's not hearsay. I
12 think Mr. O'Donnell knows very well that one expert can
13 comment that he's reviewed the work of another expert.

14 But what happened was there was a stipulation
15 entered into by and between the Respondents in this
16 case that both of these appraisers would work together
17 and see if they could come to a stipulated value. I'm
18 going to come to the ultimate question, did you all
19 agree, and I think the answer's going to be yes, and I
20 think that's relevant.

21 MR. HIRSCHKOP: Your Honor, I don't agree to
22 the stipulation on behalf of my client. I know nothing
23 about it. I was at the trial. I didn't hear any

JAPP.2689

1 stipulation entered at trial. Perhaps I missed it, but
2 I don't know of any.

3 THE COURT: I don't think he's talking about
4 a trial stipulation. There was an outside agreement.

5 MR. BETTIUS: Dr. Tauber's had various
6 lawyers at various times.

7 MR. HIRSCHKOP: I know Dr. Tauber takes the
8 position that Mr. Humphrey was not retained by him or
9 on his behalf.

10 THE COURT: I'll hear Mr. Reed's opinion as
11 to what his value is, Mr. Bettius.

12 BY MR. BETTIUS:

13 Q Will you tell us, sir, what property you've
14 been asked to appraise in this matter?

15 A Originally the Jefferson Hospital complex,
16 which I refer to as the old original hospital and a
17 nursing wing in back of the hospital, and then an annex
18 building or office building, as it may be referenced,
19 along with about 150,000 square feet of land those
20 buildings are located on.

21 It later became an issue over what is
22 referenced as the Beauregard Building, plus some
23 additional land associated with the Beauregard

J.APP.2690

1 Building.

2 Q All right, sir. Will you tell us the nature
3 of the ownership interest? What's the size of the
4 total tract, Mr. Reed, do you know?

5 A Pardon?

6 Q What is the size of the total tract?

7 A Well, in the original hospital, the annex
8 building and the nursing wing, it was approximately
9 150,000 square feet. Now, in --

10 MR. BETTIUS: Your Honor, for purposes of
11 helping everybody, that previous exhibit prepared by
12 the appraiser -- I mean, by the title expert may be of
13 some assistance.

14 BY MR. BETTIUS:

15 Q Do you have a copy of this?

16 A Yes.

17 Q Graphically does it represent the various
18 parcels, sir? I'm referring to Exhibit 1. Does it
19 represent the various parcels and the buildings located
20 on them?

21 A Well, the colored-in document is a little
22 confusing, because it shows parcels and leases. The
23 Beauregard Building, however, is this western end of

J.APP.2691

1 the property, just off of Route 7 on Beauregard Street,
2 and everything else would go to three buildings, the
3 nursing wing, the hospital and the annex building.

4 Q Is that building referred to as condo on this
5 document, a three-story brick building and parking
6 structure? Is that the one you're referring to?

7 A That article, document that you have, does
8 show the condo, but the City of Alexandria taxes the
9 condo as three condos, and associates with that 9,296
10 square feet of land. In addition to that, there's
11 42,174 square feet of land, and that is taxed with two
12 levels of parking deck. So that whole corner overlaps
13 itself and, quite honestly, I don't see how it can be
14 separated physically without doing something with the
15 condo building.

16 Q All right, sir. Now, in terms of the other
17 parcels and buildings, the parcel identified in yellow,
18 is that owned in fee or is that a lease, Mr. Reed?

19 A Well, I appraised everything like it was free
20 and clear. There are various overlapping leases there.

21 Q Tell us what your conclusions are, Mr. Reed.

22 A Well, to begin with, when you engaged me to
23 do that I contacted the resident engineer there at the
JAPP. 2692

1 hospital and went there at a point in time and he
2 showed me through most of the entire complex. I then
3 went back again after that, when I had some questions
4 on different parts of the building.

5 I took that and assembled what data was
6 available to me that I could get together and came up
7 with some preliminary values. At that point in time
8 -- I think the sequence of events is correct -- we did
9 meet in your office prior to a deposition that was set,
10 and you were there, the assistant attorney general was
11 there, and some other people. It was suggested at that
12 time that we contact Mr. Humphrey, who I had learned
13 was the appraiser for Dr. Tauber and that we would get
14 together and do whatever was necessary to come up with
15 a combined value of the total property, which would
16 include the hospital, the annex and the nursing wing
17 and exclude the Beauregard Building.

18 I forget whether I contacted him or he
19 contacted me, quite honestly. I would think that I
20 probably contacted him. We moved ahead with that and
21 met on various occasions. We went over what we had,
22 which included various documents, tax records,
23 photographs and we, together, arrived at a value of

J.APP. 2693

1 \$7.5 to \$8 million for the three buildings and the
2 150,000 square feet of land.

3 Q That excluded the Beauregard Building?

4 A Pardon?

5 Q That excluded the Beauregard Building?

6 A That excludes the Beauregard Building.

7 Q Did you subsequently do an appraisal that
8 includes the Beauregard Building?

9 A Well, acting on your instructions, I did go
10 back and inspect the Beauregard Building, and made an
11 estimated value of that building and the land. Now, I
12 appraised it as an office building, effective in 1994,
13 and not as a condo, although there has been recently a
14 condo unit sold in that building.

15 Q Do you recall what the unit sold for a square
16 foot?

17 A Well, there are three units in the condo, the
18 Beauregard Building. According to city records, the
19 unit that sold contained 1,890 square feet and it sold
20 for \$275,000, which I calculate to be about \$145 a
21 foot.

22 Q All right, sir. So for the aggregate value
23 of all the parcels, what did you come to? J.APP.2694

1 A Well, I didn't value the Beauregard Building
2 as a condo. I valued it as an office building, and I
3 had some serious concerns about the condition of that
4 building. It's a one-story building with a two-level
5 parking deck. I know of no other buildings like that.
6 There's obviously some structural damage in the
7 building and without some engineering study, it's
8 difficult to say whether that building really is worth
9 anything or not.

10 We estimated the value of the land in the
11 original complex at \$20 a foot, and I think that would
12 carry over to the Beauregard Building.

13 We used as a cost basis values that ranged
14 from \$30 to \$35 a foot. If you apply that to the
15 Beauregard Building, it would -- it has a gross area of
16 about 8,900 square feet. It would calculate to
17 somewhere around \$300,000. So I estimated the value of
18 the Beauregard Building at \$1,300,000, based on what's
19 available to me now.

20 Again, I do have some concerns about the
21 Beauregard Building, and I think there's a possibility
22 that it might be -- the best thing to do is to remove
23 the building and redevelop that site.

J.APP.2695

1 Q All right. Bearing that in mind, what do you
2 come to as the total value for all of aggregate pieces?

3 A Approximately \$9 million.

4 Q All right, sir. Now, will you go down and
5 give me the values for each of the other pieces for the
6 -- for instance, the hospital building. Did you break
7 it out by virtue of what -- the hospital building and
8 the Medical Office Building and the nursing wing? Did
9 you have aggregate values for those?

10 A Well, we valued the -- we valued the hospital
11 building and the nursing wing together. We did it two
12 ways. We valued it by the cost approach and also the
13 market approach. Both approaches are very close
14 together. The cost approach, \$3,734,610 and the market
15 approach, \$3,724,350. We then valued the annex
16 building separately. The cost approach, \$3,705,905 and
17 the market approach at \$4,072,440.

18 The overall range mathematically was
19 \$7,440,515 to \$7,796,790, and just because there's so
20 many issues pertaining to those buildings, and with
21 respect to what it would take to renovate them, make
22 them really workable properties again, we adopted an
23 overall value range of \$7.5 to \$8 million.

J.APP.2696

1 Q And then what takes it to \$9 million is the
2 addition of the Beauregard parcel and building; is that
3 correct?

4 A Yes.

5 MR. BETTIUS: That's all I have.

6 THE COURT: Questions?

7 CROSS-EXAMINATION

8 BY MR. BONO:

9 Q Did you do an appraisal report?

10 A I did not do a report.

11 Q Now, in terms of your valuation, did -- what
12 land parcels did you include?

13 A What land parcels?

14 Q Yes.

15 A I think, again, you have to look at the plat,
16 because it's otherwise confusing, because they're
17 broken down into parcels on the front, 1 through 7. Do
18 you have this plat?

19 Q Yes, I have it.

20 A Well, you have the colored-in plat. I think
21 the colored-in plat is hard to follow, because it also
22 includes lease information. Parcel 1 is the Beauregard
23 Building. Parcel 2 is the little shopping center at

J.APP.2697

1 the corner of Beauregard and King Street. And then
2 parcels -- then the rest of the parcels belong to the
3 hospital complex.

4 Q Did you make a separate valuation of the land
5 alone?

6 A Well, we valued it, which we were both in
7 agreement with, with -- as a complex and did value the
8 land at -- on a cost approach basis of \$3 million, and
9 just assigned \$1.5 million to the hospital and the
10 annex -- the hospital and the nursing wing, and a \$1.5
11 million for the annex building.

12 MR. BONO: Thank you very much.

13 THE COURT: Any questions, Mr. O'Donnell?

14 Mr. O'DONNELL: Briefly, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. O'DONNELL:

17 Q Mr. Reed, how are you?

18 A Fine. How are you, sir?

19 Q Good. Thank you.

20 You said you didn't prepare an appraisal
21 report in this case. Could you tell me why not?

22 A Well, we weren't asked to.

J.APP.2698

23 Q You're familiar with the Uniform Standards of

1 Professional Appraisal Practice, correct?

2 A Yes, sir.

3 Q And that governs the circumstances and
4 conditions under which you are permitted to provide
5 appraisal opinions of properties; is that correct?

6 A I think it does. I think it provides for a
7 verbal report.

8 Q It does not -- doesn't it require if you are
9 offering a formal opinion on valuation that you prepare
10 a written report, either self-contained summary or
11 review?

12 A I don't think so.

13 Q Okay. What sort of valuation analysis did
14 you use in appraising? I've heard you mention the cost
15 approach to valuing the land, and so I understand from
16 your testimony that you have used at least initially a
17 cost approach to the valuation of the property?

18 A A cost approach and a market approach.

19 Q So you have used a direct sales comparison
20 approach?

21 A We reviewed sales. When I met with Mr.
22 Humphrey, I brought what sales I had -- what sales data
23 I had, he brought what he had, and we went through all

J.APP. 2699

1 of the sales and tried to interpret them and see how it
2 might relate to this property. What complicates it is
3 the condition of the property. I mean, the condition
4 is very, very poor.

5 Q Well, and you have -- for that reason you
6 have not attributed much value to the buildings
7 themselves, you've attributed more -- the substantial
8 portion of the value to the underlying ground; is that
9 correct?

10 A Well, no. I think we pretty much attributed
11 close to equal amounts to land and buildings. Quite
12 honestly, a little more to the buildings.

13 Q Did you utilize any sort of income approach
14 or attempt to utilize an income approach with respect
15 to valuation of this property?

16 A We didn't think that the condition warranted
17 an income approach.

18 Q Were you aware of, in the course of
19 appraising the property, the Inova lease?

20 A I realized --

21 MR. BETTIUS: The Inova lease had been
22 terminated, Your Honor. I object. The Inova lease
23 basically went to a licensed facility.

J.APP.2700

1 THE COURT: Objection's overruled.

2 MR. O'DONNELL: Thank you.

3 BY MR. O'DONNELL:

4 Q You may answer the question.

5 A I understood there were some outstanding
6 leases, but, at least speaking for myself, I just
7 appraised the property as if it was free and clear. I
8 did not consider the leases.

