

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C James, Jr , Circuit Court Judge

Opinion No 4914 (S C Ct App Filed November 30, 2011)

RECEIVED

FEB 24 2012

SC Supreme Court

Stevens & Wilkinson of South Carolina, Inc ,
Gary Realty Company, Inc , Garfield Traub
Development, LLC, and Turner Construction
Company

Plaintiffs,

Of Whom

Stevens & Wilkinson of South Carolina, Inc
Gary Realty Company, Inc and Garfield Traub
Development, LLC are

Respondents,

vs

City of Columbia, Paul C "Bo" Aughtry III,
Windsor/Aughtry Co , Inc , Vista Hotel Partners,
LLC, and Hilton Hotels Corporation

Defendants,

Of Whom

City of Columbia is

Petitioner

APPENDIX - VOLUME III

Michael W Tighe
D Reece Williams, III
Richard C Detwiler
Kathleen M McDaniel
CALLISON TIGHE & ROBINSON, LLC
Post Office Box 1390
Columbia, South Carolina 29202-1390
Telephone (803) 404-6900
ATTORNEYS FOR PETITIONER

Richard A Harpootlian
Graham L Newman
RICHARD A HARPOOTLIAN, P A
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202-1090
Telephone (803) 252-4848
ATTORNEYS FOR RESPONDENT
STEVENS & WILKINSON OF SOUTH CAROLINA, INC

Kenneth M Suggs
Francis M Hinson, IV
JANET JENNER & SUGGS, LLC
500 Taylor Street, Suite 301
P O Box 927
Columbia, South Carolina 29202
Telephone (803) 726-0050
ATTORNEYS FOR RESPONDENT
GARY REALTY COMPANY, INC AND
GARFIELD TRAUB DEVELOPMENT, LLC

1 THE NEXT IRRELEVANT ALLEGATION IS THAT HE MISREPRESENTED
2 TO THE CITY COUNCIL THAT HE CAN INDUCE HILTON TO BREACH THE
3 OBLIGATION TO THE PLAINTIFFS' TEAM THAT'S IN THE BRIEF AND
4 IT'S IN MR GARFIELD'S AFFIDAVIT IT'S A CONCLUSION IT'S
5 BASED ON HEARSAY TESTIMONY BY MR GARFIELD, BUT THAT'S NOT
6 WHAT THE EVIDENCE IS I MEAN, THE COURT HAS BEEN THROUGH THE
7 EVIDENCE THREE OR FOUR TIMES WITH THESE LETTERS, AND AS MR
8 FOSTER HAS SAID, THE EVIDENCE IS CLEAR THERE WERE NO CONTACTS
9 BETWEEN HILTON AND AUGHTRY I THINK HIS EVIDENCE WAS -- HIS
10 ARGUMENT WAS NOT UNTIL RIGHT ABOUT THE TIME OF THESE LETTERS,
11 BUT CERTAINLY THERE WAS NO CONTACT BETWEEN -- THERE'S NO
12 EVIDENCE OF ANY CONTACT BETWEEN HILTON AND AUGHTRY GOING BACK
13 ON THE OTHER SIDE OF MARCH 17 ABOUT THIS HOTEL HERE OR ABOUT
14 THIS IDEA

15 SO THERE'S SIMPLY NO EVIDENCE TO SUPPORT THE IDEA THAT
16 AUGHTRY SAYS TO THE CITY COUNCIL HE COULD PERSUADE HILTON TO
17 BREACH AN OBLIGATION WITH THE PLAINTIFFS' TEAM NOBODY EVEN
18 KNOWS OF AN OBLIGATION THAT THERE WAS TO THE PLAINTIFFS'
19 TEAM, BUT CERTAINLY AUGHTRY DIDN'T SAY THAT THERE'S NO
20 EVIDENCE ABOUT THAT IT'S JUST IN THE BRIEF

21 AND THEN FINALLY THERE'S AN ALLEGATION THAT AUGHTRY
22 MISREPRESENTED HE HAD HILTON'S SUPPORT TO DELIVER A FULL-
23 SERVICE HOTEL WELL, WE'VE GOTTEN A LETTER FROM HILTON THAT
24 SAYS THEY'VE GOT HIS SUPPORT FOR A FULL-SERVICE HOTEL, JUST
25 NOT A HOTEL MANAGED BY HILTON A HOTEL FRANCHISE BY HILTON

1 AND NOT MANAGED BUT THERE'S NOT A QUESTION THAT HILTON SAID
2 THEY WOULD SUPPORT A HOTEL A FULL-SERVICE HOTEL, FRANCHISE
3 TO AUGHTRY WHICH IS ALL AUGHTRY HAS EVER SAID TO ANYBODY

4 SO THE ATTEMPT HERE IS TO STRETCH OUTSIDE THE TIMELINE
5 AND THEN TALK ABOUT SOME FRAUD SHAM EXCEPTION THERE'S NO
6 FRAUD SHAM EXCEPTION AND MOST OF THE CASES, INCLUDING THE
7 SUPREME COURT CASES, SAY A MISREPRESENTATION TO A LEGISLATIVE
8 BODY IS NOT SOMETHING THAT TRIGGERS LIABILITY BECAUSE THE
9 COURT CAN'T GET INTO GOING BEHIND LEGISLATION I MEAN,
10 BRIBERY YES DURESS, YES BUT NOT JUST PEOPLE TALKING TO A
11 LEGISLATURE THAT'S WHAT SEPARATION OF POWERS IS ABOUT

12 SO MY -- AND I'M NEAR THE END HERE I WON'T EVEN ARGUE
13 MY LAST POINT WHICH IS THAT -- THE SECOND PART OF OUR BRIEF
14 WAS THE POINT THAT INTERFERENCE WITH A CONTRACT IN SOUTH
15 CAROLINA AND IN MOST STATES REQUIRES THE CONDUCT OF THE
16 PERSON ALLEGED TO HAVE INTERFERED TO BE UNJUSTIFIED AND
17 WITHOUT JUSTIFICATION AND IMPROPER AND HERE WE'RE SAYING PUT
18 ~~ASIDE NOERR~~ IF THE CONTACTS THAT YOU ARE HAVING ARE PART OF
19 YOUR RIGHT TO PETITION GOVERNMENT UNDER THE SOUTH CAROLINA
20 CONSTITUTION AND THE UNITED STATES CONSTITUTION THEN AS LONG
21 AS YOU ARE EXERCISING A LEGAL RIGHT -- THE LAW IS VERY CLEAR
22 AS LONG AS YOU'RE EXERCISING A LEGAL RIGHT, YOUR MOTIVATION
23 DOES NOT MATTER THE QUESTION IS ARE YOU EXERCISING A
24 LEGAL RIGHT? AND IF YOU'RE EXERCISING A LEGAL RIGHT, THEN
25 THAT IS -- THEN YOU CANNOT BE PROVED TO DO SOMETHING IMPROPER

1 FROM THE STANDPOINT OF INTENTIONAL INTERFERENCE OF A
2 CONTRACT YOU'VE GOT TO BE DOING SOMETHING IMPROPER TO
3 INTERFERE WITH A CONTRACT WRONGFULLY, AND IF YOU ARE INSIDE
4 OF YOUR LEGAL RIGHTS, THEN YOU CAN'T BE DOING ANYTHING---

5 THE COURT LEGAL RIGHT WOULD BE?

6 MR PAUL TO PETITION GOVERNMENT, TO ASK GOVERNMENT TO
7 NOT HAVE A PUBLIC HOTEL IN -- A PUBLICLY-FINANCED HOTEL IN
8 COLUMBIA YOU HAVE A RIGHT TO DO THAT, THERE'S NOTHING WRONG
9 WITH THAT AND THE GOVERNMENT CAN DO WHAT IT DOES IT CAN
10 SAY NO, IT CAN SAY YES IT CAN SAY NOTHING BUT YOU
11 CERTAINLY HAVE A RIGHT TO ASK YOUR GOVERNMENT TO NOT FINANCE
12 A PUBLIC HOTEL IN COLUMBIA, AND THAT'S WHAT HE DID AND SO
13 WE'RE SAYING THAT THAT IS THE EXERCISE OF THE FIRST AMENDMENT
14 RIGHT TO PETITION AND IT CAN'T BE FOUND TO BE IMPROPER SO
15 YOU CAN'T SATISFY THE FIRST ELEMENT OF TORTIOUS INTERFERENCE
16 WITH CONTRACT

17 I SEE MR VAIL IS ANXIOUS TO JUMP UP AND GRAB A HOLD OF
18 ME SO I'M GOING TO SIT DOWN AND LET ME SAY THAT WE FILED
19 A -- WE FILED AN OBJECTION AND MOTION TO STRIKE THE GARFIELD
20 AFFIDAVIT IF THAT GETS ARGUED MR WARD WILL ARGUE IT
21 BECAUSE IT'S SOUTH CAROLINA LAW I DIDN'T KNOW WHAT THE
22 COURT'S PROCEDURE IS AND I CERTAINLY DON'T PROPOSE TO ARGUE
23 IT NOW BUT I DO WANT TO NOTE ON THE RECORD THAT WE HAVE
24 OBJECTED TO THAT

25 THE COURT ALL RIGHT MR VAIL? LET ME ASK YOU---

1 MR VAIL SO MUCH TO SAY

2 THE COURT LET ME ASK YOU ONE QUESTION BEFORE WE START
3 ULTIMATELY, WOULD THE JURY BE FACED WITH DETERMINING WHETHER
4 OR NOT THE IMMUNITY APPLIED UNDER NOERR-PENNINGTON OR WOULD
5 THAT AT SOME POINT BECOME A QUESTION OF LAW?

6 MR VAIL THAT IS -- TO ANY EXTENT IT DEPENDS ON
7 CONTESTED FACTS IT'S A JURY QUESTION, YOUR HONOR, BECAUSE
8 NOERR-PENNINGTON, UNLIKE CERTAIN OTHER FEDERAL IMMUNITIES
9 LIKE UNQUALIFIED IMMUNITY UNDER 1983, NOERR-PENNINGTON IS NOT
10 AN IMMUNITY FROM SUIT IT'S ONLY AN IMMUNITY FROM LIABILITY

11 THE COURT ALL RIGHT

12 MR VAIL AND IF YOU DON'T MIND I'LL PULL THIS OVER
13 HERE SO THAT I HAVE MORE PLACES I THINK YOU CAN BOTH SEE
14 ME, AND I CHECKED WITH THE COURT REPORTER AND WITH THAT LET
15 ME -- I WANT -- THERE WAS A THEME HERE ABOUT PRIVATE ACTORS
16 VERSUS PUBLIC ACTORS I WANT YOU TO HOLD THAT IN MIND
17 BECAUSE WE'RE GOING TO COME HERE, AND AS I SAID, THIS IS --

18 AGAIN, BECAUSE NOERR-PENNINGTON IS JUST IMMUNITY FROM
19 LIABILITY, NOT FROM SUIT IT'S SUBJECT TO THE USUAL SUMMARY
20 JUDGMENT STANDARDS AND I THINK, GIVEN WHAT WE'VE SEEN HERE
21 TODAY WITH FOURTEEN LAWYERS AND SIX HOURS SO FAR, THE -- YOU
22 KNOW, WE CAN DEBATE FOR A LONG TIME ABOUT WHAT THE FACTS ARE,
23 BUT THERE ARE FACTS IN CONTEST HERE THAT GO TO THESE POINTS
24 AND I'M GOING TO POINT SOME OF THEM OUT FOR YOU

25 BUT FIRST LET ME SET NOERR-PENNINGTON IN GENERAL BECAUSE

1 NOERR-PENNINGTON -- WHAT IT IS IS A DEFENSE OF FIRST
2 AMENDMENT VALUES, AND IT SAYS IF YOU'RE DOING SOMETHING
3 THAT'S PROTECTED BY THE FIRST AMENDMENT, YOU KNOW YOU
4 CAN'T -- YOU CAN'T BE SUED FOR IT YOU CAN'T -- ALL RIGHT?
5 SO THIS INCLUDES PETITIONING GOVERNMENT IT INCLUDES -- AND
6 NOTABLY, NOTABLY, AS MY OPPONENT DESCRIBED THE CASES THAT ARE
7 EXTANT HE TALKED ABOUT THEM SEEKING LEGISLATION THAT GOES
8 TO A KEY POINT HERE BECAUSE ONCE AN M O U -- THE M O U WAS
9 LET OKAY? REMEMBER FOR PURPOSES OF THIS MOTION WE'VE
10 AGREED THAT THE M O U IS AN ENFORCEABLE CONTRACT AS CONCEDED
11 FOR PURPOSES OF THIS MOTION ONLY BY THE DEFENDANTS

12 AT LEAST ONCE THE M O U IS MET, THERE ARE NO SOVEREIGN
13 ACTS FOR THE CITY TO PERFORM ABOUT WHAT KIND OF HOTEL AND
14 WHETHER IT'S PUBLICLY FUNDED THE CITY AT THAT POINT IS A
15 PARTICIPANT IN THE MARKET IT IS NOT ACTING AS A SOVEREIGN
16 IT'S ACTING AS A BUSINESS OWNER, AND THAT MEANS -- THAT IS A
17 KEY POINT - THE STATUS OF THE CITY - BECAUSE THAT RENDERS
18 THIS MORE OF A PRIVATE ACTION AND IT'S ABOUT COMMERCE AND
19 INDEED THERE IS A COMMERCIAL EXCEPTION TO NOERR-PENNINGTON IN
20 EXACTLY THIS WAY

21 IT IS ALSO -- THERE ARE FACTS FROM WHICH IT CAN BE FOUND
22 THAT MR AUGHTRY'S INVOLVEMENT IN THIS CASE IS REALLY ABOUT
23 COMMERCE THIS IS THE GARFIELD AFFIDAVIT YOU HAVE THAT I
24 CALL YOUR ATTENTION TO EXHIBIT T WHICH GOES BACK -- IT'S THE
25 2001 LETTER FROM MR AUGHTRY THAT WE JUST TALKED ABOUT, AND

1 HE'S, OF COURSE, TALKING ABOUT THIS ACTIVITY AND WHAT IT
2 SHOULD BE BUT HE NOTES THERE, "SPECIFICALLY I WOULD BE
3 INTERESTED IN DEVELOPING A HILTON GARDEN INN IN CONJUNCTION
4 WITH THE CENTER " SO AS EARLY AS 2001 MR AUGHTRY HAS
5 FLAGGED HIS COMMERCIAL INTEREST IN THIS PROJECT THE CITY IS
6 AWARE THAT IT IS ACTING AS A MARKET PARTICIPANT IN THE R F Q
7 WHICH IS EXHIBIT A AT PAGE 4, BATES 1-1644

8 THE COURT WHERE ARE YOU LOOKING NOW?

9 MR VAIL THIS IS THE GARFIELD AFFIDAVIT, EXHIBIT A

10 THE COURT OKAY

11 MR VAIL AND IT'S PAGE NUMBER 4 OF THAT EXHIBIT

12 "COMMISSION MEMBERS ARE NOT TO BE CONTACTED BY DEVELOPERS
13 DURING THIS QUALIFICATION AND SELECTION PROCESS " NOW IF
14 THE CITY IS ACTING IN A PUBLIC CAPACITY, THAT STATEMENT
15 ITSELF IS PROBLEMATIC FOR FIRST AMENDMENT PURPOSES BECAUSE
16 EVERYBODY'S GOT THE RIGHT TO PETITION THE CITY COUNCIL THE
17 CITY IS AWARE THAT IT'S ACTING AS A MARKET PARTICIPANT IT'S
18 EVIDENCE FROM WHICH A JURY CAN FIND THAT THE CITY IS ACTING
19 THAT WAY AND THAT THE CITY IS AWARE THAT IT'S ACTING THAT
20 WAY

21 THE R F P , THE SUBSEQUENT ONE FROM 2004, CONTAINS
22 ESSENTIALLY THE SAME CLAUSE MORE CRITICALLY ON MR
23 AUGHTRY'S PART, AGAIN ATTACHED TO THE GARFIELD AFFIDAVIT AS
24 EXHIBIT I I -- AND THIS IS HIS AUGUST 3RD, 2003, LETTER, AND
25 THIS LETTER IS AFTER THE M O U HAS BEEN READ, AFTER, AS