9 Q Are you supposed to apply an income approach
10 where there is a market for exiting leases of the
11 property?

12 A Well, if it's applicable and there is a
13 market. But the -- whatever lease there was certainly
14 didn't relate to the building in its present condition.
15 It would have been something else. I mean, you
16 couldn't apply an income approach under those
17 circumstances.

18 Q And you did not undertake to look for lease
19 comparables, given the condition of the building,
20 apparently?

21 A It's not rentable. It's a disaster.

22 MR. O'DONNELL: Thank you, Your Honor.

23 THE COURT: Mr. Hirschkop?

J.APP.2701

1 CROSS-EXAMINATION

2 BY MR. HIRSCHKOP:

3 Q You keep saying we. Do you have any
4 comparables you used in, let's say, the last six months
5 for current value?

6 A In the last six months?

7 Q Yes.

8 A Well, I have some in the last six months, but
9 my appraisal was effective 1994.

10 Q So your appraisal is as of 1994 that you're
11 testifying today?

12 A Yes, sir.

13 Q Were you aware that Inova had done an
14 appraisal of the property of \$12.5 million in 1992?

15 MR. BETTIUS: Your Honor, I'm going to object
16 to that. There's no evidence of any such appraisal.

17 THE COURT: He can ask him if he knows about
18 it.

19 THE WITNESS: I know of it.

20 BY MR. HIRSCHKOP:

21 Q Did anyone show you any prior appraisals done
22 by Inova?

J.APP.2702

23 MR. BETTIUS: I object to that, Your Honor.

1 THE COURT: I'll let him ask it. Do you want
2 him to increase the value, Mr. Hirschkop? I'm not sure
3 that's in the best --

4 MR. HIRSCHKOP: I'm not sure what he's
5 testifying is what he and someone else -- what they
6 agreed to and not the usual things we get in an
7 appraisal, Your Honor.

8 THE COURT: All right. Go ahead.

9 BY MR. HIRSCHKOP:

10 Q Were you aware of any such appraisal by
11 Inova?

12 A I was given some information. I probably
13 have some of it here in my file that contains an
14 appraisal, but I don't know that I remember anything
15 like \$12 million.

16 Q And in your mind it doesn't make a difference
17 on the value of property whether there are condos on
18 the property or not?

19 A Well, as I said, I appraised the property as
20 an office building, the Beauregard property. Now --
21 and also the annex building. But I understand that
22 there are condos there now. I did not appraise them as
23 condos.

J.APP.2703

1 Q And do the -- does the presence of condos
2 affect the value of a property, normally?

3 A It certainly could.

4 Q Would the value of leases or the nature of
5 leases affect the value of a property, normally?

6 A Well, as I said, I think under normal
7 circumstances it would. But you couldn't do an income
8 approach on that building in its present condition,
9 based on the face value of any lease.

10 MR. HIRSCHKOP: Nothing further. Thank you.

11 THE COURT: Anything else, Mr. Bettius?

12 MR. BETTIUS: That's all we have, Your Honor.

13 THE COURT: Thank you, Mr. Reed. You're
14 excused and free to go.

15 THE WITNESS: Thank you.

16 THE COURT: I'm going to take about a
17 ten-minute recess.

18 MR. BETTIUS: Your Honor, I'm going to offer,
19 in terms of testimony, I have an affidavit from the
20 Commonwealth that's attached on costs, and I'm going to
21 move these as an exhibit. That would be 4 (sic).

22 (Whereupon, Complainant's Exhibit

23 No. 5 was marked for

J.APP.2704

identification.)

THE COURT: All right. Show that to Mr. Bono, Mr. Hirschkop and Mr. O'Donnell.

MR. BETTIUS: I think we've given it to them.

(Whereupon, a brief recess was taken.)

THE COURT: Is there any other evidence, Mr. Bettius?

MR. BETTIUS: No other evidence, Your Honor.

MR. McALEER: May it please the Court again, Mr. McAleer for Inova.

Your Honor, I don't know where we stand in the middle of this process or when the Court wants to take up the Inova fee issues, but I certainly have the affidavits that have been previously filed and submitted to opposing counsel. In fact, I believe the original set of affidavits were already moved into evidence at trial, but I have copies of all of those here. I'll be glad to address the Inova fee issues whenever the Court wants.

THE COURT: Does any of the parties have any objection to the amount of the fees?

MR. BETTIUS: No, Your Honor.

J.APP.2705

MR. BONO: Yes, Your Honor, and I'd like to

1 be heard.

2 I'm sorry, but we filed a memorandum on this.
3 I mean, not to the specifics, to portions of the fees,
4 but based on legal argument.

5 THE COURT: As to where they come from, who
6 pays, not amounts?

7 MR. BONO: And the amount that should be
8 awarded, but not as to the specific entries. We're not
9 challenging the time.

10 MR. McALEER: That was my understanding, Your
11 Honor.

12 THE COURT: I can deal with that on the
13 writing, on the memos.

14 MR. BONO: Yes, Your Honor. I could be
15 heard briefly, if I could, on that point.

16 THE COURT: Let's see where we stand first,
17 and then we'll get back to what we're going to do.
18 There's no further evidence of any kind for anybody?

19 MR. McALEER: If the Court wishes, although
20 it's already in the file, I have just additional copies
21 of the --

22 THE COURT: I've got enough copies of
23 everything.

J.APP. 2706

1 MR. McALEER: That's absolutely fine. Thank
2 you, Your Honor.

3 THE COURT: All right.

4 MR. BETTIUS: Your Honor, just -- this in
5 reference to cost. That's all we have, Your Honor.

6 THE COURT: All right. Any objection to that
7 one, gentlemen, other than the objections that were
8 previously made?

9 MR. BONO: Just the same objections, Your
10 Honor.

11 THE COURT: All right. It will be admitted.

12 (Whereupon, Complainant's Exhibit

13 No. 5 was received in evidence.)

14 THE COURT: What I thought we would do, then,
15 is kind of -- sort of see where we are. I,
16 unfortunately, did not have time last week to look at
17 the memoranda that were filed.

18 Has the Complainant filed any response?

19 MR. BETTIUS: We were waiting for the hearing
20 today, your Honor, to see if any further briefs were
21 necessary. We're prepared to file one. To me, if I
22 can address this, Your Honor, there's been no evidence
23 presented of any financial contribution. I thought

J.APP. 2707

1 that's what they were going to do today. There's been
2 no evidence, just a recitation of what they said
3 before.

4 At this point we saw nothing to rebut. If
5 there are any issues that the Court wants us to look
6 at, we'll be delighted to do it.

7 THE COURT: I'm going to accept everybody's
8 invitation and I'm going to revisit the real estate
9 issues. I'm going to take another look at those. I
10 mean, everybody's invited me to that and, quite
11 frankly, I'm going to do that.

12 MR. BETTIUS: The only point that I would
13 make in that respect is that Mr. O'Donnell said that
14 some conveyance is necessary. We don't seek a
15 conveyance. There never was a conveyance. There's no
16 deed outstanding. We don't need a deed. He's never
17 owned anything. Mr. O'Donnell's totally incorrect
18 about that.

19 THE COURT: Well, I'm going to deal with the
20 real estate issues. Do you want time to file
21 something in writing and to respond?

22 MR. BETTIUS: I think so, Your Honor. In
23 view of the fact that we're looking at. -- J.APP.2708

1 THE COURT: How much time do you want?

2 MR. BETTIUS: Ten days?

3 THE COURT: All right. That's to any of the
4 other issues regarding the source of the attorney's
5 fees, Inova fees.

6 MR. BETTIUS: I understand. I take it Your
7 Honor doesn't want any more argument today.

8 THE COURT: No.

9 MR. O'DONNELL: Your Honor, I'll avail myself
10 of that same opportunity if you're going to address the
11 real estate issues.

12 THE COURT: I'm going to get to the
13 Respondents in a minute.

14 Even though I thought, quite frankly, we had
15 an arrangement last time where all of these issues were
16 supposed to be dealt with at this hearing, maybe it was
17 my fault for not having a more formal arrangement as to
18 what this hearing was going to be. I will allow the
19 Respondents time to produce any evidence they wish on
20 the issues of the title, of the attorney's fees and of
21 the value of the property. I'm going to direct that
22 they notify the Court within two weeks of today's date
23 whether they wish to introduce any further evidence on

J.APP.2709

1 those issues. It's just too important.

2 As I said, it perhaps should have been --

3 MR. BETTIUS: Your Honor, I thought that the
4 Court was perfectly clear. We were to be here today
5 and present any evidence that we had.

6 THE COURT: That's what I thought, too, Mr.
7 Bettius. I'm going to give them the time to do it.

8 You let me know within two weeks of today's
9 date whether you will require any further evidence,
10 after you've had a time to look at the exhibits and, I
11 guess, if you get the testimony written up.

12 MR. McALEER: Your Honor, again, for Inova,
13 my understanding is with respect to the Inova fee issue
14 the only argument that Respondents are making is the
15 legal argument -- the two legal arguments that were
16 expressed in their opposition.

17 THE COURT: Right. That's right. I don't
18 want any more on that issue.

19 MR. BETTIUS: With respect to other
20 housekeeping details, Your Honor, it's my understanding
21 that Respondents will have no further standing in this
22 case with respect to the distribution issues, and that
23 will be a matter for us to present. I'm wondering when

JAPP.2710

1 Your Honor would like us to be prepared to go ahead
2 with the plan of distribution and the appointment of a
3 receiver.

4 One of the things that's unclear, Your Honor,
5 is whether Your Honor's going to proceed under the
6 corporate dissolution section or whether you're just
7 going to treat this as a failed trust. We're going to
8 anticipate both of those in our presentation.

9 So if Your Honor would like to set a date,
10 we'd like to have an opportunity, because that doesn't
11 involve these Respondents, to address the Court on the
12 plan of distribution and receivership.

13 THE COURT: All right. Let me hear from them
14 on that issue, whether they feel they're entitled to
15 participate in that.

16 MR. BONO: Your Honor, we do feel we have a
17 right to participate. This matter is not -- there's
18 been no judgment entered. I think Mr. Bettius is
19 asking for something that's premature. There are -- we
20 have to see what the final outcome is and determine
21 what our legal rights are. And so I think we
22 absolutely have standing at this point.

23 Also, I would respectfully submit that --
J.APP.2711

that this is governed by the dissolution statute.

That's what the Supreme Court of Virginia said this proceeding involves, and because this was a Maryland not-for-profit, it's the Maryland dissolution statute that needs to be complied with.

I understand it's similar to Virginia's, but that's the statute -- the Virginia Supreme Court said that. That's how this matter should be wrapped up. I think we do have standing.

On the briefing, Your Honor, I'd like to have a reasonable period of time to respond to the Complainant's briefs. I would ask --

THE COURT: They're responding to your
briefs.

MR. BONO: Well, I can guarantee, Your Honor, that there will be new issues, just like -- that we should be entitled to address that have never been argued, because their attorney -- no. I'm responding to their brief, Your Honor, because they addressed the issue of title in their post-trial brief. They addressed the issue of attorney's fees in their post-trial brief.

And because we had simultaneous briefs at JAPP. 2712

1 that point, that's how the ships passed. We -- our
2 briefs that we filed now are in response to their post-
3 trial briefs on those points, not something that, you
4 know, they should get a totally new bite of the apple
5 on. I'd like time, if they raise new arguments, to
6 respond.

7 THE COURT: After I review the briefs of the
8 Complainant, if there's some new issue raised, I'll ask
9 for the briefs from the Respondents. Otherwise, no.