1 WE'VE CONCEDED FOR PURPOSES OF THIS MOTION, THERE IS A
2 BINDING CONTRACT BETWEEN GARY REALTY AND THE CITY HE NOTES
3 -- IT'S A LETTER TO THE MAYOR IT SAYS "MY THOUGHTS
4 REGARDING THE MARKET IN KEEPING WITH OUR CONVERSATION,
5 HERE'S A CONCEPTUAL OUTLINE OF MY PROPOSAL I WOULD ACQUIRE
6 FROM THE CITY THE SITE SURROUNDING THE SPACE THAT IS
7 CURRENTLY DESIGNATED FOR THE CONVENTION CENTER HOTEL " THAT
8 IS AN EXPRESSION OF COMMERCIAL INTEREST, NOT POLITICAL
9 INTEREST

10 WHY IS THAT IMPORTANT? I SAID NOERR-PENNINGTON IS ABOUT
11 PROTECTING FIRST AMENDMENT VALUES THERE ARE DIFFERENT KINDS
12 OF SPEECH THERE IS A HIERARCHY OF FIRST AMENDMENT VALUES
13 REGARDING SPEECH SPEECH PETITIONING THE GOVERNMENT, SPEECH
14 -- WHEN THESE EDITORIAL WRITERS WRITE AND THEY SAY YOU
15 SHOULDN'T PUBLICLY SUBSIDIZE A HOTEL, THAT'S CORE FIRST
16 AMENDMENT SPEECH AND THAT'S PROTECTED BUT COMMERCIAL
17 SPEECH WHEN SPEECH IS COMMERCIAL, IT'S PROTECTED ONLY IF IT
18 IS NEITHER MISLEADING NOR RELATED TO UNLAWFUL ACTIVITY NOW,
19 YOUR HONOR FOR PURPOSES OF THAT -- AND THAT'S CENTRAL HUDSON
20 GAS AND ELECTRIC CORPORATION WHICH IS CITED IN OUR BRIEF

21 INDUCING SOMEONE TO BREACH A CONTRACT IS UNLAWFUL
22 ACTIVITY MISLEADING SPEECH IS ALSO NOT PROTECTED AND
23 NEITHER ONE IS PROTECTED BY NOERR-PENNINGTON

24 THE COURT WHAT WAS MISLEADING HERE?

25 MR VAIL I'M GOING TO COME TO -- THERE ARE ALLEGATIONS

1 AND THERE IS -- THERE IS CONFLICTING EVIDENCE ON THIS BETWEEN
2 MR AUGHTRY AND MR GARFIELD ABOUT WHETHER NUMBERS
3 PROJECTIONS THAT MR AUGHTRY PROVIDED TO THE CITY PROVIDED IN
4 THIS DEBATE WERE ACCURATE OR WHETHER THEY WERE, IN FACT,
5 SELF-SERVING HIS COMMERCIAL INTERESTS AND, AGAIN, IF IT'S
6 FOUND THAT HE'S ACTING IN HIS COMMERCIAL CAPACITY, THESE
7 MISLEADING -- AND IF THESE THINGS ARE FOUND TO BE MISLEADING
8 THEY'RE NOT PROTECTED THEY'RE JUST LIKE ANYBODY ELSE
9 SEEKING TO BREACH A CONTRACT

10 THE COURT SO YOU COULDN'T GO TO YOUR LEGISLATOR AND
11 GIVE A BUNCH OF FALSE INFORMATION IN AN EFFORT TO TRY TO GET
12 THE LEGISLATURE TO ADOPT SOME ACT THAT WOULD BENEFIT YOU?

13 MR VAIL YOU CAN DO THAT THAT IS ABSOLUTELY
14 PROTECTED, BUT IN THAT CASE YOU ARE APPROACHING THE
15 LEGISLATURE IN ITS SOVEREIGN CAPACITY NOT IN ITS CAPACITY AS
16 A MARKET PARTICIPANT AND THAT'S THE DISTINCTION BETWEEN THE
17 TWO THINGS

18 THE COURT ARE THERE ANY CASES THAT SAY WHAT YOU SAY?

19 MR VAIL YES AND I THINK -- I'LL GO TO IT NOW AND LET
20 ME GO HERE I THINK -- WE'VE HAD A LOT OF TALK ABOUT CASES,
21 YOUR HONOR LET ME PULL THIS UP I HAVE PAGE -- I BELIEVE
22 IT'S 21 OF OUR BREACH -- BRIEF WE CITE THE LOCKHEED CASE
23 YEAH PAGE 21 OF OUR BRIEF THIS IS A VIRGINIA SUPREME COURT
24 CASE AND I BELIEVE THAT THIS IS THE CASE THAT'S MOST CLOSELY
25 FACTUAL -- FACTUALLY ANALOGOUS TO THIS CASE

1 IN THE LOCK -- THE LOCKHEED CASE INVOLVES BIDDING IT
2 INVOLVES -- THE STATE OF VIRGINIA DEPARTMENT OF SOCIAL
3 SERVICES WAS LETTING CONTRACTOR DATA MANAGEMENT SERVICES IN
4 ITS CHILD SUPPORT ENFORCEMENT DIVISION THERE WERE TWO
5 BIDDERS THAT RESPONDED TO A REQUEST FOR PROPOSALS, AND
6 NOTABLY, NOTABLY, IN THE LOCKHEED CASE THERE WAS NOT A
7 CONTRACT THERE WAS NOT AN EXISTING CONTRACT, BUT AFTER THE
8 BIDDING PROCESS THE STATE HAD ISSUED A NOTICE OF INTENT TO
9 CONTRACT WHICH WAS ESSENTIALLY AN ADMINISTRATIVE PROCEDURE TO
10 SAY THIS PERSON WON THE BID, AND IT TRIGGERED A POTENTIAL FOR
11 BID CHALLENGE

12 LOCKHEED THE LOSING BIDDER, I THINK IT'S FAIR TO SAY,
13 WENT A LITTLE OVER THE TOP AND THREATENED THAT IF THE OTHER
14 PARTY GOT THE BID THINGS WOULD GET BLOODY THAT'S WHAT THE
15 CASE SAID THE SUCCESSFUL BIDDER IN THAT -- THE STATE
16 PRESENTED THE BID AND THE SUCCESSFUL BIDDER SUED LOCKHEED
17 FOR INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIPS
18 WHICH IS AN ALLEGATION HERE - AND WE'LL COME BACK TO THAT -
19 ABOUT A SECOND WRONG THAT WE DISCERNED HERE

20 THE FIRST WRONG IS PROCURING THE BREACH OF THE M O U
21 NOW, LET ME READ A PARAGRAPH FROM THE LOCKHEED CASE THE
22 NOERR-PENNINGTON DOCTRINE WAS DEVELOPED AS A PROTECTION FOR
23 ENTITIES PETITIONING THE GOVERNMENT IN RELATION TO
24 LEGISLATIVE OR POLICY-MAKING MATTERS THE DOCTRINE WAS NOT
25 INTENDED TO SHIELD FALSE, MISLEADING OR OTHERWISE IMPROPER

1 CONDUCT BY BIDDERS FOR GOVERNMENT CONTRACTS PARTICULARLY
2 WHEN THE GOVERNMENTAL BODY IS ACTING AS A PRIVATE COMMERCIAL
3 ENTITY THE EXTENSION OF THE NOERR-PENNINGTON IMMUNITY TO
4 LOCKHEED'S ACTIONS IN THIS CASE WOULD REPRESENT A SIGNIFICANT
5 STEP BEYOND THE INTENDED BOUNDARIES OF THE DOCTRINE AND WOULD
6 CONTRAVENE THE POLICY BEHIND THE ESTABLISHMENT OF THE
7 DOCTRINE THE COMMERCIAL ACTIVITY AGAIN

8 IN THIS CONTEXT THE SUPREME COURT HAS DEFINED COMMERCIAL
9 SPEECH IN RUBIN VERSUS COORS BREWING - THAT'S CITED IN OUR
10 BRIEF - AS SPEECH THAT PROPOSES A COMMERCIAL TRANSACTION BO
11 AUGHTRY'S LETTERS CAN BE FOUND TO BE PROPOSING A COMMERCIAL
12 TRANSACTION WITH HIM THAT IS THE KIND OF SPEECH---

13 THE COURT WHICH LETTERS? THE ONES---

14 MR VAIL THE TWO THAT I'VE JUST TALKED ABOUT THE
15 2001 LETTER AND THE AUGUST 2003 LETTER OKAY? AND CAN BE --
16 THE ONLY WAY THAT THE CITY COULD ACCOMPLISH WHAT MR AUGHTRY
17 PROPOSED IN THE AUGUST 2003 LETTER WAS TO BREACH THE M O U
18 -IT IS A SOLICITATION TO THE CITY SEEKING COMMERCIAL BENEFIT
19 FOR MR AUGHTRY AND SEEKING -- ASKING THE CITY TO BREACH ITS
20 EXISTING CONTRACT THAT IS NOT CONDUCT THAT IS PROTECTED BY
21 NOERR-PENNINGTON

22 AT LEAST IF THAT NARRATIVE IS TRUE, THERE ARE CONFLICTS
23 IN THE OTHERS MR AUGHTRY WILL SAY OTHER THINGS BUT THOSE
24 FACTS NEED TO BE DETERMINED AND THOSE FACTS WOULD NEED TO BE
25 RESOLVED IN FAVOR OF MR AUGHTRY ON ALL POINTS IN ORDER TO

1 BRING THIS CASE WITHIN NOERR-PENNINGTON SO ONE OF MY POINTS
2 THERE IS SIMPLY THAT THE STATE OF THE EVIDENCE DOES NOT
3 PERMIT GRANTING SUMMARY JUDGMENT GRANTING NOERR-PENNINGTON
4 IMMUNITY REGARDING THE BAD ACT OF SEEKING THE BREACH OF THE
5 M O U

6 LET ME GO TO A SECOND POINT AND I HAVE CONFERRED WITH
7 MY COLLEAGUES HERE AND I WANT TO TALK -- THE SECOND CAUSE OF
8 ACTION ASSERTED -- I HAVE A THIRD AMENDED COMPLAINT AM I
9 ON

10 THE COURT LET ME -- THE BRIEF FOR THE OPPOSITION MEMO
11 THAT I'M LOOKING AT IS TO THE AUGHTRY DEFENDANT'S MOTION FOR
12 SUMMARY JUDGMENT ON THE 11TH, 12TH, AND 13TH AFFIRMATIVE
13 DEFENSES YOU RE STILL WITHIN THAT IS THAT CORRECT?

14 MR VAIL YES YES I'M TALKING ABOUT STUFF THAT IS
15 AFFIRMATIVELY WHAT WE HAVE PLEADED I WANT TO MAKE CLEAR AND
16 I'M AUTHORIZED TO SAY THAT TO ANY EXTENT THE SECOND CAUSE OF
17 ACTION IN THE THIRD AMENDED COMPLAINT, PARAGRAPH 42, ET SEQ
18 DO NOT MAKE IT CLEAR THAT THERE IS A SECOND DISTINCT WRONG
19 ABOUT WHICH WE ARE COMPLAINING AND WHICH IS NOT ABOUT A
20 BREACH OF CONTRACT BUT IT'S ABOUT AN INTERFERENCE WITH A
21 PROSPECTIVE ADVANTAGEOUS BUSINESS RELATIONSHIP AND---

22 THE COURT I THOUGHT THE CONTRACT ALREADY EXISTED

23 MR VAIL WELL---

24 THE COURT THE BUSINESS RELATIONSHIP ALREADY EXISTED

25 MR VAIL WHAT I WANT TO GO TO IS THE SECOND R F P

1 THE COURT OKAY

2 MR VAIL OKAY?

3 THE COURT THE ONE---

4 MR VAIL AFTER THE M O U IS REPUDIATED BY FLOATING
5 THE SECOND R F P , THERE IS FURTHER CONDUCT BY MR AUGHTRY
6 AND THE OTHER DEFENDANTS ABOUT WHICH WE COMPLAINED

7 THE COURT SO THAT CREATES A WHOLE NEW BOX FOR ME TO
8 LOOK INTO

9 MR VAIL THAT'S THE PROSPECTIVE BUSINESS BECAUSE AFTER
10 WE LOST THE FIRST BUSINESS RELATION, THE CONTRACT---

11 THE COURT EVEN IF THAT WAS PROPERLY DONE BY AUGHTRY,
12 YOU'RE SAYING THERE WAS ANOTHER THING---

13 MR VAIL THERE'S A SECOND WRONG THAT'S CORRECT

14 THE COURT AND WHERE IS THAT ALLEGED?

15 MR VAIL THAT IS -- WHAT I'M SAYING IS THAT IS
16 ALLEGED, WE BELIEVE, IN THE SECOND COUNT PARAGRAPH 42, ET
17 SEQ OF THE THIRD AMENDED COMPLAINT, AND TO ANY EXTENT IF
18 WHAT I SAY HERE IS NOT CLEAR FROM THE LANGUAGE OF THAT, WE
19 WOULD SEEK LEAVE TO AMEND ACCORDINGLY AND THAT SECOND
20 WRONG---

21 THE COURT I THINK ONE OF THE THINGS I ACTUALLY DON'T
22 HAVE -- I DON'T THINK I HAVE THE PLEADINGS IN THE CASE AT
23 ALL WELL I HAVE THEM UP HERE, BUT THOSE WEREN'T GIVEN TO
24 ME AHEAD OF TIME NOR SHOULD THEY HAVE BEEN

25 MR VAIL YOUR HONOR, WE CAN HAND UP A COPY---

1 THE COURT UNLESS IT'S IN THE AUGHTRY DEFENDANT'S BRIEF
2 BOOK
3 MR PAUL YOUR HONOR I DON'T BELIEVE IT IS
4 THE COURT ALL RIGHT
5 MR HINSON YOUR HONOR WOULD YOU LIKE ME TO HAND IT
6 UP?
7 MR VAIL THERE'S CLEARLY A DELINEATED ACCOUNT FOR
8 INTERFERENCE WITH PROSPECTIVE ADVANTAGEOUS RELATIONSHIP
9 THE COURT SO WE'RE TALKING ABOUT THE THIRD AMENDED
10 COMPLAINT WHICH IS THE---
11 MR VAIL THE ONE WE'RE WORKING FROM
12 THE COURT PARAGRAPH WHAT?
13 MR VAIL 42 AND FOLLOWING ABOUT PAGE 7 OR SO
14 THE COURT ALL RIGHT
15 MR VAIL ALL RIGHT? EVEN IF THERE HAD NEVER BEEN
16 A CON -- THE INITIAL CONTRACT, THE SECOND R F P COMES UP
17 GARY SUBMITS A PROPOSAL AUGHTRY SUBMITS A PROPOSAL GARY
18 LOOKS AT AUGHTRY'S PROPOSAL AND SAYS, I DON'T HAVE TO LOBBY
19 ABOUT THIS, ABOUT AUGHTRY'S PROPOSAL, BECAUSE AUGHTRY'S
20 PROPOSAL DOES NOT CONFORM TO THE BID SPECIFICATIONS IT DOES
21 NOT OFFER A FULL-SERVICE HOTEL
22 NOW THERE IS A DISAGREEMENT FACTUALLY ABOUT WHETHER IT
23 DOES SO IT RECITES A FULL-SERVICE HILTON GARDEN INN OR A
24 COURTYARD MARRIOTT ACCORDING TO---
25 THE COURT WHAT'S IT?