10 MR. BETTIUS: Your Honor, this specter of
11 this being under some Maryland distribution statute is
12 totally incorrect. The Supreme Court said we were
13 entitled to recover on all --

14 THE COURT: I'm not even going to address
15 that today, Mr. Bettius. I'm going to go back and look
16 at the real estate. I'm going to look at the question
17 of title and credits and values --

18 MR. BETTIUS: I understand.

19 THE COURT: -- if that's necessary to do
20 that. I'm going to decide the attorney's fees, and
21 then we're going to talk about a final decree -- or a
22 decree. I don't know if it's final or not, but it's a
23 decree.

JAPP.2713

1 When I enter that judgment, then we'll have
2 to see where we stand with regard to how we're going to
3 distribute the money. That's the way we're going to do
4 it.

5 MR. BETTIUS: There's a further question,
6 Your Honor, that we put off today, and that's how this
7 money's going to be received.

8 THE COURT: I understand that. We'll do it
9 when we get a decree entered that directs the payment
10 of a sum certain.

11 MR. BETTIUS: I'm talking about next month's
12 payment, Your Honor. We deferred that, and, as far as
13 I'm concerned, this stuff of it sitting on lawyers'
14 desks for two or three weeks and going over the
15 bankruptcy --

16 MR. BONO: I resent that.

17 THE COURT: Just stop, please

18 MR. BETTIUS: But sitting in -- lawyers have
19 kept these checks from deposit saying that they need
20 direction from the Court. There's no longer any
21 reason, Your Honor, not to have a direct payment by
22 Inova into the Court. This stuff of having it go
23 through lawyers now is totally unnecessary, and having

J.APP.2714

1 lawyers make these payments

2 We've got a \$20 million judgment that's
3 minimal here now. For lawyers to double handle these
4 checks, and we've lost probably a month's interest
5 between them being with Mr. Bono in one case and Ms.
6 Beach in another, these payments should come directly
7 to the Court.

8 THE COURT: That's what I thought last time,
9 but somebody said something about the Bankruptcy Court
10 and then something was supposed to get resolved over
11 there, and then I got fussed at about that, apparently.

12 MR. BETTIUS: The bankruptcy --

13 THE COURT: I didn't get fussed at. You all
14 fussed at one another about whether that matter had
15 been resolved or not.

16 MR. BETTIUS: The Bankruptcy Court directed
17 that Your Honor has direct control over these funds and
18 it's part of this judgment, and that's always been my
19 understanding. That's one of the things we want to
20 clear up.

21 This money should go directly to the Court
22 from Inova, and we're going to ask for an order --
23 interim order that provides for that, rather than

J.APP. 2715

1 having attorneys handle the money.

2 THE COURT: All right.

3 MR. BONO: Your Honor, I strenuously object
4 to the -- it's an important issue, Your Honor. I
5 strenuously object to this attempt by the Commonwealth
6 to get their hands on the Inova money. Your Honor made
7 a determination that there's going to be a \$20 million
8 judgment entered. That's a judgment against the
9 Respondents and that judgment will be dealt with
10 accordingly.

11 Your Honor's letter opinion did not say and
12 did not hold that the Inova monies or all of them (sic)
13 are part of this constructive trust. You entered a
14 money judgment direction, and I assume when you get it
15 to your decree, Your Honor will enter a judgment.

16 As any party, we're entitled to meet that
17 judgment accordingly. I would respectfully submit that
18 we have faithfully -- and I'll say this -- faithfully
19 either paid the money into the Registry of the Court,
20 now it's going to the general receiver each month, the
21 interest-bearing account, or posted a bond.

22 And when Your Honor's decree is entered, a
23 determination will have to be made on further appeals

J.APP.2716

1 or determinations, and at that point we should have the
2 ability to either pay the money into the Court or post
3 a bond. We will represent to this Court that we have
4 faithfully done that, and we will continue to do that.

5 But I strenuously object to the Commonwealth
6 trying to just grab onto monies which are not theirs
7 and were not determined to be part of the constructive
8 trust.

9 Thank you, Your Honor.

10 MR. BETTIUS: Your Honor, this Court's
11 already --

12 THE COURT: Let me hear from Mr. Hirschkop
13 and then I'll hear from you.

14 MR. HIRSCHKOP: Your what you've decreed, is
15 essentially an attachment before a judgment. There is
16 no judgment yet. There is no final verdict in this.
17 If the \$20 million holds up and there's a deduction for
18 the amount of improvements to the real estate or the
19 value, whatever it turns out to be, based on the
20 figures we heard here today, it's only going to be \$11
21 or 12 million, with the set-off on the real estate, in
22 which case it's like a \$6 million --

23 THE COURT: I'm not sure I followed that, Mr.

JAPP.2717

1 Hirschkop, but go ahead.

2 MR. HIRSCHKOP: Well, there's a set-off --

3 THE COURT: It seems like to me if I take the
4 real estate out, it increases the amount of the
5 judgment, not decreases it.

6 MR. HIRSCHKOP: I don't think it changes the
7 judgment. They were getting real estate they weren't
8 entitled to anyway, as you'll see when you reexamine
9 it. But in any event, it's an attachment before a
10 judgment free of any bonds normally required.

11 The way you had it structured before seemed
12 appropriate in that regard, is that the partnership
13 could either put up the money or a bond. The bond is
14 just as good as the money.

15 MR. BETTIUS: We don't contest that.

16 THE COURT: Just a minute, Mr. Bettius.

17 MR. HIRSCHKOP: And I don't know why you just
18 can't stay with that. There was no reason to stay --
19 to differ from that or change from that. It was
20 working, and it's, like, \$5 or \$6 million bonded
21 already in the Court. Why not stay with that, Your
22 Honor? Why punish the partnership? There's no reason
23 for that at this point.

J.APP.2718

1 THE COURT: Go ahead, Mr. Bettius.

2 MR. BETTIUS: If I may respond, Your Honor,
3 the Supreme Court and this Court ruled that there is a
4 constructive trust and we are entitled to prevail on
5 all four counts. We're going to end up in the
6 Bankruptcy Court chasing this money.

7 Your Honor ruled that Complainant's
8 accounting reveals Respondents received net revenues
9 through June 30, 1999 in the amount of \$26,372,
10 whatever it is, and that the anticipated revenue from
11 the Inova settlement through October is \$2,005. That's
12 \$24,000, then you reduce it.

13 Your Honor, there is a direct constructive
14 trust applied to the Inova money. This Court has
15 ruled, in as clear language as you possibly can, that
16 that's the case. Now, if they want to put up a bond,
17 that's fine. But we want either a bond or a direct
18 payment for the Inova money as it's received, and I
19 think we're entitled to that.

20 It would be a tragedy to let this money end
21 up not being subject to a constructive trust when the
22 Court's already found that it is.

23 MR. HIRSCHKOP: We agreed to that, Your

J.APP.2719

1 Honor.

2 THE COURT: Do you all agree that the
3 Bankruptcy Court has said that this is a matter for
4 this Court to decide? Do the Respondents agree with
5 that?

6 MR. BONO: Yes, Your Honor.

7 THE COURT: The Court will direct payments
8 directly to the Court from Inova. I'll enter an order
9 -- a decree to that effect.

10 MR. BETTIUS: Thank you.

11 THE COURT: Ten days, Mr. Bettius, to file
12 that?

13 MR. BETTIUS: Yes, sir.

14 THE COURT: Yes, sir?

15 MR. SCHWEIKER: Your Honor, Richard Schweiker
16 with the Attorney General's office. In all the
17 discussion of the briefs, I did want to note that last
18 week we had filed a brief regarding some of the
19 questions of whether a receiver should be appointed.
20 You had asked that that be filed five days in advance
21 of this hearing. I wanted to let you know that that is
22 here.

23 THE COURT: All right. We stand in recess.

J.APP. 2720

1 (Whereupon, at 12:43 p.m., the hearing in the
2 above-entitled matter was concluded.)


3 * * * * *

J.APP. 2721

CERTIFICATE OF REPORTER

I, Eva M. Bridget, the Stenomask Reporter who was duly sworn to well and truly report the foregoing proceedings, do hereby certify that they are true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through any relationship with any of the parties at interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of November, 2000.


Eva M. Bridget
Verbatim Reporter

J.APP. 2722

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

----- -x
COMMONWEALTH OF VIRGINIA, et al.,
Complainants,
v.
LASZLO N. TAUBER, et al.,
Respondents.
----- -x

In Chancery
No.: 96-1241

ORIGINAL

Alexandria, Virginia

Friday, February 2, 2001

The above-entitled matter came on for hearing
before the Honorable Alfred D. Swersky, Judge, in and
for the Circuit Court of the City of Alexandria,
Virginia, 520 King Street, Courtroom 4, Alexandria,
Virginia, beginning at 9:05 a.m., before Eva M.
Bridget, Verbatim Reporter, when there were present on
behalf of the respective parties:

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APPEARANCES:

On Behalf of the Complainants:

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J.APP. 2724

P R O C E E D I N G S

(Whereupon, the Court Reporter was sworn by the Court.)

* * * * *

THE COURT: Ms. Beach?

MS. BEACH: Your Honor, I have an order that's been endorsed by all counsel. It wasn't even noticed yet.

THE COURT: I've signed the order.

MS. BEACH: Thank you, Your Honor.

THE COURT: You're welcome.

MR. BETTIUS: Before we start arguing, I think perhaps both counsel have prepared final orders, and I would like to tender ours for the Court's consideration. I think Mr. Bono has a final order.

THE COURT: I have them in the file.

MR. BONO: I've already seen it.

MR. BETTIUS: We have some slight modifications.

THE COURT: All right. I'll make sure I keep them straight now.

MR. TRENGA: Your Honor, good morning. I understand that the final decree that was just tendered

J.APP. 2725

1 incorporates all of the additional changes we had
2 proposed in our final order. So we only need to deal
3 with two final decrees at this point.

4 THE COURT: Let me make sure I have them
5 straight. I've read them, but I'm not sure I have them
6 straight.

7 All right, Mr. Bettius, let me hear from you.

8 MR. BETTIUS: Your Honor, we believe that our
9 order does a little more than embody the previous
10 rulings of the Court, and I'd like to just briefly go
11 over what I understand are the points of disagreement
12 between Respondents and the Complainant in the matter.

13 Respondents say there's no constructive trust
14 imposed upon the future payments of Inova. Well, that
15 ignores specific holdings of this Court and it ignores
16 specific holdings of the Supreme Court that the
17 Respondents (sic) are entitled to relief sought in the
18 Bill of Complaint.

19 Your Honor will also recall the \$51 million
20 number that's referenced in the Court's opinion -- and
21 that date is February 23 -- accounts for sums in the
22 amount of \$51 million plus dollars, which was precisely
23 the sums that were found to be due and owing for past

1 and future payments by the Complainant's expert, Arthur
2 Andersen, to the penny, I believe, Your Honor.

3 So that if you read that in conjunction with
4 the Court's order that the Respondents are charged with
5 all of those costs -- are charged with all of those
6 costs and funds that they have received, and in
7 addition the Court's previous imposition of the bond
8 indicates clearly that those funds are the subject of a
9 constructive trust.

10 Your Honor may recall that you found, as well
11 as the Supreme Court, that the Inova funds were derived
12 from operations of the hospital. Your Honor has
13 imposed a constructive trust on the assets that were
14 derived from hospital operations and you have ruled
15 specifically that the Respondents, each of them, must
16 account, and would be liable for, accrued revenues plus
17 the present value of the future payments. I mean,
18 there can be no doubt with respect to that issue.