1 MR VAIL MR AUGHTRY'S BID PROPOSAL ACCORDING TO MR
2 GARFIELD TESTIFYING -- AND THIS GOES -- WE HAVE A MOTION TO
3 STRIKE SOME -- MANY PIECES OF THIS AFFIDAVIT THAT I THINK
4 YOUR HONOR AS I UNDERSTAND THINGS -- IT'S YOU'RE NOT
5 PERMITTED TO HEAR BECAUSE IT WAS NOT---

6 THE COURT WELL, THAT'S---

7 MR VAIL NOT MADE AT THE TIME YOU WERE

8 THE COURT THAT'S DEBATABLE

9 MR VAIL BUT IN ANY CASE---

10 THE COURT I THINK I CAN CONSIDER IT I HAVEN'T HAD A
11 CHANCE TO DIGEST EVERYTHING THAT WAS SUBMITTED, BUT I THINK
12 IT'S PROBABLY TECHNICALLY BEFORE ME

13 MR VAIL OKAY WELL, TO FORECAST ONE THING ABOUT
14 THAT IN RESPONSES TO INTERROGATORIES MADE ON BEHALF OF BOTH
15 HILTON AND AUGHTRY MR RAYMOND GARFIELD WAS IDENTIFIED AS
16 SOMEONE WHO WOULD GIVE EXPERT TESTIMONY IN THIS CASE AND
17 LET ME JUST SAY AS YOU CONSIDER THAT, BECAUSE I THINK WE

18 WON'T GET TO IT TODAY, THERE ARE -- THERE ARE TWO KEY POINTS
19 THAT ARE COMPLAINED ABOUT ABOUT THE ADMISSIBILITY QUALITY OF
20 MR GARFIELD'S TESTIMONY ONE IS THAT HE DOES NOT RECITE
21 THAT THESE THINGS ARE MADE OF HIS PERSONAL KNOWLEDGE, YOU
22 KNOW THE STANDARD RECITATION OFTEN SEEN IN AFFIDAVITS

23 HE MAKES AN ALTERNATIVE ASSERTION HE SAYS THAT I WILL
24 TESTIFY COMPETENTLY ABOUT THESE THINGS YOU CANNOT TESTIFY
25 COMPETENTLY UNLESS YOU TESTIFY FROM PERSONAL KNOWLEDGE OR IN

1 THE EXPERT CAPACITY UNDER 702 FROM THE KINDS OF EVIDENCE THAT
2 EXPERTS RELY ON ROUTINELY TO MANY THINGS AND MR GARFIELD
3 TESTIFIES AS AN EXPERT IN THE HOTEL INDUSTRY AND ASSERTS IN
4 PARAGRAPH 22, WHICH IS OBJECTED TO ON THE BASIS OF HEARSAY --
5 GIVES HIS PROFESSIONAL OPINION THAT IT'S WELL---

6 MR WARD YOUR HONOR I'M GOING TO HAVE TO OBJECT TO
7 HIS OPINION COMING IN AS EVIDENCE BECAUSE HE HASN'T BEEN
8 QUALIFIED AS AN EXPERT IN THIS CASE

9 THE COURT WELL---

10 MR WARD AND---

11 THE COURT ---I DON'T KNOW HOW TO -- I DON'T KNOW HOW
12 TO QUITE ADDRESS THAT UNLESS I LEAVE THE ROOM WHILE Y'ALL
13 TALK ABOUT IT I DON'T KNOW

14 MR VAIL AND, AGAIN, WE'RE AT THE AFFIDAVIT STAGE
15 YOUR HONOR IT'S A FORECAST---

16 THE COURT I THINK I CAN HANDLE THE ADMISSIBILITY OF
17 THE AFFIDAVIT, PROBABLY WITHOUT MUCH ARGUMENT, BUT GO AHEAD,
18 MR WARD

19 MR WARD MY THOUGHT AND SUGGESTION BECAUSE WE GAVE
20 THIS MUCH THOUGHT KNOWING THAT IT WOULD BE AN ISSUE AND
21 I'LL -- YOU KNOW, OUR OBJECTION IS THAT THE AFFIDAVIT'S NOT
22 ON PERSONAL KNOWLEDGE IT HAS TO BE FACT TO BE ADMISSIBLE
23 THEREFORE UNDER 602 IT'S NOT ADMISSIBLE, AND ANYTHING IN
24 SUPPORT OF THE SUMMARY JUDGMENT HAS TO BE ADMISSIBLE THAT'S
25 HORNBOOK LAW I THINK THAT---

1 THE COURT OR IN OPPOSITION TO IT

2 MR WARD YES SIR AND AS WE SEE IT THE COURT MAY
3 EITHER RULE NOW ON GARFIELD'S AFFIDAVIT AND STRIKE IT IN ITS
4 ENTIRETY, WE THINK, AND WE CAN ARGUE---

5 THE COURT RIGHT NOW?

6 MR WARD WELL, WE CAN ARGUE THAT POINT

7 THE COURT OKAY

8 MR WARD OR THE COURT COULD TAKE THE AFFIDAVIT AND OUR
9 OBJECTION UNDER ADVISEMENT AND WHEN AND IF YOU CRAFT AN
10 ORDER IF YOU'RE GOING TO RELY UPON THE GARFIELD AND THE
11 OTHER SUB-AFFIDAVITS OF GARFIELD, YOU WOULD NEED TO ADDRESS
12 ON THE RECORD, IF YOU WOULD IN THE ORDER OUR OBJECTIONS AS
13 TO WHETHER OR NOT YOU ARE GOING TO OVERRULE THEM OR SUSTAIN
14 THEM, AND PROCEDURALLY THAT WOULD MAKE IT FLOW MUCH BETTER
15 WE'RE VERY RELUCTANT TO ALLOW THE ARGUMENT ON THE AFFIDAVIT,
16 THEREBY WAIVING IT---

17 THE COURT WELL, IT'S ALL SUBJECT TO YOUR OBJECTION

18 MR WARD -- YES -- SIR --

19 THE COURT CAN WE JUST DO IT LIKE THAT?

20 MR WARD YES, SIR

21 THE COURT ALL RIGHT

22 MR WARD AND THEN I THINK THAT IN YOUR ORDER, IF YOU
23 GET TO THAT POINT, YOU WOULD TOUCH UPON IT

24 THE COURT ALL RIGHT THANK YOU

25 MR VAIL YEAH THAT'S FINE BY US YOUR HONOR I'M

1 JUST TRYING TO FORECAST THAT IT IS OBJECTED TO

2 MR WARD THANK YOU

3 MR VAIL OKAY BUT MR GARFIELD ASSERTS THAT WHAT'S A
4 FULL-SERVICE HOTEL IS A TERM OF ART WITHIN THE INDUSTRY AND
5 THAT THE PROPERTY DESCRIBED IN THE AUGHTRY BID DOES NOT
6 SUFFICE CAN'T MEET THE STANDARDS OF THAT DEFINITION THEN
7 THERE ARE THEIR MEETINGS WITH THE CORPORATION, TO THE HOTEL
8 HOLDING CORPORATION, AND THE CITY COUNCIL ANOTHER SIDE BAR
9 POINT HERE, YOUR HONOR, ON THE THINGS ABOUT LOBBYING AND
10 PRIVATE BODIES TO ANY EXTENT ANY OF THE PETITIONING
11 ACTIVITY IS ADDRESSED TO THE HOTEL CORPORATION, THE HOTEL
12 CORPORATION IS A PRIVATE BODY, NOT A PUBLIC ENTITY OKAY
13 SO THAT'S COME BACK FROM THAT

14 THE COURT THAT GOES TOWARDS YOUR MARKET PARTICIPANT---

15 MR VAIL YES ABSOLUTELY

16 THE COURT ---ARGUMENT?

17 MR VAIL ABSOLUTELY THE -- AT THAT POINT THERE ARE
18 EX PARTE MEETINGS WE -- THE GARY PEOPLE HAVE NOT WORRIED
19 ABOUT TRYING TO INFLUENCE ANYTHING BECAUSE THEY'RE SECURE IN
20 THEIR KNOWLEDGE THAT AUGHTRY'S BID IS NON-CONFORMING AT
21 THAT MEETING AUGHTRY OFFERS A DIFFERENT KIND OF HILTON, THE
22 HILTON WITH THE BIG RED H AND THAT IS -- YOU'VE HEARD ABOUT
23 THE FLURRY OF ACTIVITY AND THE LETTERS FROM HILTON AFTERWARDS
24 ABOUT THAT

25 THE COURT SO WHAT IS -- WHAT IS WRONG OR WHAT'S

1 RELEVANT ABOUT AUGHTRY'S, AS YOU PUT IT INITIAL PROPOSAL NOT
2 TO PROVIDE A FULL-SERVICE HOTEL? HOW DOES THAT ENTER INTO
3 THIS AT ALL?

4 MR VAIL AUGHTRY'S EX PARTE PRIVATE SECRET CHANGING OF
5 THAT DEPRIVED---

6 THE COURT WITH WHO?

7 MR VAIL WITH THE CITY

8 THE COURT ALL RIGHT

9 MR VAIL WHEN THE CITY MET WITH THE BID PEOPLE ON MAY
10 20TH

11 THE COURT AND IS THAT -- IS THAT ESTABLISHED BY
12 ANYTHING OTHER THAN CIRCUMSTANCE? IS THERE EVIDENCE OF SUCH
13 A MEETING?

14 MR VAIL OH, YEAH YEAH THESE ARE -- THESE WERE --
15 THESE WERE THE MEETINGS THAT WERE HELD EACH OF THE BIDDERS
16 WAS INVITED THE FINALIST BIDDERS WAS INVITED---

17 THE COURT THE PRESENTATIONS

18 MR VAIL - YES, TO MAKE THESE PRESENTATIONS

19 THE COURT OKAY

20 MR VAIL AND THIS PRESENTATION IS EX PARTE THE
21 PUBLIC IS NOT PERMITTED TO BE THERE

22 THE COURT SO IT'S NOT -- IT'S NOT INAPPROPRIATE FOR IT
23 TO BE EX PARTE, IS IT?

24 MR VAIL I DON'T BELIEVE SO

25 THE COURT OKAY WELL, THE WAY YOU PUT IT I THOUGHT

1 YOU SAID---

2 MR VAIL YEAH

3 THE COURT ---EX PARTE IS -- EX PARTE IN SECRET

4 MR VAIL I'M SORRY IN SECRET AND WHAT'S IMPORTANT

5 ABOUT IT IS THAT IN SECRET THE BID TERMS CHANGE, DEPRIVING

6 THE GARY PLAINTIFFS OF THE OPPORTUNITY TO SPEAK ABOUT THAT

7 NOERR-PENNINGTON---

8 THE COURT ABOUT THE OTHER PERSON'S BID

9 MR VAIL BINGO NOERR-PENNINGTON DOES NOT PROTECT---

10 THE COURT HOW DO YOU KNOW THAT HAPPENED? JUST BECAUSE
11 THE BID WAS CHANGED?

12 MR VAIL THE BID CHANGED

13 THE COURT ALL RIGHT SO HOW DO YOU KNOW THAT WAS THE

14 PRODUCT OF A COMMUNICATION BETWEEN THE TWO? AND WHAT'S THE

15 -- WHAT'S---

16 MR VAIL IT WAS THE CONFIRMATION FROM HILTON THAT

17 HILTON HAD TALKED TO AUGHTRY ABOUT THE BID CHANGING IN THAT

18 MEETING SO THAT SERIES OF LETTERS---

19 THE COURT FROM '04

20 MR VAIL ---THAT WAS AT ISSUE, YES, IN THE SUMMARY

21 JUDGMENT MOTION WITH HILTON---

22 THE COURT ALL RIGHT

23 MR VAIL ---ESTABLISHED THAT THAT WAS THE CASE

24 NOERR-PENNINGTON DOES NOT PROTECT THAT CONDUCT BECAUSE NOERR-

25 PENNINGTON DOES NOT PROTECT CONDUCT THAT IT SELF-SUPPRESSES

1 FREE SPEECH OR THE OPPORTUNITY TO PETITION

2 THE COURT AND YOU'RE SAYING THAT THAT IRREGULARITY IF
3 THAT'S WHAT YOU CALL IT, WAS---

4 MR VAIL IS A CAUSAL FACTOR---

5 THE COURT IN THE PROSPECTIVE -- IN INTERFERING WITH A
6 PROSPECTIVE BUSINESS RELATIONSHIP

7 MR VAIL THAT'S CORRECT

8 THE COURT SO WOULDN'T ALL THE OTHER BIDDERS HAVE THAT
9 SAME CLAIM?

10 MR VAIL YES, THEY WOULD

11 THE COURT AND WOULD YOU HAVE TO SHOW THAT YOUR BID
12 WOULD HAVE BEEN ACCEPTED BUT FOR THAT---

13 MR VAIL I THINK THAT WOULD BE PART OF OUR BURDEN OF
14 PROOF

15 THE COURT HOW ARE YOU ABLE TO PROVE THAT?

16 MR VAIL WE WOULD PROVE THAT SIMPLY BY SAYING THAT WE
17 HAD A BID THAT CONFORMED

18 THE COURT - OKAY

19 MR VAIL THIS WAS NOT A PERMISSIBLE BID AMENDMENT AT
20 THIS POINT IN THE BIDDING PROCESS

21 THE COURT ALL RIGHT COULD CONCEIVABLY THESE
22 DEFENDANTS BE OBLIGATED TO THREE DIFFERENT BIDDERS FOR LOST
23 PROFITS OR WHATEVER DAMAGES WOULD FLOW FROM THEM NOT GETTING
24 THE BID?

25 MR VAIL I THINK YOU -- YOU WOULD HAVE A CONTEST OF

1 WHO COULD SHOW THAT THEIR BID WOULD HAVE WON OTHERWISE

2 THE COURT A CASE WITHIN THE CASE?

3 MR VAIL POTENTIALLY BUT, YOU KNOW, THAT WOULD BE AN
4 ELEMENT OF YOUR DAMAGES, TOO YOU'D HAVE TO SHOW THAT YOUR
5 BID WOULD HAVE WON

6 THE COURT THE CITY---

7 MR VAIL SO THE CITY WOULD ONLY WIND UP BEING LIABLE
8 TO ONE LET ME GO - I GAVE YOU -- I THINK THE LOCKHEED CASE
9 WAS WORTH YOUR ATTENTION, YOUR HONOR THE AUGHTRY DEFENDANTS
10 RELY PARTICULARLY ON TWO CASES THAT I WANTED TO TALK ABOUT
11 BOTH FEDERAL CASES, A FISHERMAN'S BEST, WHICH DEALT WITH --
12 WHICH DEALT WITH A DISPUTE IN CHARLESTON ABOUT WHETHER
13 COMMERCIAL FISHERMEN OR RECREATIONAL FISHERMEN WOULD CONTROL,
14 YOU KNOW THE USAGE OF A PUBLIC DOCK AND LET ME KEY --
15 THERE WAS -- THERE WAS NO LIABILITY FOUND THERE

16 THERE WERE THESE TWO PEOPLE WHO WERE -- YOU KNOW THEY
17 WERE GOING BACK AND FORTH ABOUT WHO SHOULD GET THE DOCK, WHO
18 SHOULD GET THE DOCK AND LET ME READ A KEY FINDING FROM THAT
19 CASE TO YOU BECAUSE THESE WERE COMPETITORS FOR THE DOCK
20 SPACE AND IT SAYS, "COMPETITIVE BIDDERS ARE FREE TO LOBBY
21 THE RELEVANT GOVERNMENT, BUT THEY CANNOT DO SO BY CORRUPTING
22 THE BID PROCESS THE ABOVE CASES" -- THERE'S SOME CASES
23 CITED

24 THE COURT ARE YOU TALKING ABOUT THE SECOND R F P 'S OR
25 THE FIRST?

1 MR VAIL THIS IS---

2 THE COURT EXCUSE ME

3 MR VAIL THIS WOULD GO TO BOTH OF THEM

4 THE COURT ALL RIGHT

5 MR VAIL "REAFFIRM THAT LOBBYING EFFORTS INVOLVING
6 COMPETITIVE PROPOSALS CAN BE A SHAM IF OTHER EVIDENCE
7 INDICATES THAT CORRUPT OR QUESTIONABLE PRACTICES ARE
8 INITIATED BY A COMPETITOR DIRECTLY INVOLVED WITH THE BIDDING
9 PROCESS " IN THAT CASE THE NEXT SENTENCE IS THAT THE PARTY
10 WHO WAS FOUND NOT LIABLE THERE WAS NOT A COMPETITOR THAT'S
11 THE DIFFERENCE THAT'S A KEY DIF -- THE FACTUAL DISTINCTION
12 BETWEEN A FISHERMAN'S BEST AND THIS CASE

13 THE COURT WHEN YOU CITE A FISHERMAN'S BEST ON PAGE 22
14 WHERE IS THAT QUOTE THAT YOU'RE TALKING ABOUT?

15 MR VAIL I DON'T KNOW THAT WE CITED THAT I DON'T
16 KNOW THAT WE CITED DIRECTLY TO THAT LANGUAGE I DON'T HAVE A
17 PINPOINT CITE HERE FOR YOU

18 ~~THE COURT~~ -- OKAY --

19 MR VAIL AND THE DEFENDANT ALSO RELIES ON THE B M W
20 CASE I GATHER THERE'S PROBABLY A CASE OF SOME NOTE HERE
21 ABOUT B M W BUILDING A FACILITY AT CLEMSON AND THERE --
22 AND THIS IS AT PAGE STAR 23 OF THAT OPINION THEY FOUND --
23 ONE OF THE -- THEY FOUND THAT THERE WAS NO INTERFERENCE WITH
24 A PROSPECTIVE BUSINESS ADVANTAGE BECAUSE THE PLAINTIFF
25 ALREADY HAD REALIZED ALL THE ADVANTAGE THAT HE COULD HAVE