19 Next the Respondents want to give quitclaim
20 deeds. That, in the context of Virginia law dealing
21 with trustees, is an absurdity. A special warranty
22 deed is the most usual vehicle by which -- and I'm
23 going to hand the key points up to Your Honor -- is the

J.APP.2727

1 vehicle by which trustees make conveyance, wherein they
2 will warrant the title only against defects which were
3 created during their tenure.

4 That's particularly important in this case,
5 Your Honor, because if there are conflicting claims
6 with reference to this real estate, they're the parties
7 best able to defend them and resolve these issues,
8 because all the issues with respect to who has what are
9 inter-party matters that reflect largely on the
10 Defendants (sic) themselves.

11 So we believe that there is no authority in
12 Virginia, and an abundance of authority to the
13 contrary, that the trustees should convey by special
14 warranty deed.

15 One of the things that I find fascinating in
16 the arguments made by Respondents at this point is that
17 they assert that there's no joint and several
18 liability. Well, that just cuts against every opinion
19 that's been rendered by the Court and by -- by this
20 honorable Court and by the Supreme Court, and also Your
21 Honor has indicated that the Respondents cannot profit
22 and that the Respondents have obtained interest in real
23 property and were paid dividends in excess of their

JAPP. 2728

1 capital contributions.

2 I mean, who is the party defendant if not the
3 defaulting trustees jointly and severally.

4 THE COURT: Isn't the question, though, the
5 extent of the liability, whether it's limited to the
6 assets of the partnership or whether the individual
7 assets of each of the partners would be liable for
8 this? That's the question.

9 MR. BETTIUS: Your Honor, I believe that
10 those questions are inextricably combined and result
11 inextricably in the same answer. The failure to
12 discharge fiduciary duty is a tort, and these people
13 were found to be common law trustees to receive income.
14 Your Honor, judgment's going to be entered in this case
15 of \$20 million. The partnerships were merely a vehicle
16 by which the individual Respondents chose to deposit
17 the monies which they diverted and the revenues which
18 they diverted.

19 If it's the assets of the partnership, Your
20 Honor, that doesn't make any sense at all, because then
21 the trustees wouldn't be charged for their default.
22 You'd be charging the vehicle into which they put the
23 diverted assets. I can't imagine any precedent for

1 that kind of an award of judgment, where people are
2 charged individually as trustees and they default.

3 Your Honor, that default continued not just
4 for the 30-year period until they were brought to
5 accounting. On two separate occasions this Court gave
6 Respondents individually an opportunity to account and
7 trace, and they stubbornly clung to the argument that
8 it was somehow the beneficiary's duty to trace
9 potentially commingled assets.

10 These assets were received by individual
11 trustees and as individual trustees, Your Honor, there
12 can be no basis for any other holding of liability.

13 Secondly, they say that no interest accrues
14 and they want the opportunity to pay over time without
15 interest. Your Honor, it has been clear since 1997,
16 when this Court ruled that there was liability, it has
17 been clear since 1997, by the Court's own imposition of
18 a bond on the receipts to be received from Inova, that
19 there was a recognition and an option by these parties,
20 either pay this money into court and allow it to accrue
21 interest, or turn it over to the Commonwealth
22 to whom it belonged or the citizens of the
23 Commonwealth, but they elected to take the money, and

J.APP. 2730

1 they have, in fact, used it, earned it, earned interest
2 on it or invested it. The very finding of this Court
3 that the Inova sums were the subject of a bond and the
4 Respondents have elected to post the bond and continue
5 to receive the money indicates the Commonwealth is
6 entitled to the time value of that money. They had an
7 option, and I have never seen a situation where the
8 Court has allowed, subject to an obvious trust for
9 money to be disbursed, to have it disbursed over a
10 period of three years and then not make the Respondents
11 accountable for interest with respect to it.

12 In addition, the scheme of distribution,
13 which the Respondents put forth in this case, and the
14 method of payment, totally ignores that there's \$7
15 million in bonds. They just gloss over that. What, in
16 effect, they're asking the Court to do in this decree
17 is to make -- turn Inova into a bonding company and say
18 absolve us from liability, the only thing that the
19 Commonwealth can look to are the Inova payments.

20 Well, Your Honor, that would be the most
21 manifest injustice. We have a right to look to the
22 assets.

23 Your Honor has, in effect, by this ruling

1 allowed the Respondents, at the end of this
2 transaction, to receive a portion of the Inova
3 settlement based on equitable principle. We don't
4 agree with that, Your Honor, and we respectfully
5 dissent from that and, of course, it may be a verdict
6 that makes everybody unhappy is probably correct.

7 But we are entitled, Your Honor, to be paid
8 that \$20 million and we're entitled to interest. And
9 that issue also turns on the finality of this order.
10 They don't need any dispensation from this Court to
11 appeal. Today should be the final order with respect
12 to these Respondents.

13 They have no further standing in this matter.
14 They, for 30 years, failed to discharge their
15 responsibilities as trustees, they have twice failed
16 before the Court to account, and it would be the
17 cruelest of ironies, we respectfully submit, Your
18 Honor, to allow them to participate in the distribution
19 of a plan that's going to be approved, and perhaps in
20 many respects formulated by, the Court together with
21 the people who are interested in the funds.

22 We assume that there may be a lot of input
23 into what occurs, but in terms of formal standing of

J.APP. 2732

1 these Respondents, that would, indeed, be the cruelest
2 of ironies.

3 They also object to naming the Commonwealth
4 as trustee. Your Honor, the objection to the
5 Commonwealth as receiver in this case and the objection
6 to the Commonwealth as trustee are two totally
7 different issues.

8 When the parties were, in fact, adversaries,
9 and when the parties were in the process of litigation
10 and issues remained unsettled on appeal, this Court
11 declined to allow the Attorney General to be the
12 receiver. We're now at the point in time when Your
13 Honor is going to have a great deal of control over
14 what happens to this money, the timing of the money,
15 and -- but there can be no doubt, Your Honor, as to who
16 is the proper trustee to be chosen to administer this
17 money.

18 The Supreme Court's opinion itself indicates
19 that for more than, I think, two or three centuries the
20 Attorney General has been recognized by the courts and
21 by the Constitution to be the trustee of the public
22 benefit in cases such as this.

23 And there are a long series of cites we

1 prepared on amendment. Your Honor will approve a plan
2 of distribution, and it presents one of the technical
3 issues that perhaps Your Honor never had to deal with,
4 but is clearly before the Court, are we going to
5 henceforth, after the judgment is entered and the funds
6 are received, we're going to treat this as a 13 --
7 Title 13 distribution, or are you just going to treat
8 it in terms or function of trust funds. And in either
9 event, the Court's going to have -- is going to have
10 extreme control. I'm sure the Court's going to want to
11 hear from interested parties to have some input with
12 respect to the plan of distribution.

13 The Attorney General's labored hard to
14 present a plan of distribution. The Attorney General
15 has been contacted by charities who -- at least one
16 charity who would like to have some. And, of course,
17 we welcome any of that input. If Respondents want to
18 talk informally to the Attorney General about the
19 appropriate disposition, or they want to file amicus
20 positions with you with respect to the appropriate
21 disposition, they're welcome to do that.

22 But we respectfully submit, Your Honor, they
23 have no standing with respect to further proceedings.

1 It is, Your Honor, very difficult after
2 coming to, I think, what is basically the end of this
3 function of the case, to see that the Respondents are
4 going to have any participation in the Inova money, yet
5 they ask for that. And they also seek to take the
6 benefit of the Inova money as the basis for their
7 appeal without bond. And that is, we respectfully
8 submit, Your Honor, absurd.

9 Inova is not a bonding company, nor does the
10 Commonwealth have -- the citizens of Alexandria and
11 Northern Virginia, have to look to the continuity of
12 Inova as a business enterprise. They're not registered
13 with the clerk of the court as an approved surety, nor
14 with the State Corporation Commission.

15 If there is to be an appeal in this case, the
16 present bond, which is approximately \$7 million or \$8
17 million, should be replaced with an appropriate
18 supersedeas bond on appeal to cover the amount of the
19 judgment and costs.

20 Your Honor, with respect to the date of
21 interest from which interest should run, obviously the
22 Court imposed a bond on the Inova money and that's the
23 date. I'm trying to think if there are any -- oh,

J.APP. 2735

1 there's one critical issue, Your Honor, it's the
2 Inova -- the payment to Inova.

3 As Your Honor notes, the costs cannot be
4 assessed against the Commonwealth, and it raises issues
5 of sovereign immunity if they are. Obviously with
6 respect to any entitlement to Inova's funds, they
7 should be taxed against the corpus fee, because
8 otherwise the Court would be entering a judgment
9 against the Commonwealth where there's no authority to
10 do that.

11 One point. There is also the contention
12 raised by Respondents, somehow again, that they are
13 entitled to the protection of Maryland law, and that
14 this Maryland law apparently is some corporate law.

15 Your Honor, they're not sued as directors at
16 this point. They have been found to be trustees. And
17 I want to ask, with all due respect and rhetorically,
18 what corporation? They allowed the corporation to
19 demise (sic), and they purposefully allowed it to
20 destroy itself.

21 So in 1973, there was no corporation. There
22 is no statute to protect them in further dealings. If
23 Your Honor would read this opinion, I think you will

J.APP.2736

1 see that the law of Maryland is not different than the
2 law of Virginia, and the Supreme Court recognized that
3 under the -- I think it's Gospel Mission case and other
4 cases. All of these are public funds and they are
5 trustees and they're liable as trustees.

6 Your Honor, I respectfully submit that the
7 order -- and I'll give you a list of what I think are
8 the points, and I'll give it to Mr. Bono -- I got
9 reminded, joint and several liability, Your Honor, I
10 think I've covered that issue.

11 And on this issue of joint and several
12 liability -- and I am reminded, the Respondents are at
13 this time, Your Honor, judicially estopped not to raise
14 -- not to submit to issue joint and several liability.
15 And I want to call Your Honor's attention to a document
16 -- several documents, in fact, that were filed by the
17 Respondents in this case, and under the signature of
18 their counsel at that time -- it's signed by Mr. Bono.

19 And in that they -- Mr. Bono states
20 unequivocally on page 12 a motion filed on November 9th
21 of the year 2000, also Respondents are entitled to a
22 credit for the price Dr. Gondor paid when he purchased
23 the real estate. This credit should be shared by

1 Respondents, because they are jointly and severally
2 liable. And I have a copy of that document.

3 In addition, Your Honor, in the bankruptcy
4 petition which was filed in this case, they assert,
5 again, that they are -- they have been found -- and I'm
6 going to read it, Your Honor, directly from that and
7 I'm going to hand it up to the Court -- as noted above,
8 Dr. Tauber's the named Respondent in the lawsuit filed
9 by the Commonwealth of Virginia and Tauber's actions in
10 the management of JMHI and successors in interest,
11 including JMHJV, have been the subject of extensive
12 testimony and evidence in the above-referenced lawsuit.

13 Tauber's breaches of fiduciary duty and
14 financial malfeasance in connection with the
15 mismanagement of JMHJV, together with the fact that he
16 has been found jointly and liable -- jointly and
17 severally liable with the other Respondents. They
18 again talk about joint and several liability.