1 REALIZED IN THAT CASE HERE THAT'S NOT TRUE BECAUSE THE
2 GARY PLAINTIFFS DIDN'T BUILD THE HOTEL, THE AUGHTRY
3 DEFENDANTS DID THAT'S A KEY FACTUAL DISTINCTION BETWEEN
4 B M W AND THIS CASE WE CITED THE VENETIAN CASINO CASE WITH
5 THE IDEA THAT---

6 COURT REPORTER WHAT WAS THAT? REPEAT THE CITE---

7 MR VAIL WE CITED THE VENETIAN CASINO CASE AT PAGE 27
8 OF OUR BRIEF NUMBER FOR THE IDEA THAT IN NOERR-PENNINGTON
9 DECISIONS CONTEXT MATTERS THE FACTS MATTER AND THERE ARE
10 CONTESTED FACTS HERE AND TO THE EXTENT THERE ARE
11 UNCONTESTED FACTS THERE IS -- YOU KNOW, MR AUGHTRY'S LETTER
12 OF AUGUST 8TH, 2003 I THINK IS A DAMNING FACT AND IT'S NOT
13 CONTESTED IT'S AN ADMISSION

14 THE COURT AND WHAT DOES HE SAY IN THAT LETTER?

15 MR VAIL THAT'S THE LETTER THAT TALKS ABOUT -- THAT
16 SAYS -- THAT'S THE LETTER THAT COMES AFTER THE M O U IS IN
17 EXISTENCE AND SAYS YOU SHOULD DO SOMETHING DIFFERENT I
18 WOULD LIKE TO BUILD SOMETHING DIFFERENT HERE'S HOW I CAN DO
19 IT, AND LET'S DO IT AND THE ONLY WAY TO DO IT IS TO BREACH
20 THE M O U THAT'S CLOSE TO SUMMARY JUDGMENT FOR US

21 THE COURT WHERE -- WHERE IS THAT LETTER? WHAT EXHIBIT
22 IS THAT?

23 MR VAIL THAT'S EXHIBIT I I TO THE RAYMOND GARFIELD
24 AFFIDAVIT

25 THE COURT OKAY

1 **MR VAIL** AT PAGE 26 OF OUR BRIEF WE CITED YOU THE CASE
2 OF LANHAM VERSUS BLUE CROSS BLUE SHIELD WHICH STANDS FOR THE
3 PROPOSITION THAT THE QUESTION OF INTENT TO DECEIVE IS FACTUAL
4 AND IT'S FOR A JURY

5 **COURT REPORTER** WOULD YOU SPELL IT PLEASE?

6 **MR VAIL** LANHAM? L-A-N-H-A-M

7 **COURT REPORTER** THANK YOU

8 **MR VAIL** VERSUS BLUE CROSS BLUE SHIELD THE
9 DEFENDANTS PRESENTED YOU WITH A NARRATIVE ABOUT THIS CASE
10 WE'RE PRESENTING YOU WITH AN ALTERNATIVE NARRATIVE IT'S NOT
11 UNUSUAL IN LAWSUITS THAT'S WHY YOU HAVE LAWSUITS WHEN YOU
12 HAVE ALTERNATIVE NARRATIVES -- HERE YOU HAVE TWO ALTERNATIVE
13 NARRATIVES

14 THERE ARE FACTUAL CONTESTS ABOUT WHAT FACTS SUPPORT
15 THOSE NARRATIVES THAT MEANS THAT A JURY DECIDES WHICH
16 NARRATIVE, IN FACT IS THE ONE UPON WHICH WE WILL PUT THE
17 IMPRIMATUR OF A JUDGMENT ON THE COURT

18 **THE COURT** WHAT IF -- WHAT IF IT WERE DETERMINED AS A
19 MATTER OF LAW THAT THE M O U WAS NOT A CONTRACT BETWEEN THE
20 CITY AND THE PLAINTIFFS?

21 **MR VAIL** THE---

22 **THE COURT** WOULD THAT---

23 **MR VAIL** IT'S ULTIMATELY -- THE UNDERSTANDING IS, YOU
24 KNOW, IT'S NOT CONTESTED FOR PURPOSES OF THIS MOTION, BUT
25 ULTIMATELY THERE'S GOT TO BE A DETERMINATION IN THAT CASE

1 YOU WOULD STILL HAVE A CLAIM FOR INTERFERENCE WITH THE
2 PROSPECTIVE BUSINESS RELATIONSHIP

3 THE COURT UNDER THE SECOND R F P

4 MR VAIL YEAH ALSO UNDER THE FIRST R F P

5 THE COURT IT JUST WOULD BE INDEPENDENT OF A CONTRACT

6 MR VAIL IT WOULD BE INDEPENDENT IT WOULD BE A
7 PROSPECTIVE ADVANTAGE AND NOT A CONTRACT, YES, BUT IT WOULD
8 BE IN THE SAME TORTIOUS ACT

9 THE COURT AND THE INTERFERENCE WITH THE FIRST R F P
10 OR THE FIRST M O U WOULD -- HELP ME OUT THERE HOW IS THAT
11 -- HOW IS THAT---

12 MR VAIL WELL THAT GOES TO THE ALLEGATIONS THAT MR
13 AUGHTRY WAS -- WAS PROVIDING INACCURATE INFORMATION TO THE
14 CITY IN ITS COMMERCIAL CAPACITY ABOUT THE RELATIVE ADVANTAGES
15 OF THE DIFFERENT PROPOSALS

16 THE COURT WHAT ABOUT MR -- WELL, WHAT ABOUT THE
17 DEFENDANT'S ARGUMENT FROM MR PAUL THAT MARCH 17TH OR APRIL 2
18 IS THE CUT-OFF DATE FOR MY ANALYSIS OF ANY WRONGFUL CONDUCT
19 BY AUGHTRY WITH REGARD TO THE M O U ? IS HE CORRECT WITH
20 THAT? IS THE CONDUCT AFTER THAT DATE NOT PROBATIVE OF
21 ANYTHING? IT'S JUST---

22 MR VAIL RELATED TO---

23 THE COURT ---ICING ON THE CAKE?

24 MR VAIL THAT'S -- I THINK TO THE EXTENT THAT IT MIGHT
25 BE -- THAT SUBSEQUENT CONDUCT IS EVIDENCE OF A CONTINUING

1 LINE OF ACTIVITY, I THINK THE EVIDENCE COULD BE USED IN THAT
2 DAY, BUT I THINK THAT IT IS CORRECT THAT FOR -- THE DAMAGE IS
3 DONE AS OF THEN

4 THE COURT ALL RIGHT

5 MR VAIL BUT IT DOES NOT MEAN THAT THE SUBSEQUENT
6 CONDUCT COULD NOT BE EVIDENCE THAT THAT KIND OF CONDUCT WAS
7 PART OF A CONTINUING LINE OF CONDUCT

8 THE COURT ALL RIGHT ALL RIGHT ANY RESPONSE, MR
9 PAUL? HOW ABOUT THE ANALYSIS THAT MR VAIL GIVES LOCKHEED
10 THAT THAT TAINTS THE CITY AS A MARKET PARTICIPANT THAT THROWS
11 NOERR-PENNINGTON OUT OF THE WINDOW?

12 MR PAUL YOUR HONOR I'LL -- IT'S ALWAYS DANGEROUS FOR
13 ME TO TRY TO REMEMBER THE CASES, BUT MY RECOLLECTION OF
14 LOCKHEED IS THAT IT'S A BID FOR THE DEPARTMENT OF FAMILY AND
15 CHILDREN SERVICES IN VIRGINIA AND THEY WERE LETTING I THINK
16 TWO CENTERS OR SOMETHING TO OPERATE AND THE COMPANY CALLED
17 MAXIMUS -- I THINK IT WAS MAXIMUS AGAINST LOCKHEED I THINK
18 MAXIMUS WON THE BID -- LOCKHEED FILED A COMPLAINT SAYING -- A
19 FALSE COMPLAINT SAYING TWO MEMBERS OF THE EVALUATION
20 COMMITTEE HAD A CONFLICT OF INTEREST IT WAS AN ABSOLUTE
21 FALSE COMPLAINT

22 THE COURT AND LOCKHEED WAS WILLING TO BUILD IT?

23 MR PAUL YES, SIR LOCKHEED WAS -- WAS TO OPERATE IT
24 IT WAS NOT THE BUILDER, IT WAS THE OPERATOR AND SO LOCKHEED
25 AND MAXIMUS---

1 THE COURT A DAY CARE FACILITY?

2 MR PAUL I'M SORRY?

3 THE COURT A DAY CARE FACILITY?

4 MR PAUL IT WAS -- I DON'T -- I CAN'T REMEMBER I
5 DON'T KNOW WHETHER IT WAS A---

6 MR VAIL INFORMATION MANAGEMENT SERVICES

7 MR PAUL IT WAS SOME KIND OF CENTER, I DON'T KNOW
8 AND SO MAXIMUS AND LOCKHEED WERE COMPETING MAXIMUS GOT THE
9 BID LOCKHEED FILED A COMPLAINT OR AN OBJECTION TO THE BID
10 SAYING TWO MEMBERS OF THE EVALUATION COMMITTEE HAVE CONFLICTS
11 OF INTEREST AND IT WAS A FALSE -- IT WAS ULTIMATELY PROVED TO
12 BE A FALSE ALLEGATION MAXIMUS LOST THE BID I MEAN, THEY
13 UNDOED THE BID IN FAVOR OF MAXIMUS OPENED UP THE BIDDING
14 AGAIN MAXIMUS SUED LOCKHEED FOR INTERFERING WITH AN
15 EXPECTANCY BECAUSE THEY'D ALREADY GOTTEN THE BID WHEN
16 LOCKHEED FILED A FALSE -- A KNOWINGLY FALSE COMPLAINT SO
17 MAXIMUS SUES LOCKHEED LOCKHEED DEFENDS ON NOERR-PENNINGTON
18 AND IF THE COURT WOULD GO BACK, THIS IS NOT LEGISLATIVE
19 THIS IS ADJUDICATORY THIS IS NOT -- THIS IS A DEPARTMENT OF
20 SERVICES OR SOMETHING FOR THE STATE OF VIRGINIA IT'S A
21 PROCUREMENT OFFICE FOR THE STATE OF VIRGINIA FOR SERVICES
22 SO IT'S NOT AS IF THIS IS SOME REPRESENTATION TRYING TO GET A
23 CITY ORDINANCE PASSED OR A LAW PASSED THIS IS AN ACTUAL
24 MISREPRESENTATION TO AN ADMINISTRATIVE ADJUDICATORY BODY THAT
25 LOCKHEED MADE A MISREPRESENTATION TO

1 AND SO THE COURT SAID, NO THERE IS NO NOERR-PENNINGTON
2 IMMUNITY WHEN YOU FALSELY REPRESENT TO THE MEMBERS THAT
3 DECIDE THIS THAT YOU'VE GOT A CONFLICT OF INTEREST WHEN YOU
4 KNOWINGLY FALSELY MISREPRESENTED THIS IN THE CONTEXT OF SOME
5 KIND OF ADMINISTRATIVE PROCEEDING CONTESTING A BID WELL,
6 THAT -- AND IT IS TRUE -- MY RECOLLECTION IS THAT THEY HAD A
7 SNIPPET IN THERE ABOUT -- TALKING ABOUT THE STATE IS IN A
8 COMMERCIAL CONTEXT AND I THINK IN THAT CASE THE STATE --
9 WELL, FIRST OF ALL, I DON'T THINK THAT'S THE TURNING POINT OF
10 THE CASE THAT THE STATE IS VIEWED TO BE IN A COMMERCIAL
11 CONTEXT, BUT IT WAS A PROCUREMENT OFFICE FOR THE STATE BUYING
12 SERVICES THAT IS NOT WHAT THIS IS HERE

13 THIS IS -- THIS IS A PUBLIC CONVENTION CENTER AND A
14 DECISION BY THE CITY OF COLUMBIA THAT THE CONVENTION CENTER
15 NEEDS A HOTEL TO BRING THE MIDLANDS CONVENTION CENTER TO ITS
16 ULTIMATE REALIZATION AND SO THEY WERE STRUGGLING AROUND
17 TRYING TO FIGURE OUT A WAY TO DO IT FOR THE BEST OF THE
18 CITIZENS OF COLUMBIA -- AND AUGHTRY'S COMMUNICATIONS ARE TO --
19 THE CITY COUNCIL THEY'RE NOT TO THE COMMITTEE THEY'RE NOT
20 TO ANYBODY THEY'RE DIRECTLY TO THE LEGISLATURE OF THE CITY
21 OF COLUMBIA

22 AND SO IT'S NOT AT ALL THE CONTEXT OF THIS THING THAT
23 HE'S TALKING ABOUT HERE I'M HAVING A LITTLE BIT OF TROUBLE
24 REMEMBERING ALL THE FACTS BUT WHAT I DO REMEMBER -- I THINK
25 WHAT I'VE SAID I THINK IS CORRECT THAT IT WAS A VERY FALSE

1 -- A KNOWINGLY FALSE REPRESENTATION ABOUT THE PEOPLE THAT
2 DECIDED THE ISSUE IN THE CONTEXT OF A BID CONTEST THAT HAD
3 ALREADY BEEN AWARDED

4 THE COURT UNDER NOERR-PENNINGTON DOES IT MAKE ANY
5 DIFFERENCE THAT THE REAL PLAYER ON THE CITY'S SIDE IS A
6 NONPROFIT CORPORATION AS OPPOSED TO THE PUBLIC BODY ITSELF?

7 MR PAUL THERE'S ACTUALLY TWO ANSWERS TO THAT FROM THE
8 CONTEXT OF THE NONPROFIT ENTITY THAT WAS -- THAT WAS BEING
9 CONSIDERED AS A PART OF THE M O U PROCESS I THINK THAT MAY
10 TAKE SOME OF THE COMMERCIAL ASPECT OUT OF IT, BUT THE
11 COMMUNICATIONS AGAIN AS I SAY, ARE TO THE LEGISLATURE THE
12 NONPROFIT ENTITY WAS NEVER VESTED WITH ANYTHING IN THIS CASE
13 DURING THE PERIOD THAT THEY WERE TRYING TO ENFORCE THE M O U
14 THAT IS, THE NONPROFIT ENTITY NEVER OWNED A HANDFUL OF DIRT
15 IT NEVER HAD A DOLLAR OF MONEY IT NEVER DID ANYTHING IT
16 WAS A SHELL THAT WAS WAITING FOR A BOND ISSUE THAT NEVER
17 HAPPENED, AND THAT'S ALL IT WAS IT WAS A SHELL WITH SOME
18 POLITICAL PEOPLE THAT WERE APPOINTED TO TRY TO ADMINISTER IT,
19 AND THAT'S ALL IT WAS WAS A BUNCH OF PEOPLE REALLY

20 SO THERE WAS NOT EVEN A NEED TO TRY TO COMMUNICATE WITH
21 IT BECAUSE IT HAD NOTHING IT HAD NO PROPERTY IT HAD
22 NOTHING IT WAS JUST WAITING TO BE THE VEHICLE IF SOMETHING
23 EVER HAPPENED BUT MR AUGHTRY'S COMMUNICATIONS WERE
24 DIRECTLY TO THE CITY COUNCIL HIS MEETINGS WERE WITH THE
25 CITY COUNCIL EVERYTHING HE DID WAS AN ATTEMPT TO INFLUENCE

1 LEGISLATION BY THE CITY COUNCIL

2 THE COURT HOW ABOUT HIS AUGUST 8, 2003, LETTER? ARE
3 YOU SAYING THAT THAT FALLS SQUARELY WITHIN NOERR-PENNINGTON?

4 MR PAUL YES SIR I DO BELIEVE IT FALLS SQUARELY---

5 THE COURT EVEN IF IT IS EQUATED WITH AN ENCOURAGEMENT
6 BY MR AUGHTRY TO SCUTTLE THE M O U ? IF HE CAME OUT IN THIS
7 LETTER AND BASICALLY SAID TO GET ME IN THE DOOR I CAN DO
8 THIS FOR YOU, I CAN DO THIS FOR YOU AND I CAN DO THIS FOR
9 YOU AND YOU NEED TO SCRAP THAT M O U

10 MR PAUL I THINK THE -- I THINK THE EVIDENCE IS THAT
11 -- WHEN AUGHTRY WAS DEPOSED, I THINK HIS TESTIMONY IS THAT HE
12 HAD NOT SEEN THE M O U THE ONLY THING HE KNEW ABOUT IT WAS
13 WHAT WAS PUBLISHED IN THE PAPER, AND THE PAPER -- THE
14 ARTICLES IN THE PAPER WERE NOT SAYING THAT THIS IS A BINDING
15 CONTRACT THE ARTICLES IN THE PAPER WERE TALKING ABOUT IT'S
16 AS IF IT WAS UP FOR CONSIDERATION

17 SO THERE'S NO EVIDENCE THAT AUGHTRY KNEW WHEN HE WROTE
18 ~~THIS LETTER THAT THERE WAS ANY-KIND-OF-CONTRACT-BETWEEN THE~~
19 CITY AND THE PEOPLE THAT ARE PARTIES TO THE M O U AND THAT
20 IS HIS TESTIMONY AT THE TIME AND HE SAID, I KNEW WHAT WAS
21 IN THE PAPER, AND THE PAPER WAS TREATING THIS AS IF IT WAS UP
22 FOR GRABS, YOU KNOW WAS UP FOR CONSIDERATION THAT'S I
23 THINK, HIS TESTIMONY I DON'T THINK THERE'S ANY EVIDENCE TO
24 THE CONTRARY OF THAT

25 HE NEVER -- HE NEVER MET WITH THE PEOPLE AT THE M O U ,

1 AND HIS TESTIMONY ALSO WAS THAT WHEN I MET WITH THE MAYOR AND
2 THE CITY COUNCIL, NOBODY SAID TO ME "WHOA WE CAN'T TALK TO
3 YOU WE'RE BOUND BY A CONTRACT " IN FACT HE SAID THEY ALL
4 SAID TO HIM WE HEAR YOU AND WE WILL CONSIDER BUT NOBODY
5 EVER SAID TO HIM FROM THE CITY THAT -- I THINK HIS TESTIMONY
6 WAS THE MAYOR NOR THE COUNCIL NEVER SAID WE ARE BOUND BY A
7 CONTRACT HERE, AND THE NEWSPAPER ARTICLES DIDN'T SAY IT AND
8 SO I DON'T THINK THERE'S ANY EVIDENCE HE HAD ANY KNOWLEDGE
9 THAT IT WAS A BINDING CONTRACT, IF IT WERE, AND HE DIDN'T
10 EVEN KNOW ABOUT THE DEGREE -- HE KNEW ABOUT THE EXISTENCE OF
11 AN ARRANGEMENT IS HIS TESTIMONY

12 THE COURT HOW ABOUT THE SECRET COMMUNICATION MR VAIL
13 TALKED ABOUT THAT RESULTED IN AUGHTRY OR YOUR CLIENTS
14 CHANGING THEIR BID FROM A LIMITED-SERVICE TO A FULL-SERVICE
15 WITH A BIG RED H HOTEL?

16 MR PAUL ALL RIGHT AS THE COURT I THINK FINALLY
17 BROUGHT OUT IN THE INQUIRY WITH MR VAIL, THE -- WE DIDN'T
18 KNOW WHAT SECRET MEETING HE'S TALKING ABOUT, BUT THE MEETINGS
19 WERE NOT SECRET THE MEETINGS WERE SCHEDULED, PUBLICIZED
20 MEETINGS BUT THE CITY SAID THEY WOULD MEET ONE ON ONE WITH
21 EACH PROPONENT AND SO THEY MET PRESUMABLY WITH MR VAIL'S
22 CLIENT THEY MET WITH AUGHTRY THEY MET WITH EVERYONE, AND
23 THE CITY ASKED PEOPLE WHATEVER THEY WANTED TO ASK THEM

24 AND I THINK MR AUGHTRY'S TESTIMONY IS THAT IN THAT
25 MEETING THE CITY -- AUGHTRY SAID I DON'T THINK YOU NEED --

1 AND I'M GOING TO BE REAL SURE THAT THIS IS TRUE, YOU KNOW
2 THAT I SAY THIS ACCURATELY AUGHTRY'S POSITION IS WHAT HE
3 WAS PROVIDING WAS A FULL-SERVICE HOTEL HE SAID THAT IN THE
4 R F P AND HE LISTED THE SERVICES AND IF YOU COMPARE THOSE
5 SERVICES WITH ANY -- WITH THE LIST OF SERVICES IN THE
6 PLAINTIFF'S HOTEL THE LIST OF SERVICES ARE THE SAME

7 AUGHTRY WANTED TO DO IT WITH A MARRIOTT COURTYARD CALLED
8 AN URBAN CONCEPT OR A HILTON GARDEN INN URBAN CONCEPT, AND HE
9 GAVE THEM A PICTURE OF SOME KIND OF URBAN HILTON IN
10 WASHINGTON D C , THAT IS DIFFERENT THAN MOST HILTON GARDEN
11 INNS

12 THE COURT I THINK THEIR AFFIDAVIT SAYS THAT IN THE --
13 OR A LETTER SAYS THAT IN THE INDUSTRY A MARRIOTT COURTYARD IS
14 NOT A FULL-SERVICE HOTEL

15 MR PAUL WELL THAT'S -- AND THAT'S THE POINT THAT'S
16 WHAT MR GARFIELD IS SAYING BUT MR GARFIELD -- WHAT MR
17 AUGHTRY WAS PROVIDING OR OFFERING TO PROVIDE WAS SOMETHING
18 THAT IS NOT A STANDARD HILTON-GARDEN INN OR A STANDARD
19 MARRIOTT COURTYARD, AND THAT'S WHAT HE TOLD THEM HE SAID IT
20 WAS A---

21 THE COURT IT WOULD STILL BE FULL SERVICE

22 MR PAUL YES SIR YES, SIR, AND THAT'S WHAT HIS --
23 THE THIRD LINE OF HIS PROPOSAL SAYS A FULL-SERVICE HILTON
24 GARDEN INN OR MARRIOTT COURTYARD, AND HE SAID THERE'S THIS
25 URBAN CONCEPT THAT GIVES YOU FULL SERVICE, BUT IT IS A LESS

1 EXPENSIVE HOTEL AND THE CITY SAID ARE YOU WILLING TO
2 BUILD A HILTON THAT IS NOT A GARDEN INN BUT IS A -- IS A
3 HILTON?

4 THE COURT BIG RED H

5 MR PAUL YES, SIR AND HE SAID I AM WILLING TO
6 BUILD IT I DON'T RECOMMEND IT, BUT, YES, I AM WILLING TO
7 BUILD IT, BUT I WOULD NOT---

8 THE COURT A THREE-MILLION DOLLAR---

9 MR PAUL BUT I WOULD NOT BUILD IT I WOULD NOT -- I
10 DON'T RECOMMEND THAT YOU DO IT THAT'S NOT WHAT I WANT TO
11 BUILD AND THE ONLY WAY IT WOULD MAKE ECONOMIC SENSE IS IF
12 YOU SUBSIDIZE IT BY \$3 MILLION SO HE ANSWERED THE QUESTION
13 THAT THEY ASKED HIM HE DIDN'T COME IN AND SAY THIS IS
14 WHAT I REALLY WANT TO DO THE TESTIMONY IS THEY SAID TO HIM
15 ARE YOU WILLING OR NOT TO BUILD THIS KIND OF HOTEL? AND HE
16 SAID I AM WILLING TO BUILD IT BUT I AM NOT WILLING TO
17 BUILD IT WITHOUT A SUBSIDY I WOULD RATHER BUILD A HILTON
18 GARDEN INN THAT IS A FULL-SERVICE URBAN CONCEPT HILTON GARDEN
19 INN OR A MARRIOTT COURTYARD IT'S YOUR CHOICE, DOESN'T
20 MATTER TO ME THAT WAS THE TESTIMONY

21 SO IT'S NOT LIKE AUGHTRY DID A BAIT AND SWITCH THE
22 CITY IS THE ONE THAT SCHEDULES THESE MEETINGS, AND THEY ARE
23 INQUIRING OF PEOPLE AND THAT'S WHAT -- YOU KNOW, THEY GO IN
24 AND THEY HAVE AN INQUIRY SO HE ANSWERS THEIR QUESTIONS HE
25 DIDN'T EVEN WANT TO BUILD A HOTEL THAT WAY, AND SO THAT

1 WAS---

2 THE COURT I TAKE IT HE'S THE ONE THAT ENDED UP
3 BUILDING THE HOTEL?

4 MR PAUL HE DID HE BUILT THE HOTEL AND IT'S A
5 HILTON IT'S NOT A GARDEN INN IT'S A HILTON BECAUSE THAT'S
6 WHAT THE CITY SAID THEY WANTED BUT -- SO I DON'T WANT -- I
7 WANT TO BE SURE I ANSWERED THE COURT'S QUESTION

8 THE COURT YOU DID

9 MR PAUL ALL RIGHT I AM -- I'M NOT SURE I KNOW WHAT
10 TO SAY ABOUT THE ATTEMPT TO REWRITE THE SECOND CAUSE OF
11 ACTION I MEAN WE HAVE GONE A LONG TIME IN THIS CASE
12 WE'VE TAKEN A LOT OF DEPOSITIONS AND THE SECOND CAUSE OF
13 ACTION TO ME I DON'T SEE HOW IT COULD BE ANY CLEARER IT
14 SAYS IN PARAGRAPH 43 PLAINTIFFS AND THE CITY CONTEMPLATED
15 THE M O U WOULD BE SUPPLANTED BY A SUBSEQUENT CONTRACT
16 BETWEEN THE PARTIES CALLED THE DEVELOP MANAGEMENT AGREEMENT

17 THEN IT GOES ON IN PARAGRAPH 44 IN THE EVENT THE
18 M O U IS ULTIMATELY NOT -- IS FOUND NOT TO HAVE CREATED A
19 CONTRACT, THE DOCUMENT -- THE DOCUMENT, THAT IS THE M O U ,
20 UNQUESTIONABLY CREATED AND EVIDENCES THE REASONABLE
21 EXPECTATION THAT A CONTRACT WOULD ULTIMATELY BE ENTERED INTO
22 AND, THUS, A PROSPECTIVE CONTRACTUAL RELATIONSHIP WHICH THE
23 DEFENDANTS AUGHTRY, WINDSOR AUGHTRY, AND THE VISTA HOTEL WERE
24 NOT A PARTY

25 NOW, WHAT I UNDERSTAND MR VAIL TO HAVE JUST SAID IS

1 THAT THEY ARE NOW TRYING TO CHANGE -- IN A VERY LOW-KEY,
2 UNDERSTATED WAY AFTER YEARS OF LITIGATION AND DISCOVERY IS
3 CLOSED, THEY'RE TRYING TO CHANGE THE SECOND CAUSE OF ACTION
4 TO SAY WELL, WE DIDN'T REALLY MEAN THE M O U GAVE RISE TO
5 THE EXPECTANCY WE HAVE SOME KIND OF EXPECTANCY FROM THIS
6 BID PROCESS, AND THAT'S WHAT WE'RE REALLY SUING ABOUT

7 THE COURT I THINK THEY'RE WANTING TO SAY BOTH

8 MR PAUL I'M SORRY BUT I DON'T -- I MEAN, WE
9 CERTAINLY OBJECT TO ANY ATTEMPT TO AMEND THIS SECOND CAUSE OF
10 ACTION AT THIS STAGE OF THIS CASE AFTER ALL OF THIS DISCOVERY
11 TO TRY TO GET PAST THE TIMELINE THAT I JUST GOT THROUGH
12 ARGUING I MEAN, I REALLY THINK WE -- WE OBJECT TO THIS AS
13 STRONGLY AS WE KNOW HOW TO SAY THE WORDS TO TRYING TO SLIP
14 PAST THE TIMELINE WHICH IS WHAT I SAID IN MY OPENING YOUR
15 HONOR SO I WANTED TO BE SURE THAT I COVERED THAT

16 THE COMMERCIAL SPEECH -- I'M NOT SURE OF THE CASE THAT
17 MR VAIL WAS TALKING ABOUT I MEAN, THERE ARE CASES ON
18 COMMERCIAL SPEECH THAT ARE FIRST AMENDMENT CASES AND THE
19 ONES I'M FAMILIAR WITH DON'T RELATE TO NOERR-PENNINGTON
20 THEY RELATE TO OTHER THINGS SO I CAN'T -- I CANNOT ARGUE
21 WITH MR VAIL ABOUT WHETHER HIS CASE IS REALLY A NOERR-
22 PENNINGTON CASE OR WHETHER IT'S JUST A CASE ABOUT COMMERCIAL
23 SPEECH

24 I MEAN, THERE'S A LOT OF FIRST AMENDMENT CASES THAT DEAL
25 WITH THE IDEA OF COMMERCIAL SPEECH VERSUS A POLITICAL SPEECH

1 IF YOU WILL THOSE ARE OUTSIDE THE SCOPE OF NOERR-
2 PENNINGTON, AND THEY'RE OUTSIDE THE ANALYSIS OF NOERR-
3 PENNINGTON BECAUSE NOERR-PENNINGTON IS BROADER THAN THE FIRST
4 AMENDMENT FREE SPEECH BECAUSE IT HAS GOT THE THREE PRONGS
5 THAT IT RELIES ON, THAT IS, SEPARATION OF POWERS AND WHETHER
6 THE JUDICIARY IS GOING TO LOOK BEHIND LEGISLATION AND SEE
7 WHAT CAUSED IT AND SEE WHO IS RESPONSIBLE FOR IT IT'S GOT
8 TO DO WITH THE RIGHT TO PETITION THE GOVERNMENT AND IT'S GOT
9 TO DO WITH THE FIRST AMENDMENT, AND THOSE THREE THINGS ARE
10 THE GENESIS OF IT

11 AND IF THE RUBIN CASE IS JUST A CASE -- AND I HATE TO
12 ARGUE ABOUT A CASE THAT I'M NOT SURE WHICH ONE HE'S TALKING
13 ABOUT BUT IF THE RUBIN CASE IS JUST A RUN-OF-THE-MILL,
14 GARDEN-VARIETY, FREE-SPEECH CASE WHERE THE QUESTION IS IS
15 THIS COMMERCIAL SPEECH LIKE IN AN ADVERTISEMENT ON A
16 BILLBOARD OR IS THIS SPEECH LIKE YOU GO UP AND LOOK A
17 POLITICIAN IN THE EYE OR YOU CALL THEM A NAME OR YOU DO
18 SOMETHING TO THEM-OR YOU PUT WORDS ON A BILLBOARD AS
19 COMMERCIAL SPEECH, THAT'S A DIFFERENT KIND OF FIRST AMENDMENT
20 ANALYSIS SO I DON'T KNOW WHAT HE'S TALKING ABOUT THERE, BUT
21 I DO WANT TO BE SURE THAT IF THE COURT ANALYZES THAT CASE
22 THAT THAT DISTINCTION IS BEFORE THE COURT

23 SO THAT'S A LITTLE DISORGANIZED I WON'T TAKE ANY MORE
24 OF THE COURT'S TIME UNLESS THE COURT'S GOT QUESTIONS

25 THE COURT ALL RIGHT ANYTHING ELSE ON THIS ISSUE?

1 MR VAIL? IT MIGHT BE A BIT IRREGULAR SINCE YOU'RE NOT THE
2 MOVING PARTY ANYTHING ELSE FROM THE PLAINTIFFS ON NOERR-
3 PENNINGTON?