19 Your Honor, I think that covers the points.
20 I'll hand this up to the Court so that you can have it
21 with the decree. And if you want copies of the two
22 previous -- copies of the two previous pleadings where
23 they asserted joint and several liability --

JAPP.2738

1 THE COURT: I don't need those. All right,
2 anything else?

3 MR. BETTIUS: Your Honor, there is a
4 memorandum for the Court's guidance, if you feel you
5 need it.

6 THE COURT: Give Mr. Bono a copy. Did you
7 give counsel copies of this?

8 MS. FITZGERALD-O'CONNELL: Yes, sir.

9 THE COURT: All right. Mr. Bono?

10 MR. BONO: Thank you, Your Honor. May it
11 please the Court.

12 Let me take up the issues that are existing
13 between the parties with respect to the entry of a
14 decree. First, Your Honor's question to Mr. Bettius on
15 the issue of personal liability is directly on point.
16 This is not a question of joint and several liability.
17 It's a question of whether the personal assets of the
18 individual trustees should be subjected to the Court's
19 decree. And that's the point we're making, that under
20 the -- we respectfully submit that under the Court's
21 opinions, that it is directed against the assets of the
22 -- of the partnership and not the individual doctors.
23 And that was for good reason, because there's never

JAPP. 2739

1 been a -- a finding or evidence presented that would
2 establish the right to invade those personal assets.
3 And that's the point, not joint and several liability.

4 Secondly, with respect to the constructive
5 trust point, on the Inova payments, Your Honor's July
6 13 letter opinion, I believe, makes clear that the
7 Court was not subjecting the Inova payments to a
8 constructive trust, because Your Honor did not apply
9 strict accounting rules, but applied an equitable
10 fairness test for the award in this case.

11 The Court made express reference to the fact
12 that if there were strict accounting rules applied,
13 Respondents would be liable for the accrued revenues,
14 plus the present value of the future payments. But
15 Your Honor said however, equitable principles require
16 that a fairness test be applied to any award in this
17 case.

18 And then Your Honor, in the exercise of your
19 discretion in equity made a finding that there should
20 be an award of \$20 million. It's for that very reason,
21 and the reason that the Court also noted that the
22 future Inova payment totaled in excess of \$24 million,
23 that I would submit that it's clear that Your Honor was

1 not applying a constructive trust to the Inova
2 payments. Otherwise, the opinion would have said that
3 the future Inova payments shall be paid to the -- to
4 the Complainants.

5 Third, because Your Honor made an equitable
6 determination, I believe that the Complainants' request
7 for an interest component on the \$20 million, rather
8 than the payments being made as received by -- in the
9 Inova settlement, is contrary to what Your Honor
10 intended and what Your Honor exactly found in this
11 order.

12 The statutory interest rate in Virginia is
13 nine percent. And Your Honor knows that the assets of
14 the partnership -- which we do not disagree are subject
15 to this order are, in terms of revenue, the Inova
16 income stream. And this income stream is paid at about
17 \$2 million a year on monthly payments, and it's
18 increased, and our proposed order captures those
19 payments.

20 And we submit that the order should provide
21 for the \$20 million, but it should be based upon the
22 monies already paid into court, plus the receipt of the
23 monies as -- as they are received.

J.APP.2741

1 Otherwise, the -- given that fact and the
2 fact that the Court knew that at the time, that this
3 award, this monetary award will escalate a tremendous
4 amount over the \$20 million, because there is no cash
5 in the partnership to make this payment.

6 I respectfully submit that that's not what
7 Your Honor determined in the order, and I think it
8 would be using the fairness-in-equity test that the
9 payments should be made as they are received from the
10 partnership assets, and that interest should not be
11 added to the unpaid amount, and certainly not going
12 back to the -- prior to the time period of -- of the
13 decree.

14 Finally -- or otherwise with respect to the
15 deeds, we submit that the quitclaim deed would be an
16 appropriate deed to prepare for the property. The
17 partnership is unable to transfer interest that it
18 doesn't own, and Your Honor is aware that there's
19 several ownership interests that we don't have and we
20 would submit -- I don't want to get into a battle on
21 warranties and breaching of warranties with the
22 Commonwealth. On -- with respect to the Commonwealth
23 as trustee and receiver, Your Honor already, long ago

J.APP.2742

1 in this case, rejected the notion that the Attorney
2 General should be the receiver in this case.

3 THE COURT: We're talking about two different
4 things here, I think.

5 MR. BONO: Well, they asked for both. They
6 asked for Attorney General as receiver, I believe, and
7 that, I think, has already been rejected. And with
8 respect to the Commonwealth as trustee, I would submit
9 that that should not be done, and that the -- on the
10 appointment of an receiver, that the receiver can act
11 as the trustee over the funds, rather than an adversary
12 party in the case.

13 With respect to the issue of standing, I
14 don't think we should be carved out of the proceedings,
15 If there are future proceedings, I think we have a
16 right to be heard in future proceedings.

17 With respect to the Inova fees that the
18 Court has decided both parties should equally share,
19 whether that money should be paid from the corpus I
20 think should be consistent. If the Commonwealth wants
21 their half paid from the corpus, I believe that the
22 Respondents should be entitled to the same benefit, or
23 that both of us should have to pay separately. But I

JAPP.2743

1 don't think it should be one or the other, in light of
2 the Court's ruling that there should be an equal
3 sharing of those fees.

4 With respect to Maryland law, contrary to
5 what the Commonwealth has said, the Respondents in this
6 case, by operation of law, as of the time of the
7 dissolution of JMHI in 1973 -- and this was an express
8 finding of the Virginia Supreme Court -- became
9 trustees in dissolution and the Virginia Supreme Court,
10 in the opinion in this case, which is 499 SE 2d 839,
11 and it's at 844, expressly held that it was the
12 Maryland dissolution statute which governed the
13 dissolution and the subsequent distribution of assets
14 of this Maryland corporation.

15 And that was in direct response to the
16 arguments that Respondents had made that they should be
17 entitled to the benefits of the rule that said that the
18 law of incorporation should be implied, and the
19 Virginia Supreme Court said this case is a -- should
20 be viewed as a dissolution case, and it cited the
21 Maryland Code and the Court of Appeals of Maryland case
22 as the governing code.

23 Now, while that -- while that statute may, in

1 many respects, be similar to Virginia's, it is the law
2 of this case that it's the Maryland dissolution statute
3 that applies, and that's why we have included that in
4 our decree.

5 Finally, Your Honor, with respect to
6 potential appeals in this case, we have respectfully
7 submitted that whatever Your Honor finally determines
8 should be the language of the decree, that Your Honor
9 stay the entry of the decree pending the appeal in this
10 matter, provided that we continue to pay into court the
11 Inova settlement payments and otherwise, if there is
12 going to be no stay, then we're going to have to make a
13 determination with respect to the real estate and with
14 respect to the expenses of the real estate.

15 But I would submit that, given the many
16 issues in this difficult case, and the likelihood of an
17 appeal from one or both parties, which I expect an
18 appeal from the Commonwealth as well, that there be a
19 stay entered to maintain the status quo. The monies,
20 the Inova monies, continue to be paid in to the
21 receiver until a final determination is made on the
22 issues. Thank you.

23 THE COURT: What I'm going to do is -- is

1 there something you want to say that wasn't said? I'm
2 sorry, Mr. Hirschkop, you have a right to be heard.

3 MR. HIRSCHKOP: If Your Honor please, on the
4 constructive trust issue, I think the Commonwealth
5 wants it both ways. If there is a constructive trust
6 on the flow of income from Inova, then that's the
7 equitable solution -- it should be the income from
8 Inova that's really the damages in the case. I think
9 that is the equitable solution; to tell you the truth,
10 if we're ever going to work this thing out, that's
11 where it's going to go.

12 And that goes also to what a possible
13 supersedeas bond would be. There is \$8 million to \$12
14 million in real property that's not going anywhere.
15 There's \$2 million in the court's registry now, or less
16 than 2 and it will be 2 at the next payment, I think.

17 And then there's Inova, a billion dollar
18 corporation paying all this money in. If, for some
19 reason, Inova looks like it's going to fail during the
20 course of the appeal, they can come to this Court and
21 you keep jurisdiction over a supersedeas bond and then
22 ask for a greater bond. What they're trying to do is
23 deny an appeal by saying I want a \$20 million bond.

J.APP.2746

1 That's an impossibility. They don't have any assets.

2 So the constructive trust can go both ways, I
3 submit, Your Honor. If they're going to get a
4 constructive trust, then the damages, the \$20 million
5 should be the flow of income. I interpret it that -- I
6 can't look inside Your Honor's head, but that's the way
7 I interpret the papers, as the equity you were trying
8 to achieve. The quitclaim deed, whatever counsel said
9 I adopt, the same with Maryland law.

10 Personal liability, I have repeatedly before
11 the Court made the point that I don't believe there's
12 personal liability. In the equities of this case, Your
13 Honor, there is no accounting that Your Honor's
14 accepted. Mr. Bettius, with a certain amount of
15 hyperbole, says that we refused to give an accounting.

16 Indeed, what happened, an accounting was
17 supplied by counsel in good faith. The parties looked
18 at that and said, no, we think it should be more
19 detailed. And so the experts who you originally
20 recognized in the first trial as being the more
21 believable and more acceptable, were rehired and they
22 worked with Mr. Cochran and were to give you a complete
23 and detailed accounting. A great sum of money was

1 spent on that. There was no effort by the individuals
2 to block an accounting. A good-faith effort was made.
3 Your Honor didn't accept that accounting. You didn't
4 accept the Commonwealth's accounting.

5 In terms of imposing individual liability, no
6 findings were ever made that Dr. Tauber took \$20
7 million out of this partnership. Indeed, Dr. Tauber
8 has provided all of these services over the many years.
9 No accounting was made of that, nor requested to be
10 accounted on that. It is the individuals who put up
11 the money to buy the land, then put up the money to
12 build the buildings. Your Honor at first said you'd
13 give a credit for that, and then upon review decided
14 not to.

15 And that's within your discretion to do -- or
16 jurisdiction to do. We contest that there shouldn't be
17 -- I don't want to waive the exception to that, Your
18 Honor.

19 But there's no finding of individual
20 liability or an amount of individual liability. It
21 would be a terrible travesty to say they can go into
22 Dr. Friedman's office next week or 21 days after this
23 order is final, and seize all of his assets. That

1 would really be a travesty. Remember, this is found
2 money for the Commonwealth. It's like the Commonwealth
3 put up money.

4 As a technical matter of law, they are going
5 to get, assuming an appeal is denied or we don't settle
6 it in the interim, the \$20 million. The statutory
7 interest, the same equitable argument would apply.
8 There is no final order. The monies that have been
9 gotten in recent years essentially were either paid
10 into the court or used to keep the properties alive.

11 There's no distribution, you prevented it.
12 So there'd be no equitable argument they could have for
13 interest until a judgment is entered and then interest
14 accrues under the statute. The Inova money, I agree,
15 should come out of the corpus. Everything else I just
16 adopt the argument of counsel.

17 Thank you, Your Honor.

18 THE COURT: Mr. Schweiker.

19 MR. SCHWEIKER: Thank you, Your Honor.

20 Richard Schweiker with the Attorney General's
21 Office.

22 I just want to try to clarify some of the
23 confusion that I believe exists with respect to

1 designating the Commonwealth as taking judgment as
2 trustee. This isn't the issue of appointing the
3 Commonwealth or the Attorney General as special
4 receiver. The Court has indicated that that should be
5 reserved for a later date and then decide whether it's
6 appropriate to be the Attorney General or someone else.

7 This has to do just with the capacity in
8 which the Commonwealth takes judgment. It really --
9 it's typical, ordinary language that we use in orders
10 where we are obtaining a judgment that's either for
11 charitable purposes or being recovered on behalf of
12 others. A parallel-type situation would be in the
13 consumer protection context, where we obtain
14 restitution on behalf of consumers. And so it's just
15 designated that the Commonwealth is taking this as
16 trustee, and it's going to be for other purposes, and
17 the Court, of course will have final approval on that.