4 MR VAIL JUST YOUR HONOR WE'LL STAND ON THE LAW
5 ONE EVIDENTIARY PIECE FROM THE DEPOSITION OF GREGORY SCOTT
6 DICKENS, WHO IS A HILTON OFFICIAL ON THE FULL-SERVICE
7 CONCEPT, PAGE---

8 THE COURT IS THAT AN EXHIBIT TO ANYTHING THAT I HAVE?

9 MR VAIL IT IS NOT AN EXHIBIT, BUT WE WOULD PROFFER IT
10 NOW

11 THE COURT OKAY

12 MR VAIL WHAT DOES FULL-SERVICE HILTON HOTEL MEAN?
13 FULL-SERVICE HILTON HOTEL IS A HILTON HOTEL WITH FULL
14 SERVICES, AMENITIES, INCLUDING BANQUET FACILITIES ROOM
15 SERVICE, FOOD AND BEVERAGE FACILITIES, AND A BROADER SPECTRUM
16 THAN A LIMITED-SERVICE HOTEL MAY HAVE IS A HILTON GARDEN
17 INN A FULL-SERVICE HILTON HOTEL? NO, IT'S NOT IT'S A
18 LIMITED SERVICE SO WE'LL -- WE'LL GET A COPY OF THAT

19 THE COURT WHERE IS -- WHERE IS MR AUGHTRY'S FIRST
20 BID? WHERE IS IT? DO I HAVE THAT?

21 MR PAUL YES, SIR YES, SIR IT'S ATTACHED TO HIS
22 AFFIDAVIT I THINK IT'S ATTACHED TO THE GARFIELD IT'S---

23 THE COURT ALL RIGHT NOW, ANSWER THIS PLEADING
24 QUESTION FOR ME HOW CAN THE SECOND CAUSE OF ACTION BE
25 CONSIDERED TO RELATE TO THE SECOND R F P AS STATED?

1 MR VAIL YOUR HONOR AS IT'S STATED I AM NOT CERTAIN
2 THAT IT DOES, BUT AS I NOTED WE WOULD SEEK LEAVE TO AMEND TO
3 STATE EXACTLY THE CAUSE OF ACTION THAT

4 THE COURT WHAT'S THE SCHEDULING ORDER SAY ABOUT THAT?

5 MR SUGGS WE DON'T HAVE ONE

6 MR WARD WE WOULD OBJECT---

7 THE COURT I THOUGHT YOU SAID DISCOVERY WAS CLOSED I
8 ASSUME THAT WAS BY COURT ORDER

9 MR WARD YES, SIR THERE IS A SCHEDULING ORDER THAT
10 SAID DISCOVERY IS COMPLETE AS OF X DATE, ALTHOUGH WE'VE
11 OFFENDED IT ON SEVERAL OCCASIONS SO I DON'T KNOW THAT
12 DISCOVERY IS COMPLETE, BUT THE AUGHTRY DEFENDANTS WOULD
13 OBJECT TO ANY CONSIDERATION OR GRANTING OF AN ORAL AMENDMENT
14 TO AMEND THE COMPLAINT IN RESPONSE TO THE ARGUMENT TODAY ON
15 THE MOTIONS UNDER THE NOERR-PENNINGTON DOCTRINE THEY'RE
16 FREE TO FILE A MOTION FOR LEAVE TO AMEND, BUT WE DON'T -- WE
17 WOULD OBJECT TO THAT AND OPPOSE THAT RELIEF TODAY

18 --- MR SUGGS ---WE'LL-FILE A-FORMAL MOTION ON THAT---

19 THE COURT ALL RIGHT ALL RIGHT IS THERE ANY --
20 LET'S SEE MR PAUL, WHAT I'VE GOT -- YOUR NOERR-PENNINGTON
21 MOTIONS ARE IDENTICAL AS TO GARFIELD AND STEVENS & WILKINSON
22 IT'S JUST THE CAUSES OF ACTION ARE NUMBERED DIFFERENTLY

23 MR PAUL THAT'S CORRECT STEVENS & WILKINSON JUST HAS
24 TWO THEY DON'T HAVE A CIVIL CONSPIRACY THIRD CAUSE OF
25 ACTION

1 THE COURT OKAY AND YOUR 10TH, 11TH -- ARE THERE
2 THREE AFFIRMATIVE DEFENSES THAT ASSERT NOERR-PENNINGTON?

3 MR PAUL A COUPLE OF THEM ONE ASSERTS NOERR-
4 PENNINGTON, AND ONE ASSERTS RIGHT TO PETITION THE FIRST
5 AMENDMENT UNDER THE U S CONSTITUTION THE THIRD ASSERTS A
6 FIRST AMENDMENT RIGHT TO PETITION THE GOVERNMENT UNDER THE
7 SOUTH CAROLINA CONSTITUTION SO THERE ARE THREE SEPARATE
8 SPECIFIC DEFENSES THAT ARE APPLICABLE

9 THE COURT OKAY ALL RIGHT WHAT ELSE DO YOU FOLKS
10 WANT TO GET ACCOMPLISHED TODAY?

11 MR DETWILER YOUR HONOR, WE'D LIKE TO TALK TO YOU
12 ABOUT THE MOTION TO CONSOLIDATE ALL FIVE OF THESE CASES FOR
13 TRIAL PURPOSES THAT IS A MOTION THAT I THINK IS PROPERLY
14 BEFORE YOU, AND I WOULD ASSERT RESPECTFULLY TO ALL THESE
15 FOLKS THAT I THINK THESE ARGUMENTS TODAY HAVE PROVEN THE NEED
16 TO CONSOLIDATE ALL---

17 THE COURT ALL OR NOT

18 MR DETWILER YES, SIR I BELIEVE THAT THEY
19 CONCLUSIVELY PROVE THAT THEY NEED TO BE CONSOLIDATED

20 THE COURT IS THERE -- DOES ANYBODY OBJECT TO THAT?

21 MR PAUL YOUR HONOR---

22 THE COURT I GUESS MR FOSTER IS NOT HERE, SO I DON'T
23 KNOW WHETHER HE DOES OR NOT

24 MR WILLIAMS EVERYONE HAS CONSENTED---

25 MR THOMPSON WE HAVE NO OBJECTION TO THAT, YOUR HONOR

1 MR WILLIAMS EVERYONE HAS CONSENTED EXCEPT MR PAUL
2 THE COURT AND THE PLAINTIFFS Y'ALL HAVE CONSENTED
3 TOO?
4 MR SUGGS YES YES, YOUR HONOR
5 THE COURT ALL RIGHT
6 MR PAUL AND IT'S WITH GREAT RELUCTANCE THAT I OPPOSE
7 MR WILLIAMS ON THIS, BUT I -- EVERY TIME I THINK ABOUT
8 TRYING THIS CASE ON A CONSOLIDATED BASIS, I CANNOT IMAGINE
9 THE AGONY OF YOU'VE GOT A WITNESS ON THE STAND AND YOU'VE
10 GOT ALL THESE LAWYERS EXAMINING AND EVERYBODY HAS GOT A
11 DIFFERENT AGENDA AND EVERYBODY'S FOCUS IS A LITTLE BIT
12 DIFFERENT AND BY THE TIME WE GET THROUGH THERE WILL BE --
13 THERE WILL BE NO FOCUS FOR A JURY TO UNDERSTAND THE CASE
14 THE COURT LET'S DO THIS LET'S JUST TAKE A COUPLE OF
15 MINUTES TO GIVE SOME FOLKS A BREAK, AND WE'LL COME BACK AND
16 DEBATE THAT IN A LITTLE BIT MORE DETAIL
17 MR PAUL YES, SIR
18 THE COURT DOES THAT SUIT EVERYBODY?
19 MR SUGGS YES SIR MAY MR VAIL BE EXCUSED, YOUR
20 HONOR?
21 THE COURT YES, SIR THANK YOU FOR COMING
22 MR VAIL THANK YOU, YOUR HONOR
23 (WHEREUPON, A SHORT BREAK WAS TAKEN)
24 THE COURT OKAY DOES ANYBODY ELSE WANT TO SAY
25 ANYTHING ABOUT THE CONSOLIDATION?

1 MR PAUL YOUR HONOR, I'LL -- WE HAVE DECIDED TO GO
2 ALONG WITH THE CITY AND SO WE'LL AGREE TO THE CONSOLIDATION
3 THE COURT ALL RIGHT WHO CAN DO THAT ORDER?
4 MR NEWMAN WELL, WE'LL DO IT
5 THE COURT ALL RIGHT
6 MR NEWMAN STEVENS & WILKINSON WOULD RESPECTFULLY
7 SUGGEST THAT IT WOULD BE PERHAPS WISE TO CONSOLIDATE THE
8 CASES AGAINST AUGHTRY, CONSOLIDATE THE CASES AGAINST THE
9 CITY, AND HOLD OFF CONSOLIDATING ALL FIVE CASES AT ONE TIME
10 UNTIL YOU'VE RULED ON THE DISPOSITIVE MOTIONS THAT ARE BEFORE
11 YOU
12 THE COURT I THOUGHT THOSE WERE ALL -- ALL RIGHT SAY
13 THAT AGAIN
14 MR NEWMAN OKAY ESSENTIALLY YOU'VE GOT TWO BODIES OF
15 CASES THE BO AUGHTRY CASES AND THE CITY OF COLUMBIA CASES
16 WE DON'T HAVE ANY PROBLEM WITH THOSE TWO BUCKETS BEING
17 CONSOLIDATED, BUT WE WOULD SUGGEST THAT MAYBE YOU SHOULD RULE
18 ON THE DISPOSITIVE MOTIONS BEFORE POURING EVERYTHING INTO THE
19 SAME BUCKET
20 THE COURT OH SO, IN OTHER WORDS EVERYTHING AGAINST
21 AUGHTRY SHOULD BE CONSOLIDATED AND EVERYTHING AGAINST THE
22 CITY SHOULD BE CONSOLIDATED BUT NOT NECESSARILY WITH EACH
23 OTHER
24 MR NEWMAN YES, SIR
25 MR WARD AND, YOUR HONOR, THAT RELIEF ISN'T BEFORE THE

1 COURT THE ONLY MOTION BEFORE THE COURT WAS THE CITY'S
2 MOTION TO CONSOLIDATE THEM ALL THAT'S A SUGGESTION FROM MR
3 HARPOOTLIAN

4 MR WILLIAMS JUDGE, WE HANDED---

5 THE COURT HE'S NOT HERE

6 MR WILLIAMS JUDGE, WE HANDED UP AN ORDER TO THE
7 EFFECT THAT ALL THE CASES WOULD BE CONSOLIDATED

8 THE COURT ALL RIGHT WHAT'S THE REASON FOR NOT DOING
9 IT NOW?

10 MR NEWMAN JUDGE I THINK THAT THE CONCERN IS JUST THE
11 OVERALL COMPLEXITY OF THE CASE I THINK MR DETWILER MADE A
12 GOOD POINT---

13 THE COURT WHO DID YOU SUE?

14 MR NEWMAN WE SUED THE CITY AND WE SUED AUGHTRY SO
15 OUR CASES WOULD NOT BE CONSOLIDATED UNDER MY MODIFIED
16 SUGGESTION

17 THE COURT WELL, HOW ABOUT HILTON? WHAT DOES MR
18 FOSTER SAY ABOUT IT?

19 MR THOMPSON WE WOULD CONSENT TO EITHER ONE OF THESE
20 ARRANGEMENTS I'M ASSUMING THIS MEANS THAT UNDER THIS NEWLY-
21 PROPOSED STRETCH THAT THE CASE AGAINST HILTON WOULD BE IN THE
22 AUGHTRY BUCKET

23 MR SUGGS IT WOULD BE WE'RE THE ONLY PEOPLE THAT
24 SUED HILTON, AND SO WE HAVE ONE CASE AGAINST---

25 THE COURT SO HILTON DOESN'T OBJECT TO GOING TO TRIAL

1 WITH ALL THESE DEFENDANTS

2 MR NEWMAN NO YOUR HONOR

3 THE COURT AND STEVENS & WILKINSON HAS SUED WHO AGAIN?

4 MR NEWMAN BO AUGHTRY AND THE CITY OF COLUMBIA

5 THE COURT BUT YOU DON'T WANT TO BE LUMPED TOGETHER

6 WITH THE OTHER PLAINTIFFS THAT'S WHAT YOU DON'T WANT

7 MR NEWMAN WELL, WE DON'T ACTUALLY---

8 THE COURT WHO REPRESENTS THE OTHER PLAINTIFFS?

9 MR NEWMAN MR SUGGS

10 MR SUGGS THERE'S A -- TURNER CONSTRUCTION IS
11 REPRESENTED BY JOHN T LAY AND BY A FIRM OUT OF ATLANTA,
12 KILPATRICK STOCKTON

13 THE COURT WHAT DO THEY SAY?

14 MR WILLIAMS THEY AGREE TO A CONSOLIDATION

15 MS MCDANIELS THAT'S CORRECT YES

16 MR DETWILER OKAY

17 THE COURT I'M TRYING TO SORT THIS OUT

18 MR PAUL YOUR HONOR COULD WE SPEAK FOR A MINUTE ON
19 BEHALF OF AUGHTRY? THE THING THAT MOVED US TO THE CITY SIDE
20 OF THIS ARE THE ISSUES RELATED TO COLLATERAL ESTOPPEL AND,
21 I MEAN, THERE'S NO GOOD ANSWER TO THIS FROM -- AT LEAST FROM
22 THE AUGHTRY DEFENDANT'S STANDPOINT THAT IS, EITHER WAY
23 THERE ARE SIGNIFICANT PROBLEMS AND I THINK THE SAME IS TRUE
24 FOR EVERYBODY BUT FROM OUR STANDPOINT WHAT MADE US MOVE TO
25 THE CITY'S SIDE IS THE COLLATERAL ESTOPPEL ISSUES IF THEY'RE

1 NOT ALL CONSOLIDATED INTO ONE HEARING SO THAT'S

2 MR DETWILER WHAT'S MOVING US YOUR HONOR, IS LARGELY
3 THE FACT THAT ALL OF THESE CASES INVOLVE THE SAME WITNESSES,
4 THE SAME SET OF FACTS, THE -- AND TRYING THEM SEPARATELY RUNS
5 THE RISK OF INCONSISTENT RESULTS RELATED TO WHAT MR PAUL
6 JUST SAID

7 THE COURT OKAY MR NEWMAN, INITIALLY MY CONCLUSION
8 IS THAT IF ALL -- IF ANY OF THE CASES ARE TO BE CONSOLIDATED,
9 IT SHOULD BE ALL OF THEM SO I'M GOING TO GRANT THE MOTION
10 OVER YOUR OBJECTION

11 MR NEWMAN YES, SIR

12 THE COURT IF YOU CAN COME UP WITH SOME OTHER IF
13 SOME OTHER DEVELOPMENT OCCURS THAT DOESN'T EXIST AT THIS
14 TIME THEN THAT CAN BE REVISITED, BUT I'M GOING TO SIGN THE
15 ORDER CONSOLIDATING ALL -- AND THERE ARE FIVE, RIGHT?

16 MR WILLIAMS YES YOUR HONOR

17 THE COURT FIVE SUITS 05-1014, 05-3361, 06-5092,
18 06-6488, AND 07-1252 AND THAT'S FOR THE COURT REPORTER'S
19 BENEFIT ALL RIGHT HOW DO WE PROGRESS FROM HERE? I GUESS
20 YOU HAVE TO WAIT TO HEAR FROM ME ON ANY -- ANY FURTHER
21 INVOLVEMENT THAT I'LL HAVE AND THEN---

22 MR SUGGS THEY TOOK MR VAIL TO THE AIRPORT

23 THE COURT IS THAT FOR ME TO KEEP OR FOR---

24 MR SUGGS YOU CAN KEEP IT

25 THE COURT IT WASN'T EX PARTE COMMUNICATION IT HAD --

1 IT HAD HIS HANDWRITING ON THERE IT DIDN'T HAVE MR PAUL
2 OVER THERE WITH THE DEVIL HORNS OR ANYTHING AND MR VAIL WITH
3 A HALO

4 MR SUGGS YOU CAN KEEP THIS ONE, YOUR HONOR

5 THE COURT I SUPPOSE WHAT WE'LL DO IS I'LL TALK TO
6 JUDGE BARBER AND WHOEVER ELSE ABOUT ANY FURTHER INVOLVEMENT
7 THAT I WOULD HAVE, AND IF WE GET TOGETHER AGAIN I WILL
8 EITHER HAVE RULED ON THESE MOTIONS OR NOT I APPRECIATE THE
9 WAY YOU'VE PRESENTED IT IT'S A DIFFICULT PROPOSITION I
10 KNOW YOU PUT A LOT OF WORK INTO IT AND I APPRECIATE THE WAY
11 YOU'VE HANDLED IT

12 MR SUGGS ONE OTHER THING I THINK MR DETWILER IS
13 GOING TO PRESENT YOU WITH AN ORDER ALLOWING HIS AMENDMENT
14 WITH THE CAVEAT IN THE ORDER THAT IT DOESN'T PREJUDICE OUR
15 ABILITY TO ARGUE AGAINST THAT BEING A PROPER DEFENSE UNDER
16 THE LAW

17 MR DETWILER CORRECT

18 THE COURT OKAY

19 MR DETWILER THANK YOU YOUR HONOR

20 THE COURT ALL RIGHT

21 MR DETWILER WE'LL DO THAT WE'LL SEND THAT TO
22 SUMTER?

23 THE COURT IF YOU---

24 MR DETWILER ARE YOU GOING TO BE HERE TOMORROW?

25 THE COURT I'LL BE HERE TOMORROW HALF A DAY

1 MR DETWILER WE'LL GET IT OVER TO YOU WE'LL JUST
2 E-MAIL IT TO YOU

3 THE COURT EITHER WAY WELL, IF YOU E-MAIL IT, I WON'T
4 BE ABLE TO SIGN IT 'TIL NEXT WEEK I DON'T THINK WE'VE
5 FIGURED OUT HOW TO MAKE A COPY HERE

6 MR DETWILER WE'LL HAVE IT -- WE'LL HAVE IT OVER TO
7 YOU BEFORE YOU LEAVE

8 THE COURT ALL RIGHT OKAY THANK YOU

9 MR NEWMAN THANK YOU, JUDGE

10 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED THERE WERE
11 NO EXHIBITS INTRODUCED)

12

13

14

15

16

17

18

19

20

21

22

23

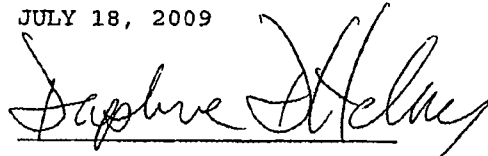
24

25

I, THE UNDERSIGNED DAPHNE D HELMS, OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 9TH OF JULY 2009

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN COUNSEL, NOR INTEREST TO ANY PARTY HERETO

JULY 18, 2009

A handwritten signature in cursive script, reading "Daphne D Helms", written over a horizontal line.