18 So I think there is some confusion in mixing
19 up these two different -- two different issues. And
20 that's the main point that I want to note. I think
21 it's been made clear that we just sort of pushed aside
22 this issue of there being a \$6.5 million bond posted,
23 and I don't think it would be accurate for the Court to

1 accept the assertion that \$2 million a year has been
2 spent each year just on upkeeping (sic) the property.

3 THE COURT: Mr. Kiyonaga, I have your
4 objection. I didn't know if you wished to be heard
5 further on that or not.

6 MR. KIYONAGA: No, Your Honor.

7 THE COURT: I have it here. What I'm going
8 to do is this, I'm going to take the decree -- the
9 Complainant's decree and I'm going to interlineate the
10 rulings in it, and then I will fax it to you all,
11 hopefully by Monday. So what I need you all to do is
12 before you leave here, leave a fax number with the
13 court administrator, and I will get this to you. Then
14 it can be put in final form and entered very, very,
15 promptly, because I want this done right away. I'll
16 try to get it to you on Monday.

17 MR. HIRSCHKOP: Would that include our
18 application for a stay and the supersedeas bond?

19 THE COURT: Well, we may have to face that
20 issue when an appeal is noted, because we need to see
21 who's appealing, whether both parties appeal or just
22 one. Quite frankly, I intended to reserve the
23 questions of bonds and supersedeas and everything else

1 until the time an appeal was noted, and then have a
2 further hearing to try to resolve that.

3 MR. HIRSCHKOP: It's clear we have 21 days
4 from whatever ruling you make before they can do
5 anything.

6 MR. BETTIUS: Your Honor, we wouldn't execute
7 on any judgments anyway.

8 THE COURT: I wouldn't think so. All right.
9 Thank you. I'll hopefully have it to you on Monday.

10 MR. BETTIUS: Your Honor, within the 21 days.


11 (Whereupon, at 9:35 a.m., the hearing in the
12 above-entitled matter was concluded.)

13 * * * * *

CERTIFICATE OF REPORTER

I, Eva M. Bridget, the Verbatim Reporter who was duly sworn to well and truly report the foregoing proceedings, do hereby certify that they are true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through any relationship with any of the parties at interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 13th day of February, 2001.


Eva M. Bridget
Verbatim Reporter

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

-----x

COMMONWEALTH OF VIRGINIA, et al.,

Complainants,

v.

LASZLO N. TAUBER, et al.,

Respondents.

-----x

Alexandria, Virginia

Friday, March 23, 2001

The above-entitled matter came on for hearing
before the Honorable Alfred D. Swersky, Judge, in and
for the Circuit Court of the City of Alexandria,
Virginia, 520 King Street, Courtroom 4, Alexandria,

Virginia, beginning at 9:00 a.m., before Eva M.

Bridget, Verbatim Reporter, when there were present on
behalf of the respective parties:

APPEARANCES:

On Behalf of the Complainants:

MARC E. BETTIUS, ESQ.

DEBRA FITZGERALD-O'CONNELL, ESQ.

Lawson & Frank

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RICHARD S. SCHWEIKER, JR., ESQ

Assistant Attorney General

Office of the Attorney General

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Richmond, VA 23219

On Behalf of the Respondents Tauber, et al.:

GASPARE J. BONO, ESQ.

Long, Aldridge & Norman, L.L.P.

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Washington, DC 20004

PHILIP HIRSCHKOP, ESQ.

Hirschkop & Associates

108 North Columbus Street

Alexandria, VA 22314

* * * * *

P R O C E E D I N G S

(Whereupon, the Court Reporter was sworn by the Court.)

* * * * *

MR. BETTIUS: Good morning, Your Honor.

THE COURT: I've read all of the materials submitted by the parties. Tell me, Mr. Bettius, is it the intent of the Complainant to pursue collection proceedings pending the appeal of this matter?

MR. BETTIUS: Yes.

THE COURT: All right. Tell me why I shouldn't grant the relief sought by the Respondents by way of suspending the bond.

MR. BETTIUS: Your Honor, we believe the law on this issue is perfectly clear. The Respondents offer us as security that which we already had. The Inova payments belong to the Commonwealth. The requirements with respect to the supersedeas are clear. And, Your Honor, I would refer to the case -- we cite only one case, Clinch Valley Lumber Corporation versus Hagan Estates, which is reported at 167 Va. 1.

When the legislature prescribes a method for exercise of the right of appeal or supervision, such a

1 method is exclusive, and neither the Court nor Judge
2 may modify these rules without express statutory
3 authority, and then only to the extent specified.

4 Your Honor, the issue is that we are entitled
5 to a suspension of this judgment, and we believe the
6 Court's discretion is limited to either a bond in the
7 amount sufficient to protect us for the full amount of
8 the judgment, a letter of credit or cash. Assets tend
9 to disappear. Inova is not a bonding company, they are
10 not a surety. We believe the Court, under Virginia
11 law, is duty bound if it's going to grant a
12 supersedeas, to provide an amount sufficient under
13 circumstances that comport with the statute.

14 THE COURT: What's the effect if I grant a
15 bond or make them post a letter of credit and the
16 judgment is suspended? Do you still get the -- do we
17 still get the \$177,000 a month paid to the general
18 receiver? Can you have both?

19 MR. BETTIUS: No, Your Honor. Absolutely
20 not. The point is they then have that judgment
21 suspended and they would have the money. Now, that
22 raises another very interesting issue, and that's the
23 validity of the existing bond.

1 Mr. Bono wants us to believe that that's a
2 supersedeas bond that protects him in this appeal.
3 Well, that's impossible. Our Supreme Court has ruled
4 that you cannot have a supersedeas bond under
5 circumstances where there's no appeal noted, and there
6 was not an appeal noted.

7 What occurred in this case was this Court
8 permitted riders to be executed to a bond to preserve
9 the status quo ante. There should now be present in
10 the breast of this Court \$9 million, and there is not,
11 because a bond was executed that allowed them to take
12 this money.

13 We intend to execute on that bond Monday
14 morning. I don't want there to be any doubt about
15 that, Your Honor. That bond is now due and payable.
16 It is not a supersedeas bond. It was a bond that was
17 granted by this Court to allow those payments to be
18 made.

19 There is a very cogent reason that the Court
20 requires that the bond be sufficient to answer for the
21 judgment. I'm not suggesting anybody's going to do
22 this, but in the normal course of events, as soon as
23 the judgment's entered and there is an appeal, assets

1 tend to float away. Assets tend to be dissipated.

2 Money gets moved offshore.

3 If we're going to suspend the execution of
4 this judgment today -- and this Commonwealth has
5 graciously extended past the 21-day period to these
6 Respondents the opportunity and has held off on
7 execution on the present bond and execution of this
8 judgment until this Court comes -- until they came to
9 this Court with a decision for a bond. If the Court
10 grants the supersedeas bond today, we believe that the
11 Court's discretion is narrowly, narrowly circumscribed,
12 and that any other ruling by the Court other than the
13 bond has to be in a sufficient amount to cover not only
14 the \$20 million, but an additional \$1.3 million in
15 interest.

16 Your Honor, we are entitled to that. The
17 people of the Commonwealth have waited 30 years for the
18 appropriate disposition of these charitable funds. The
19 Court has already allowed the Respondents in this case
20 to retain the bulk of the charitable funds.

21 I'm going to suggest to the Court that if
22 this bond is collected, and if the Inova money is, in
23 fact, subject to a constructive trust, that this case

1 settles or has a high probability of settling. If they
2 want to pursue this appeal, they have to do so do at
3 their own risk. But at the end of the day -- and it's
4 a very risky procedure, I submit, Your Honor, because,
5 with all frankness, the Commonwealth has never
6 understood what equitable principle allows them to
7 retain any part of this.

8 If they want to venture into that mine field,
9 let them go forth. But at the end of the day, the
10 Commonwealth is entitled to assurance, and the people
11 of the City of Alexandria and Northern Virginia are
12 entitled to an assurance that the funds are going to be
13 there to pay this judgment.

14 Your Honor, we believe the Clinch Valley case
15 says that. And it doesn't speak well of the
16 Respondents that they come in after all these years and
17 say we're going to give you as security what the Court
18 has already given you, and take possession of that \$7
19 million bond, which replaced the money that should have
20 been here today, because we should be able to walk down
21 to the court and say to the receiver give us \$9
22 million. That's what's supposed to be there.

23 Now they want to say we can't collect that

1 money, and at the end of the day we're supposed to
2 wait. There's a great misconception in their brief.
3 They assert that the purpose of the bond is to balance
4 the interest of the parties pending the outcome of the
5 appeal. That's hogwash. The purpose of the bond is to
6 give us, with surety, an assurance that at the end of
7 day the money is there in the full amount.

8 Your Honor, we believe the Court has
9 absolutely -- with all due respect, I say to you, Judge
10 Swersky, the Court has absolutely no discretion in this
11 matter.

12 THE COURT: Mr. Bono?

13 MR. BONO: Thank you, Your Honor.

14 With all due respect to the Commonwealth,
15 their position with respect to the Clinch case and, in
16 fact, their argument that this Court does not have
17 discretion is absolutely erroneous.

18 The Clinch case is a 1936 case, and it was
19 decided before the statute of the Code of Virginia
20 dealing with appeals and bonds was amended and revised
21 in 1984. The only thing the Clinch case was doing was
22 interpreting the statute at that time, which held that
23 bond was jurisdictional to an appeal, which was changed

1 by the Code of Virginia. It has no application.

2 In one of the other cases they cite --

3 THE COURT: Well, the clear language of the
4 statute, 676(C), says the court shall order an appeal
5 bond or irrevocable letter of credit. One of those two
6 is what it says.

7 MR. BONO: I respectfully disagree with the
8 Court. What it says is, if the appellants want to have
9 a stay as of right, we can post an appeal bond, and
10 then the suspension shall be granted by the Court.

11 It does not deprive this Court or any other
12 court of the authority to suspend or stay its own
13 order, which is the inherent authority of this Court to
14 stay or suspend its orders upon conditions which it
15 deems are just and proper.

16 We have researched Virginia case law, and
17 have looked at every case cited by the Commonwealth.
18 There is not one case that we are aware of, and not one
19 case cited by the Commonwealth which says what they
20 propose to this Court, which is that you have no
21 discretion and that the only way to get a suspension of
22 a decree is to post a bond or letter of credit.

23 I would suggest that law does not exist. We

1 haven't found it. They have not cited any case which
2 has so held. And as is customary, and as the language
3 of 676 says, what that provides is how the appellant
4 can obtain a suspension as of right. If we have the
5 ability to post a \$20 million bond, we can deposit it
6 with the Court, and the Court then has no discretion
7 not to suspend the judgment.

8 But apart from that, it does not take away
9 this Court's authority and discretion as a court of
10 equity to decide upon what terms and conditions its own
11 decree and order may be suspended pending appeal.

12 As Your Honor is aware, this is not your
13 typical case. This is a rather unique case. There are
14 many issues which will be reviewed by the Supreme Court
15 of Virginia, if they take the appeal, and we believe
16 what we have proposed is a very reasonable security by
17 which the Commonwealth is protected during either the
18 six months that the petition is under consideration by
19 the Supreme Court, or, if they were to grant that, the
20 appeal would be over within a year.