DAPHNE D HELMS, COURT REPORTER

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

2006-CP-40-6488

2006-CP-40-5092

2007-CP-40-1252

GARFIELD TRAUB DEVELOPMENT,
LLC, AND GARY REALTY COMPANY,
INCORPORATED

-VS-

PAUL C "BO" AUGHTRY, III,
VISTA HOTEL PARTNERS LLC, AND
WINDSOR AUGHTRY COMPANY,
INCORPORATED

STEVENS & WILKINSON OF SOUTH
CAROLINA, INCORPORATED

-VS-

TRANSCRIPT OF RECORD

PAUL C "BO" AUGHTRY, III
VISTA HOTEL PARTNERS LLC, AND
WINDSOR AUGHTRY COMPANY,
INCORPORATED

GARFIELD TRAUB-DEVELOPMENT,
LLC, GARY REALTY COMPANY,
INCORPORATED, AND TURNER
CONSTRUCTION COMPANY

-VS-

PAUL C "BO" AUGHTRY, III
CITY OF COLUMBIA, SC, HILTON
HOTELS CORPORATION, VISTA
PARTNERS LLC AND WINDSOR
AUGHTRY COMPANY, INCORPORATED

AUGUST 17, 2009

COLUMBIA, SOUTH CAROLINA

B E F O R E

THE HONORABLE GEORGE C JAMES, JR , JUDGE

A P P E A R A N C E S

GRAHAM L NEWMAN, ESQUIRE
FRANCIS "BRINK" HINSON, IV, ESQUIRE
MELINDA C PILLOW, ESQUIRE
PAGE M KALISH ESQUIRE
ATTORNEYS FOR THE PLAINTIFFS

TOBIAS G WARD JR ESQUIRE
REECE D WILLIAMS III ESQUIRE
ROBERT W FOSTER, JR , ESQUIRE
JAMES L PAUL ESQUIRE
RICHARD C DETWILER, ESQUIRE
KATHLEEN M MCDANIEL ESQUIRE
ATTORNEYS FOR THE DEFENDANTS

DAPHNE D HELMS
CIRCUIT COURT REPORTER

1 THE COURT KEEP YOUR SEATS THAT'S FINE THANK Y'ALL
2 ALL RIGHT LET ME GET MY -- WHAT I HAVE FIRST ON MY LIST IS
3 THE TURNER CONSTRUCTION? WHAT DO YOU HAVE FIRST?

4 MR DETWILER I'M REPRESENTING THE CITY OF COLUMBIA,
5 YOUR HONOR---

6 THE COURT RIGHT

7 MR DETWILER ---AND I'M HERE---

8 THE COURT WHAT I'VE GOT IS YOUR -- I GUESS THE ORDER
9 -- WHAT I'VE GOT THEM IN IS THE ORDER ON THAT LIST THAT WAS
10 -- THAT I GOT

11 MR DETWILER RIGHT WELL I THINK THAT I -- MOST OF
12 OUR ARGUMENTS APPLY TO ALL OF THE DEFENDANTS, PARTICULARLY
13 OUR FIRST ARGUMENT WITH REGARD TO THE M O U , WHETHER OR NOT
14 THAT'S A BINDING CONTRACT, AND WE'RE PREPARED TO GO FORWARD
15 ON THAT FIRST AS WE THOUGHT THAT WOULD MAKE THE MOST SENSE

16 THE COURT OKAY

17 MR DETWILER YOU MAY RECALL THAT HILTON ARGUED THAT
18 PART OF THEIR MOTION LAST TIME AND COVERED A LOT OF THE BASES
19 THAT WE'LL TRY NOT TO REPEAT, BUT THERE'S SOME THINGS WE NEED
20 TO SAY ON BEHALF OF THE CITY

21 MR KALISH YOUR HONOR, PAGE KALISH HERE ON BEHALF OF
22 TURNER CONSTRUCTION, AND WE'RE GOING TO ADOPT AND INCORPORATE
23 THE POSITIONS THAT ARE TAKEN BY GRAHAM NEWTON'S CLIENT AND
24 SO I THINK IT WOULD MAKE THE MOST SENSE FOR GRAHAM TO SPEAK
25 FIRST AND ALLOW ME TO ADD UPON THAT

1 THE COURT ALL RIGHT

2 MR KALISH AND THE CITY'S AGREEABLE TO THAT

3 THE COURT ALL RIGHT WELL LET'S DO THIS I DON'T
4 KNOW IF THE COURT REPORTER -- HOW SHE MIGHT KEEP UP WITH IT,
5 BUT IF EVERYBODY COULD INTRODUCE THEMSELVES START, MR
6 DETWILER, WITH YOU AND JUST TELL HER WHO YOU REPRESENT AND,
7 YOU KNOW, WHAT FIRM YOU'RE WITH JUST IN CASE THERE'S ANYTHING
8 THAT NEEDS TO BE ON HER RECORDS FOR THAT

9 MR DETWILER THANK YOU, JUDGE I'M RICHARD C
10 DETWILER I'M WITH CALLISON, TIGHE, AND ROBINSON HERE IN
11 COLUMBIA I REPRESENT THE CITY OF COLUMBIA WITH ME TODAY
12 IS MR REECE WILLIAMS AND MS KATHLEEN MCDANIEL BOTH OF
13 THEM ARE IN THE SAME FIRM, REPRESENTING THE CITY

14 MR PAUL YOUR HONOR, I'M JIMMY PAUL WITH CHAMBERLAIN
15 HRDLICKA REPRESENTING AUGHTRY -- WINDSOR/AUGHTRY AND VISTA
16 HOTELS TOBY WARD IS CO-COUNSEL WITH US, AND HE'S HERE IN
17 COLUMBIA

18 MR FOSTER AND I'M ROBERT FOSTER WITH NELSON MULLINS
19 REPRESENTING HILTON

20 MR NEWMAN JUDGE, GRAHAM NEWMAN HERE FOR STEVENS &
21 WILKINSON

22 MR HINSON BRINK HINSON WITH JANET, JENNER AND SUGGS
23 HERE FOR GARY REALTY AND GARFIELD TRAUB DEVELOPMENT

24 MS PILLOW MINDY PILLOW WITH KILPATRICK STOCKTON HERE
25 FOR TURNER CONSTRUCTION

1 THE COURT HOW DO YOU SPELL YOUR LAST NAME?

2 MS PILLOW PILLOW, JUST LIKE YOU LAY YOUR HEAD ON

3 THE COURT OKAY

4 MR KALISH PAGE KALISH OF ELLIS, LAWHORNE, AND SIMS

5 HERE ON BEHALF OF TURNER CONSTRUCTION AS WELL

6 THE COURT ALL RIGHT

7 MR PAUL YOUR HONOR---

8 THE COURT YES, SIR

9 MR PAUL ---MR DETWILER AND I HAD DISCUSSED A
10 PROCEEDING WITH THE PLAINTIFFS AND WE'RE GOING TO SEE IF IT'S
11 ALL RIGHT WITH THE COURT MY MOTION FOR THE AUGHTRY
12 DEFENDANTS ON NO AGREEMENT TO AGREE IS VERY SIMILAR TO THE
13 CITY'S MOTION ON NO AGREEMENT TO AGREE WE'VE GOT SOME
14 DIFFERENT POINTS AND DIFFERENT FOCUS, BUT ESSENTIALLY IT'S
15 THE SAME AND WHAT WE HAVE PROPOSED TO THE PLAINTIFFS AND
16 WHAT I THINK THEY AGREED TO IS THAT, IF THE COURT IS
17 PERMITTING IT, IS THAT MR DETWILER WOULD ARGUE HIS MOTION
18 FIRST THEN I WOULD ARGUE MINE AND TRY MY BEST NOT TO REPEAT

19 WHAT HE HAS SAID AND THEN THE PLAINTIFFS WOULD RESPOND HOW
20 EVER THEY WANT TO RESPOND AND THEN MR DETWILER AND I WOULD
21 REPLY IF THAT -- THAT WAY I WOULDN'T ARGUE THE WHOLE MOTION
22 AFTER HE HAD ALREADY ARGUED IT

23 THE COURT ALL RIGHT MR NEWMAN, MR HARPOOTLIAN SAID
24 YOU'D BE ARGUING THE ENTIRE THING TODAY?

25 MR NEWMAN YES, SIR NOW, THERE ARE SOME PERMUTATIONS

1 BETWEEN THE VARIOUS PARTIES THAT MY ESTEEMED CO-COUNSEL MAY
2 ADDRESS, BUT I'LL BE CARRYING THE BULK OF THE LOAD FROM THE
3 PLAINTIFFS' PERSPECTIVE

4 THE COURT ALL RIGHT

5 MR NEWMAN WHAT MR PAUL SUGGESTED ACTUALLY WE WERE
6 GOING TO SUGGEST AS WELL THERE IS A LOT OF DUPLICATION WHEN
7 IT COMES TO THE ARGUMENTS, SO I THINK IT WOULD MAKE SENSE FOR
8 US TO ADDRESS THE BREACH OF CONTRACT OR EXISTENCE OF A
9 CONTRACT ISSUES IN A JOINT FASHION

10 THE COURT OKAY ALL RIGHT MR DETWILER?

11 MR DETWILER THANK YOU, YOUR HONOR MAY IT PLEASE THE
12 COURT? YOUR HONOR, AGAIN I'M HERE REPRESENTING THE CITY OF
13 COLUMBIA MR FOSTER, THE LAST TIME WE WERE BEFORE YOU
14 SPOKE TO THE ISSUE OF WHETHER THE M O U IS A BINDING
15 CONTRACT I DON'T WANT TO REPEAT EVERYTHING THAT MR FOSTER
16 SAID I DON'T THINK WE HAVE THAT MUCH TIME BUT---

17 THE COURT BY THE WAY, HOW MUCH TIME HAVE Y'ALL
18 ALLOCATED FOR THIS?

19 MR DETWILER I WILL BE -- I WILL NOT TAKE AS LONG AS
20 MR FOSTER DID LAST TIME, JUDGE

21 THE COURT NO, THAT'S FINE IF YOU DO I KNOW THAT
22 Y'ALL ALL HAVE TO STATE YOUR POSITIONS, AND I'M NOT UNDER THE
23 TIME CRUNCH THAT I WAS BEFORE WITH THE OTHER 79 MOTIONS THAT
24 I HAD TO HEAR THAT WEEK

25 MR DETWILER RIGHT

1 THE COURT ALL OF WHICH I'VE RULED ON EXCEPT THIS ONE
2 AND ONE OTHER ONE, SO I

3 MR DETWILER JUDGE, I'D LIKE TO SAY ON BEHALF OF ALL
4 COUNSEL WE REALLY APPRECIATE YOUR VOLUNTEERING AND I KNOW
5 YOU DID -- YOU DID HAVE A CHOICE TO SOME DEGREE IN KEEPING
6 THIS CASE AND HEARING THE REST OF THESE MOTIONS, AND WE
7 REALLY APPRECIATE THAT THAT'S GOING TO BE VERY HELPFUL TO
8 US ONE WAY OR THE OTHER IN HOW YOU DECIDE AND HOW WE GO
9 FORWARD IN THIS CASE, AND WE APPRECIATE IT

10 YOUR HONOR, WE BELIEVE, AND AS I THINK MOST OF THE
11 DEFENDANTS REITERATE, THAT THE MEMORANDUM OF UNDERSTANDING IS
12 AN AGREEMENT TO AGREE AND UNDER SOUTH CAROLINA LAW AN
13 AGREEMENT TO AGREE CAN'T BE A BINDING CONTRACT AND REALLY
14 IT BOILS DOWN TO WHETHER OR NOT ALL OF THE ESSENTIAL TERMS OF
15 THE DEAL ARE PROVIDED FOR IN THE DOCUMENT AND I WANT TO
16 SPEAK FROM THE CITY'S VIEWPOINT ABOUT WHAT THE ESSENTIAL
17 TERMS WERE THAT WERE NOT IN THE M O U BECAUSE THAT'S
18 CRITICAL TO UNDERSTANDING THIS CASE

19 THE M O U WAS REALLY A FRAMEWORK AND THAT'S A PHRASE
20 THAT WE USED IN OUR BRIEF, BUT I WANT TO POINT OUT THAT IT'S
21 A PHRASE THAT THE PLAINTIFFS USE IN THEIR BRIEF WITH REGARD
22 TO THEIR RESPONSE TO AUGHTRY'S MOTIONS FOR SUMMARY JUDGMENT
23 IT'S A FRAMEWORK TO COME UP WITH A WORKABLE ARRANGEMENT TO
24 BUILD A -- WHAT STARTED OUT TO BE A \$60 MILLION HOTEL HERE IN
25 COLUMBIA YOU KNOW, ONE DOCUMENT CAN'T POSSIBLY SET FORTH

1 ALL THE TERMS TO BUILD A HOTEL OF THAT MAGNITUDE AND I WANT
2 TO -- AS I GO THROUGH MY ARGUMENTS, I'M GOING TO TALK OR
3 POINT YOU TO TESTIMONY AND INFORMATION PROVIDED BY TWO TEAM
4 MEMBERS THAT WERE ON THE PLAINTIFFS' TEAM THAT ARE NOT
5 PARTIES TO THIS CASE AND I THINK THAT IF THEY DON'T HAVE A
6 DOG IN THIS FIGHT -- AND I THINK THAT THEIR TESTIMONY OR
7 THEIR PERSPECTIVE IS VERY IMPORTANT TO THE COURT IN
8 UNDERSTANDING WHAT WAS REALLY GOING ON

9 THOSE TWO PEOPLE SPECIFICALLY ARE JOHN LUMPKIN WHO IS
10 QUOTED EXTENSIVELY IN OUR BRIEF TO THE COURT AND A GENTLEMAN
11 BY THE NAME OF BILL OR WILLIAM CORRADO MR CORRADO IS A
12 FELLOW THAT WORKS IN NEW YORK CITY IN HIGH FINANCE HE
13 WORKED FOR CITIGROUP HE WAS THE FELLOW WHO PUT TOGETHER ALL
14 OF THE FINANCIAL MODELS WITH REGARD TO THE CITY HOTEL
15 FINANCING STRUCTURE, AND WE WENT UP TO NEW YORK AND TOOK HIS
16 DEPOSITION AND IN OUR SUPPLEMENTAL MATERIALS WE HANDED TO
17 THE COURT THIS MORNING, WE HAVE A SUBSTANTIAL PART OF HIS
18 DEPOSITION TESTIMONY THAT I'LL -- AND I'LL GIVE YOU SPECIFIC
19 PAGE REFERENCES THAT WILL BE HELPFUL I THINK AS WE GO