21 And we have proposed that there is \$2 million
22 in cash already with the Court. I offered to Mr.
23 Bettius that the existing bond that -- he told me he

1 had some problems with the language of the existing
2 bond, and I offered to amend that existing bond to make
3 it an appeal bond, which would be applicable to this
4 very decree so that there'd be no question about that,
5 and the continuing pledge of the Inova payments, which
6 Your Honor aptly said they can't have it both ways.
7 Your Honor has already taken those monthly payments.

8 And their only other argument is that well,
9 Inova is not sound enough of an entity during this one-
10 year period. Well, that's -- there's been no showing
11 to that effect. And if at some point later during this
12 appeal time there is any inkling that Inova would not
13 be able to make those payments, the Commonwealth can
14 come in here and ask for additional security at that
15 time.

16 And I would respectfully request that the
17 supplemental papers we filed yesterday show that we had
18 our expert calculate the present value of the Inova
19 payments, together with the bond already posted and the
20 cash, and there is \$24 million or in excess of that
21 value that we have proposed would be put up as security
22 to stay this judgment.

23 Otherwise, Your Honor, we are going to be

1 subject to individual collection actions during this
2 appeal period, which I think would be unfair and
3 unnecessary, because the Commonwealth is protected as
4 we have proposed.

5 Thank you, Your Honor.

6 THE COURT: Mr. Hirschkop?

7 MR. HIRSCHKOP: I must say the position of
8 Mr. Bettius defies the 37 years of experience I have.
9 Courts have fashioned supersedeas bonds repeatedly.
10 They have not just been surety. Mr. Bettius gives it
11 away when he says it can be cash or surety or a letter
12 of credit. The statute says nothing about cash. Cash
13 is not a surety. Well, we know it insures. What
14 better insurance can you have? But if you interpret it
15 literally, the question suggests -- I don't intend to
16 mean your suggestion in itself -- but then you could
17 have put up cash.

18 Or, if your judgment was for \$8 million in
19 this case, Mr. Bettius says we don't have the right
20 even to take the present bond and use it for surety. I
21 mean, I just don't understand their argument at all.

22 What is ignored in this whole thing is
23 section A of 676.1, the last sentence, if the appellant

1 wishes suspension of execution, the security shall also
2 be conditioned as provided in subsection C and shall be
3 in such sum as the trial court may require. So you do
4 have discretion.

5 THE COURT: To set the amount.

6 MR. HIRSCHKOP: Yes. And you can set the
7 amount --

8 THE COURT: Not necessarily the form. I
9 haven't ruled yet. Not necessarily the form, but I can
10 say you need \$12 million more or you need \$3 million
11 more. I can set the sum.

12 MR. HIRSCHKOP: Yes, sir. What I suggest to
13 you in a court of equity -- since there's no question
14 there's ample security for this judgment, Inova is a
15 billion-dollar corporation. Mr. Bono is absolutely
16 correct, the statute specifically says, during the
17 course an appeal, if the bond is inadequate, you can
18 apply to the trial court or the appellate court to
19 modify the bond.

20 So you could set an \$8 million or \$9 million
21 bond, conditioned upon those payments coming in each
22 month to the receiver. And the giveaway, again, on
23 this whole thing is Mr. Bettius saying you shouldn't

1 set a bond like that, because it will force an appeal.
2 It'll deny us -- it'll force a settlement. It'll deny
3 us the right to appeal. He was very plain and he was
4 very open and honest about it.

5 THE COURT: I don't think there's any secret,
6 Mr. Hirschkop. I've been trying for two years to get
7 you all to settle. I've done everything I can do.
8 I've beaten myself about the head and breast, to tell
9 you the truth, to get this case settled. I've done
10 about everything I can do.

11 MR. HIRSCHKOP: If the state court had a
12 procedural order for mediation like federal court --

13 THE COURT: I suggested -- I don't know how
14 many years ago it was I suggested mediation to you all.
15 I'm not saying there weren't efforts. There were, and
16 I remember some of them extensively, because you used
17 the conference room in my office to try to get the
18 matter resolved. But there isn't a case I've had in my
19 career that I've tried any harder to get the parties to
20 settle than this one.

21 MR. HIRSCHKOP: And there have been continued
22 efforts, Your Honor.

23 THE COURT: I understand that. I understand.

1 MR. HIRSCHKOP: But what I'm suggesting is
2 you can't be lured into the trap Mr. Bettius seeks to
3 set. You will deny us the right to appeal, because
4 we'll be forced to settle by a crippling judgment that
5 we can't bond. I mean, it's outrageous. He can walk
6 in there on Monday and take the money in the Court. If
7 it was only an \$8 million judgment, he could just take
8 everything. What's the appeal for? What's the
9 supersedeas for? What is the stay for?

10 Section A does give you that discretion. And
11 given, particularly, that this is an equity situation
12 -- given this is an equity situation, and clearly what
13 we have proposed would secure the judgment, that would
14 be the fair and judicious thing to do, and not deny us
15 the right to appeal.

16 Thank you.

17 MR. BETTIUS: Your Honor, may I be heard
18 briefly?

19 THE COURT: Yes, sir.

20 MR. BETTIUS: Your Honor, the present bond
21 cannot be security for this appeal. I cite as
22 authority to that --

23 THE COURT: But I could take into

1 consideration the fact that that bond is there and
2 available in determining an amount of any supersedeas
3 bond can't I, Mr. Bettius?

4 MR. BETTIUS: It's not there and it's not
5 available, Your Honor, because it was not conditioned
6 upon the riders and not conditioned on an appeal. You
7 are imposing if you do that.

8 We've all had in this Court great experience
9 with this bonding company. If you will recall, Judge
10 Kent once had to impose a \$20,000 a day contempt
11 citation against them to get them to pay a judgment.

12 It cannot be a supersedeas bond, Your Honor,
13 because there was no appeal pending. And that's what
14 the case says, and it's Branch versus Richmond Cold
15 Storage. This is not a supersedeas bond. It was
16 issued in terms of all the riders to protect the fund,
17 pending a decision of this Court as to how much was
18 subject to the judgment.

19 It is not a supersedeas bond. It could not
20 be a supersedeas bond pending appeal, because there was
21 no appeal pending at the time all of these riders went
22 on.

23 If Your Honor wants -- the first thing the

1 bonding company is going to come in and say is this
2 isn't a supersedeas bond, and you've now imposed an
3 additional obligation on the surety and we're
4 discharged.

5 And we want to back away from that.

6 THE COURT: I didn't follow that, Mr.
7 Bettius. Back up.

8 MR. BETTIUS: The additional obligation on
9 the surety is to pay all costs and judgment -- in
10 connection with the judgment.

11 Your Honor, I totally disagree with Mr.
12 Hirschkop and his interpretation of the statute that
13 you can set an amount less, because subsection C is
14 clear, security for suspension of execution. An
15 appellant who wishes execution of the judgment or award
16 for which an appeal is sought to be suspended during
17 the appeal shall be subject to the provisions of
18 subsection J, following an appeal bond or irrevocable
19 letter of credit conditioned upon the performance or
20 satisfaction of the judgment.

21 And there is only one amount that will
22 satisfy this judgment. It's not \$7 million, it's not
23 the Inova money, it's the payment of \$20 million -- at

1 this point \$21,300,000, plus accrued interest, during
2 the appeal. If Your Honor posts a bond -- posts a bond
3 for a lesser amount, it won't be conditioned upon
4 payment of the judgment. It won't accord with
5 subsection C.

6 Any argument -- and I've heard a lot of
7 arguments in this case I've never understood -- any
8 argument in this case to the contrary, that this
9 statute's not clear and the Court has some discretion
10 to issue a bond that doesn't require the payment and
11 satisfaction of the judgment and all interest and
12 costs, is extralegal in its support of the statute.

13 THE COURT: Mr. Bettius, by taking the
14 Commonwealth -- the Complainant taking the position
15 that it takes about the collection, do you realize
16 administratively what happens here if I require a
17 supersedeas bond and the payments have to stop? Then
18 we've got to notify Inova, then we've got to redirect
19 the payments, and then maybe six or eight months from
20 now we're back here again trying to redirect that.

21 Was there any consideration given to that
22 effect?

23 MR. BETTIUS: Your Honor, there is no effect

1 at all in that respect. All the Court does -- they can
2 continue to receive those payments. If the receiver is
3 discharged, we can execute on the -- there's no
4 suspension. We can execute on the cash, we can execute
5 on the bond, and we'll do that. We'll execute on that
6 bond and we'll execute on the cash and we will execute
7 on the Inova money.

8 So the money is going to keep going right
9 where it's going, Your Honor, because we have a lien on
10 it. We have a constructive trust on it. It's already
11 ours. There's no need for redirection, Your Honor.
12 That money is subject to the lien of our judgment, and
13 we have a right to collect it each and every month
14 until this judgment is satisfied.

15 It's just like anything else, Your Honor,
16 once the judgment's rendered against you, and it's a
17 very difficult thing, you are then caught in the
18 problem of having to pay the judgment. There is no
19 need for redirection. We intend to collect that money
20 by execution each and every month, in addition to the
21 \$7 million in cash that's already there.

22 What will happen is the Commonwealth isn't
23 going to distribute any of that money to counsel or

1 anybody else. The Commonwealth's going to hold that
2 money pending a resolution of this case, because if
3 there's a remand and ultimately they're successful,
4 we've got to repay the money. So the money is not
5 going anywhere. The Commonwealth has the right to
6 execute and get it, or, in the alternative, they have a
7 right to security coextensive with subsection C, which
8 says that that bond has to be in a sufficient amount to
9 satisfy the judgment, and the judgment is \$20 million.

10 I mean, Your Honor, any other construction of
11 this statute -- what is it you want to tell me, Debra?

12 Your Honor, their reliance on subsection A,
13 if you look at it, really doesn't apply to this
14 situation at all. That's the appeal bond. It applies
15 to the Court of Appeals. This appeal will not be
16 directed to the Court of Appeals. It's going to be
17 directed to the Supreme Court.

18 And under the section that deals with the
19 suspension of execution, the bond has to be coextensive
20 with the liability, and it has to be -- answer to the
21 judgment. You can't answer to the judgment for
22 anything less than that amount of money.

23 THE COURT: Mr. Hirschkop, I'm going to give

1 you -- wait a minute. I really am, quite frankly, a
2 little bit confused about the issue about the bond,
3 that having been some time ago.

4 How much is that bond that we're currently
5 holding now? What's the amount of that?

6 MR. BONO: Your Honor, it's over \$6.5
7 million. In our Exhibit C to our supplemental brief --

8 MR. BETTIUS: It's \$6.552 million.

9 MR. BONO: It's \$6,552,083.66.

10 THE COURT: What's your position, Mr. Bono
11 and Mr. Hirschkop, on what that bond is?

12 MR. BONO: Your Honor, I do not have a
13 problem, and I believe it solves the issue of whether
14 that bond is applicable to Your Honor's decree or not,
15 because I believe I can get a rider attached to that
16 that would make it applicable, if that's the issue
17 here, to this decree. And we have -- and we would be
18 able to do that. That's not the issue.

19 The issue is an amount above that number
20 which makes it impossible for us to deal with. So I
21 can make -- I can solve the Commonwealth's problem with
22 respect to the issue of is that bond -- can that bond
23 be made to be an appeal bond applicable to Your Honor's

1 decree. The answer is, I believe, yes. I believe I
2 can do that for the Commonwealth to remove that issue
3 from the Court.

4 THE COURT: Quite frankly, when I came in
5 this morning -- and I still -- I'm sorry, Mr.
6 Hirschkop. Go ahead. I'll give you a brief chance.

7 MR. HIRSCHKOP: I wanted to answer your
8 question to Mr. Bettius. A, the bond is a bond to
9 secure the judgment, ultimately. If the disposition is
10 correct, he can go and get the \$6.5 million on Monday,
11 and we still owe him \$20 million. You said what would
12 happen, and the nightmare procedure -- well, what could
13 happen is this, if we're forced to post the bond and we
14 did manage to post the bond, they can execute on
15 anything. We then get the Inova payments. Let's say
16 the Supreme Court grants our petition and sends it
17 back. The bond is gone, all the security is gone, all
18 the money you've tied up is gone, and they're back at
19 square one.

20 All you're doing is securing the money.
21 You've done that all along, by what we suggest.

22 THE COURT: All right. I, quite frankly,
23 spent some time looking for a way not to have to do

1 this, because I think it really -- it's really not the
2 proper way to do it. I thought, quite frankly, having
3 the \$177,000 a month being paid into the Court was
4 sufficient security to secure this judgment during the
5 time it's going to be suspended.

6 It's only going to be, hopefully with the
7 Supreme Court acting promptly, six to eight months
8 anyway. But, quite frankly, Mr. Bono and Mr.
9 Hirschkop, I don't think the statute leaves me any
10 discretion. I think the statute is clear that I have
11 got to require the posting of an appeal bond; that is,
12 a bond with surety or an irrevocable letter of credit
13 in an amount sufficient to pay to judgment.

14 What I'm going to do, however, is I'm going
15 to say that we have \$2 million in cash and I'm going to
16 direct, as a condition of this ruling, that the \$6.552
17 million -- that a rider be drafted to make this bond
18 applicable to the decree and this appeal, and I'll have
19 to order an additional appeal bond or irrevocable
20 letter of credit in the amount of \$12 million. I don't
21 have any choice but to do it, quite frankly, gentlemen.
22 I'd prefer not to have to do that.

23 MR. HIRSCHKOP: It's a lot of money. May we

1 have 21 days to do that, Your Honor?

2 THE COURT: What does the rule say about the
3 time limit? I know the Supreme Court has rules and
4 time limits that are mine fields, quite frankly, for
5 you if you don't watch them, Mr. Hirschkop. I'm
6 inclined to give you as much time as you need to do
7 that, because I recognize the problem, but you need to
8 watch the rules of the Supreme Court as to when these
9 -- the statutes as to when these bonds have to be
10 posted.

11 MR. HIRSCHKOP: Yes, sir. It's within the
12 discretion of the Court, as far as I've ever known, in
13 setting the supersedeas bond. We're already asking you
14 to stay your judgment for another 21 days, and the bond
15 is before you regardless of the 21 days.

16 THE COURT: Mr. Bettius?

17 MR. BETTIUS: Your Honor, I don't think you
18 have that discretion. Whether we can work something
19 out with them privately or not, if Your Honor will note
20 in the case of Aetna Casualty Company versus the Board
21 of Supervisors, the provision in this section is
22 authorizing the court or judge to enter an order
23 suspending the execution of judgment anytime within 30

1 days after the end of the term. At this point that
2 would be the end of the case. So I think it's --

3 THE COURT: I'm not sure what the end of the
4 term means anymore, quite frankly.

5 MR. BETTIUS: I don't know what it means
6 either.

7 THE COURT: Terms were abolished years ago.

8 MR. BETTIUS: Your Honor, we've already given
9 them the 30 days. I will tell you I am willing to sit
10 down and talk to counsel about this issue.

11 THE COURT: All right. Let's do this. Why
12 don't you all try to work something out. If you have a
13 problem, I'll be available by conference call and I'll
14 resolve it. But I am inclined, Mr. Bettius, to give
15 them as much time as they need to raise that, quite
16 frankly.

17 MR. BETTIUS: I will give them a reasonable
18 amount of time, Your Honor.

19 THE COURT: Twenty-one days doesn't seem
20 unreasonable to me, quite frankly.

21 MR. HIRSCHKOP: In the meantime, they can't
22 go down and grab that \$6.5 million. You've already
23 said we put a rider on that one.

1 MR. BETTIUS: Your Honor, there's no
2 suspension.

3 THE COURT: The decree is not suspended until
4 the bond is posted. Mr. Bettius, I won't say any more.

5 MR. BETTIUS: Your Honor, I will work --

6 THE COURT: What I said was if Mr. Bono --
7 I'll take him up on his offer to have this rider
8 attached to that bond. If that doesn't happen, then it
9 may be fair game.

10 How much time would you need to do that, Mr.
11 Bono?

12 MR. BONO: Two weeks, Your Honor.

13 THE COURT: All right. I'll make it a
14 condition that that rider be done within two weeks of
15 today's date. If it's not, Mr. Bettius, I suspect it's
16 fair game unless that bond is posted.

17 MR. BETTIUS: Yes, sir.

18 MR. BONO: Can I get a clarification, Your
19 Honor?

20 THE COURT: Yes, sir.

21 MR. BONO: In this interim period that --
22 Your Honor's decree is suspended so that they can't
23 start executing, is that my understanding?

1 THE COURT: Well, that's what I thought you
2 all were going to negotiate, the time in which to get
3 the bond posted. Perhaps Mr. Bettius would agree not
4 to execute for X amount of time. If you all can't
5 agree on that, then --

6 MR. BETTIUS: Your Honor, that would be my
7 recommendation to my client. I have no authority to
8 waive any rights of the Commonwealth in that respect,
9 nor does Mr. Schweiker. He'll take it up with the AG
10 and there'll be a recommendation.

11 THE COURT: If there is a problem, call me
12 Monday morning by conference call.

13 MR. HIRSCHKOP: The reason it's this morning
14 rather than Monday, I'll be gone the next two weeks.

15 THE COURT: Okay.

16 MR. HIRSCHKOP: I am representing the person
17 who, clearly, they're going to go after.

18 THE COURT: I suspect he's not the only one.

19 MR. HIRSCHKOP: I suspect he's the one
20 they're going to go after, Your Honor.

21 MR. BONO: Your Honor, may I ask for one
22 other clarification?

23 THE COURT: Yes, sir.

1 MR. BONO: If we somehow are able to post the
2 additional \$12 million bond, is it my understanding,
3 then, that the Inova monies will no longer be submitted
4 to the general receiver?

5 THE COURT: Exactly right.

6 MR. BONO: Thank you, Your Honor.

7 THE COURT: That's what I said. I should
8 have put it in the ruling, but I didn't, but that's
9 what I suggested earlier.

10 MR. BONO: Thank you, Your Honor.

11 THE COURT: Yes, sir. If that bond is
12 posted, that money goes back to you all.

13 MR. BONO: Thank you, Your Honor.

14 THE COURT: All right.

15 Mr. Hirschkop, maybe you can confer and have
16 somebody in your office available on Monday morning for
17 a conference call, if need be. I'm hoping you all work
18 that out. I think Mr. Bettius understands how I feel
19 about the matter.

20 MR. BETTIUS: That has great sway with me,
21 Your Honor, and I'm sure it does with Mr. Schweiker.

22 THE COURT: I hope so. All right. Thank
23 you. We stand in recess until 10:00.

1 (Whereupon, at 9:27 a.m., the hearing in the
2 above-entitled matter was concluded.)

3 * * * * *

CERTIFICATE OF REPORTER

I, Eva M. Bridget, the Verbatim Reporter who was duly sworn to well and truly report the foregoing proceedings, do hereby certify that they are true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through any relationship with any of the parties at interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my

hand this day of March , 2001.

Eva M. Bridget
Verbatim Reporter

MISTY KLAPPER & ASSOCIATES (703) 780-

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

-----x

COMMONWEALTH OF VIRGINIA, et al.,

Complainants,

v.

LASZLO N. TAUBER, et al.,

Respondents.

-----x

Alexandria, Virginia

Friday, April 20, 2001

The above-entitled matter came on for hearing before the Honorable Alfred D. Swersky, Judge, in and for the Circuit Court of the City of Alexandria, Virginia, 520 King Street, Courtroom 4, Alexandria, Virginia, beginning at 9:05 a.m., before Eva M.

Bridget, Verbatim Reporter, when there were present on behalf of the respective parties:

J.APP. 2784

APPEARANCES:

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1 everybody's signatures and objections noted. If it's
2 not there by Tuesday afternoon, I'll do my own decree.
3 as I've done in the past.

4 The other thing that concerns me, Mr. Bettius
5 -- and maybe I was subtle by too much the other day
6 when we were in court -- is about the status of the
7 existing bond and the existing cash that's in this
8 Court. That money is going to stay in this Court.

9 I have not yet appointed a receiver. I have
10 not yet determined whether or not the Attorney General
11 is an appropriate receiver, and to allow that money to
12 leave the Court to go to the Commonwealth would, in
13 effect, be saying that the Attorney General is the
14 receiver. That's going to stay here until we get the
15 receiver.

16 I'm going to let the receiver handle, if we
17 get there, the collection, the executions on the bond
18 and all of those other matters. So that money is just
19 going to stay right where it is.

20 MR. BETTIUS: Your Honor, with respect to the
21 executions on the bond, I was hoping the Court would
22 consider letting the Commonwealth proceed in that
23 matter so that we don't unduly burden the res with

PROCEEDINGS

1 (Whereupon, the Court Reporter was sworn by
2 the Court.)

3 *****

4
5 THE COURT: Counsel, I've read all of the
6 material that's submitted, including the material that
7 was submitted at 4:30 yesterday afternoon, and I'm
8 prepared to rule on these matters now, and I don't see
9 the need, quite frankly, for any further oral argument
10 in the matter.

11 The motion to reconsider the ruling of the
12 Court requiring the appellate surety is going to be
13 denied. I am going to require that the additional
14 \$12 million, Mr. Bono and Mr. Hirschkop, be secured for
15 the purposes of the appeal.

16 I'm going to suspend execution of this
17 requirement for about 30 days, that is, until May 21st
18 of this year, to give the Respondents an opportunity to
19 appeal this ruling and let the Supreme Court decide
20 whether or not the bond is sufficient.

21 That's a very simple decree, quite frankly.
22 to prepare, and I will expect Counsel will have that
23 decree on my desk by Tuesday afternoon, with

1 additional expenses.

2 I can understand every other concern that
3 Your Honor has with respect to that. I was also
4 wondering if Your Honor would be disposed, in order to
5 move the case along, to set a date by which we would
6 start coming on with a plan of distribution or a
7 suggestion of distribution to the Court.

8 THE COURT: I'm not prepared to do that,
9 Mr. Bettius. I think the matter needs to be decided by
10 the Supreme Court as to whether my decision is correct
11 or not -- whether my decision is correct or not.

12 MR. BETTIUS: We just didn't have any doubt
13 about that, Your Honor.

14 THE COURT: Never in doubt, often in error.
15 Isn't that what they say, Mr. Bettius?

16 Mr. Bono?

17 MR. BONO: Thank you, Your Honor. I
18 understand, Your Honor.

19 MR. BETTIUS: Inova will still continue to
20 make the payments to the receiver?

21 THE COURT: The payments are still in there.
22 Yes, that money's going to stay where it is and keep
23 coming in. All right?

1 MR. BETTIUS: Thank you, sir.
2 (Whereupon, at 9:07 a.m., the hearing in the
3 above-entitled matter was concluded.)
4 * * * * *

CERTIFICATE OF REPORTER

I, Eva M. Bridget, the Verbatim Reporter who was duly sworn to well and truly report the foregoing proceedings, do hereby certify that they are true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through any relationship with any of the parties at interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my
hand this 23rd day of April, 2001.

Eva M. Bridget
Verbatim Reporter

MISTY KLAPPER & ASSOCIATES (703) 780-