20 THE COURT WHEN WAS HE DEPOSED?

21 MR DETWILER PARDON? PARDON?

22 THE COURT WHEN WAS HE DEPOSED?

23 MR DETWILER GOSH HE WAS DEPOSED LAST CHRISTMAS

24 THE COURT OKAY

25 MR FOSTER LAST CHRISTMAS

1 MR. DETWILER MONTHS AND MONTHS AGO AND, AGAIN,
2 CITIGROUP IS NOT A PLAINTIFF IN THIS CASE, ALTHOUGH THEY
3 SPENT AT LEAST AS MUCH TIME AS ANYBODY ELSE ON THE -- ON THE
4 PLAINTIFFS' SIDE AND ON THE DEVELOPMENT TEAM SIDE IN TRYING
5 TO COME UP WITH A WORKABLE DEAL, BUT THEY'RE NOT PLAINTIFFS
6 IN THIS CASE AND NEITHER IS EDENS & AVANT WITH WHOM MR
7 LUMPKIN WORKED YOU MAY RECALL THAT MR LUMPKIN WAS THE
8 POINT MAN FOR THE TEAM HE WAS THE PERSON WHO INTERFACED
9 MOST WITH THE CITY AND ALL OF THE TEAM MEMBERS, AND WE
10 DEPOSED HIM PROBABLY OVER A YEAR AGO AND HIS -- HIS TESTIMONY
11 IS PROVIDED FOR YOUR HONOR'S REVIEW

12 BUT MR LUMPKIN TESTIFIED THAT THE M O U WAS NOT A
13 CONTRACT IT WAS AN AGREEMENT TO AGREE IT WAS A LETTER OF
14 INTENT AND -- AND TO---

15 THE COURT WELL HE EQUATED IT WITH A LETTER OF INTENT,
16 BUT JUST BECAUSE HE THINKS IT'S NOT DOESN'T MEAN IT'S NOT

17 MR DETWILER OF COURSE BUT HE UNDERSTOOD ALL ALONG
18 THAT THIS WAS A LETTER OF INTENT THAT THERE WERE SPECIFIC
19 AGREEMENTS -- SPECIFIC AGREEMENTS THAT WERE TO BE WORKED OUT
20 THAT HE -- HE CALLED CENTRAL TO THE TRANSACTION NOW, AS I
21 MENTIONED, MR CORRADO PUT TOGETHER FINANCIAL MODELS AND I'M
22 GOING TO -- I'M GOING TO TOUCH BASE ON ALL OF THESE IN MORE
23 DETAIL IN A MOMENT BUT THIS IS OUR TIME LINE, YOUR HONOR,
24 AND I'LL HAVE A HANDOUT SHORTLY THAT -- IT WILL BE A LITTLE
25 BIT EASIER FOR YOU TO READ FROM THERE

1 BUT OUR TIME LINE BEGINS AT THE EXECUTION OF THE -- I
2 MEAN, THE RELEVANT PORTIONS BEGIN WITH THE EXECUTION OF THE
3 MEMORANDUM OF UNDERSTANDING ON APRIL 17TH 2003, AND THE
4 OTHER SIGNIFICANT -- ONE OF THE MAJOR SIGNIFICANT DATES WAS
5 ON FEBRUARY 11TH, 2004---

6 THE COURT THAT'S WHEN THE -- THAT'S WHEN THEY -- THE
7 COMMITTEE MET AND SAID GO FORWARD ON THIS PREMISE

8 MR DETWILER THE NONPROFIT CORPORATION BOARD MET AND
9 SAID GO -- THEY APPROVED THE FINANCING TERMS AND -- BUT THERE
10 WERE -- IN THOSE MINUTES THERE ARE ALSO -- THERE WAS ALSO
11 MENTION OF SIGNIFICANT DOCUMENTS AND TERMS YET TO BE
12 NEGOTIATED, AND THEN THE NEXT MOST IMPORTANT POINT OR DATE I
13 THINK WOULD BE MARCH 17TH, 2004, WHEN THE CITY COUNCIL VOTED
14 FOR A SECOND REQUEST FOR PROPOSAL

15 NOW, IN THE M O U THERE WERE AT LEAST FIVE SEPARATE
16 AGREEMENTS THAT WERE SPECIFICALLY MENTIONED IN THE M O U TO
17 BE DEVELOPED ONE OF THEM, OF COURSE, WAS A DEVELOPMENT
18 MANAGEMENT AGREEMENT THAT'S IN SECTION ROMAN NUMERAL 6,
19 PARAGRAPH 1 THAT WAS THE AGREEMENT BETWEEN THE CITY OR THE
20 NONPROFIT CORPORATION, AND THAT'S THE PHRASE USED IN THE
21 M O U - THE CITY OR THE N P C - AND THE DEVELOPER BUT
22 THAT WAS GOING TO DEFINE THE TERMS OF HOW THE HOTEL WAS TO BE
23 DESIGNED, DEVELOPED, THE CONSTRUCTION OF IT, AND THE DELIVERY
24 OF THE HOTEL

25 THAT DOCUMENT WAS NEVER COMPLETED AND IT WAS NEVER

1 SIGNED, AND THERE IS NO DOCUMENT THAT THESE PLAINTIFFS WILL
2 POINT TO TODAY, I DON'T BELIEVE TO SHOW THE COURT THAT THIS
3 IS THE FINAL DOCUMENT THAT EVERYBODY AGREED TO THEY JUST
4 DIDN'T SIGN

5 THE COURT AND THEY SAY THAT -- THE FIRST PARAGRAPH
6 UNDER THE GENERAL CONDITIONS SAYS THAT YOU HAD TO PROCEED IN
7 GOOD FAITH TO EXECUTE A DEFINITIVE WRITTEN AGREEMENT

8 MR DETWILER AND I WOULD SUBMIT TO THE COURT THAT THE
9 CITY DID PROCEED IN GOOD FAITH, AND THEY ULTIMATELY DECIDED
10 ON THE 17TH OF MARCH THAT -- THAT THIS WAS NOT GOING TO WORK
11 AND THAT THE DEAL WAS NEVER DEFINED AND THEY ULTIMATELY
12 DECIDED THAT -- TO PULL THE PLUG ON IT AND I THINK AS WE
13 TALK ABOUT THE FACTS THAT ARE UNDISPUTED IN THIS CASE, YOU'LL
14 UNDERSTAND WHY WE REACHED THAT POINT

15 THE COURT CAN I -- LET ME INTERRUPT YOU JUST FOR A
16 SECOND AND ASK MR FOSTER AND MAYBE MR PAUL A QUESTION
17 THIS HANDOUT THAT Y'ALL GAVE ME BACK IN JULY, IT SAID ON
18 FEBRUARY THE 11TH THE CORPORATION VOTED TO APPROVE FINANCING
19 THE STRUCTURE AT 71 MILLION IN YOUR MEMO, MR DETWILER, ON
20 PAGE -- PAGE 6 ON THE TURNER MEMO, YOU SAID IT WAS 69 8
21 MILLION IF IT MAKES A DIFFERENCE -- I DON'T KNOW IF IT
22 MAKES A DIFFERENCE OR IF I'M MISREADING SOMETHING---

23 MR FOSTER NO YOU'RE CORRECT, YOUR HONOR HILTON
24 WAS GOING TO THROW IN 1 5 MILLION TOWARDS THIS DEAL SO THAT
25 -- IT'S BOTH -- BOTH NUMBERS ARE CORRECT

1 THE COURT SO THEY ADD UP TO MAKE---

2 MR FOSTER THEY ADD UP TO THE 71 MILLION

3 THE COURT OKAY I'M SORRY

4 MR DETWILER AND, YOUR HONOR, LET ME -- LET ME JUST
5 TAKE THIS OPPORTUNITY, SINCE YOU'VE RAISED THAT QUESTION, TO
6 EXPLAIN WHAT THIS CHART IS AND IT'S IN -- YOU HAVE A SMALL
7 VERSION OF IT BUT THIS REPRESENTS EIGHT DIFFERENT MODELS
8 THAT BILL CORRADO WITH CITIGROUP AND THE DEVELOPMENT TEAM
9 CAME UP WITH OVER TIME EACH ONE OF THOSE MODELS IS PLOTTED
10 HERE AT THE BOTTOM IN GREEN ALONG THE TIME LINE BUT -- AND,
11 OF COURSE, THERE WERE ACTUALLY MORE LIKE 30 MODELS THAT WERE
12 ULTIMATELY DONE BUT THESE ARE THE ONES THAT WE FELT LIKE
13 WERE THE MOST SIGNIFICANT AND SHOW THE MOST EVOLUTION OF THIS
14 DEAL AND IF YOU'LL -- IF YOU'LL NOTICE, THE FIRST MODEL
15 THAT WAS PITCHED TO THE CITY TALKS ABOUT THE PAR AMOUNT OF
16 THE BONDS BEING \$58,630,000 THAT EVOLVED -- NOW, KEEP IN
17 MIND THAT THE M O U WAS SIGNED ON APRIL 17TH, SO THAT ONE
18 PRECEDED THE M O U

19 THE NEXT ONE WE HAVE PLOTTED HERE IS -- IS A FEW MONTHS
20 LATER IN SEPTEMBER OF '03, AND IT'S GONE UP TO 62 MILLION A
21 VERY IMPORTANT POINT - AND WE'RE GOING TO TALK ABOUT THIS A
22 GOOD DEAL, I THINK - IS THAT THE CITY STAND-BY SUPPORT
23 PAYMENTS -- YOU MAY RECALL THAT WITHIN THE M O U THERE WAS A
24 PROVISION THAT CALLED FOR THE CITY TO PROVIDE STAND-BY
25 SUPPORT FOR THE BOND ISSUE THAT'S A EUPHEMISM FOR A

1 GUARANTEE AND THE CITY'S STAND-BY SUPPORT PAYMENTS WERE --
2 BEGAN AT ABOUT \$53 MILLION AT LEAST AS OF SEPTEMBER 24TH,
3 '03

4 MR CORRADO, IN HIS DEPOSITION THAT YOU HAVE BEFORE YOU
5 WOULD TELL YOU AND TELL US THAT THE CITY'S STAND-BY SUPPORT
6 THAT THEY WENT INTO WAS ABOUT A THIRD OF THE 58 MILLION, BUT
7 THAT WAS NEVER ON THE MODEL THAT WE -- THE MODEL THAT WE HAD
8 THE COURT EXPLAIN TO ME IN LAYMEN'S TERMS HOW THIS
9 WOULD WORK I UNDERSTAND ABOUT THE SALE OF BONDS AND THAT
10 KIND OF THING, BUT IN ESSENCE WHEN WOULD THEIR GUARANTEE BE
11 CALLED IF SUCH AND SUCH HAPPENED?

12 MR DETWILER THE GUARANTEE WOULD BE CALLED IN AS SOON
13 AS THE HOTEL BEGAN TO GO INTO ANY SORT OF NEGATIVE CASH FLOW
14 SITUATION KEEP IN MIND THAT THIS PROPOSAL WAS FOR THE CITY
15 OF COLUMBIA TO OWN AND OPERATE THE HOTEL NOW, THE OPERATION
16 WOULD BE CEDED TO HILTON AS THE MANAGER BUT THE CITY WOULD
17 ACTUALLY BE THE OWNER IT WOULD -- IT WOULD EFFECTIVELY OWN
18 THIS DEAL AND THESE FOLKS WERE GOING TO TURN OVER THE KEYS
19 TO THE CITY AND THEY WERE GOING TO BASICALLY WALK AWAY THE
20 CITY WAS GOING TO HAVE ALL OF THE LIABILITY FROM THAT POINT
21 FORWARD AS SOON AS THE---

22 THE COURT THEY HAD -- THEY WOULD BE WALKING THAT PLANK
23 AND IT GOT LONGER BY ABOUT \$12 MILLION

24 MR DETWILER YOU BET AS MR FOSTER POINTED OUT IN
25 THE LAST HEARING, A MILLION DOLLARS A MONTH IS HOW THIS

1 PROJECT INCREASED BUT LET ME -- LET ME POINT OUT SOMETHING
2 THAT I THINK IS EVEN MORE SIGNIFICANT THAN THAT TAKE A LOOK
3 AT THE CITY STAND-BY SUPPORT PAYMENTS, THE RISKS THE RISK
4 ASSOCIATED WITH THIS DEAL STARTED OUT AT ACTUALLY A THIRD OF
5 58, ACCORDING TO MR CORRADO THEN IT WAS 53 53 IT WAS
6 FAIRLY STAGNANT AND THEN ON FEBRUARY THE 11TH THE INFAMOUS
7 HOTEL CORPORATION BOARD MEETING THAT THEY RELY ON SO MUCH --
8 ON THAT DATE THEY PITCHED -- THE CITY STAND-BY SUPPORT WAS 84
9 MILLION

10 THEN TAKE A LOOK AT WHAT HAPPENED AFTER THAT DATE NOW,
11 THIS IS THE DATE THEY SAY EVERYTHING WAS SET IN STONE

12 THE COURT ALL RIGHT NOW WHAT'S THE RELATIONSHIP
13 BETWEEN THE 84 MILLION AND THE 69 MILLION?

14 MR DETWILER THIS WOULD BE THE CITY'S GUARANTEE KEEP
15 IN MIND THAT THIS IS THE BOND ISSUE

16 THE COURT RIGHT

17 MR DETWILER THIS IS WHAT IT COSTS TO PUT UP THE
18 BRICKS AND MORTARS, AND EVERYTHING ABOVE THAT WAS ESSENTIALLY
19 THE COST OF FINANCING, FEES, BOND INSURANCE, AND THAT SORT OF
20 THING, BUT THAT WAS GOING TO BE THE ULTIMATE PAR AMOUNT OF
21 THE BONDS THIS WAS GOING TO BE THE ULTIMATE EXPOSURE TO THE
22 CITY IF THE BONDS -- IF THERE WAS NOT SUFFICIENT CASH FLOW TO
23 PAY THOSE BONDS BACK, THAT WOULD BE THE CITY'S EXPOSURE

24 NOW, THAT'S NOT OUR NUMBER THAT'S THE NUMBER THAT IS
25 ON THESE MODELS AND THAT CITIGROUP CAME UP WITH, THAT THE

1 DEVELOPMENT TEAM CAME UP WITH AND SO THAT 84 MILLION WOULD
2 BE THE CITY'S BACKSTOP, IF YOU WILL

3 TAKE A LOOK AT WHAT HAPPENS AFTER THIS DATE OF
4 FEBRUARY 11TH, 2004, WHEN THEY SAY EVERYTHING WAS SET IN
5 STONE THE CITY AGREED TO EVERYTHING, EVEN THOUGH IT WAS A
6 NONPROFIT CORPORATION EVEN THOUGH THE CITY COUNCIL HAD NOT
7 VOTED ON A THING AT THAT POINT, THEY SAY IT WAS ALL SET IN
8 STONE AND THAT'S WHEN THEIR DEAL WENT HARD WELL, THEY'RE
9 STILL MAKING MODELS HERE, AND THE DEAL GOES UP ANOTHER, YOU
10 KNOW, WHAT, \$700,000 BUT LOOK WHAT HAPPENS TO THE CITY'S
11 BACKSTOP AT THAT POINT IT'S GONE UP---

12 THE COURT WHAT IS THAT AGAIN? I CAN'T READ THAT

13 MR DETWILER I'M SORRY THIS IS THE -- THIS IS ON
14 MARCH THE 2ND, 2004 AT THAT POINT THE CITY'S BACKSTOP HAS
15 JUMPED TO \$90 MILLION ON 3/15/04, ON MARCH THE 15TH OF
16 2004, THE BOND AMOUNT REACHES \$72 MILLION, AND THE CITY'S
17 BACKSTOP IS \$91 MILLION THAT'S WHAT THE CITY OF COLUMBIA
18 WAS ON THE HOOK FOR AT THAT POINT WE HAVE GRAVITATED ALMOST
19 \$40 MILLION IN A YEAR IN TERMS OF THE CITY'S EXPOSURE

20 NOW LET'S POINT OUT THAT ON MARCH 15TH, 2004, WAS THE
21 DATE OF THIS MODEL THIS IS WHEN EVERYTHING SPIKED UP WHAT
22 HAPPENS ON MARCH 17TH? MARCH 17TH THE CITY COUNCIL VOTES FOR
23 A NEW R F P THEY PULL THE PLUG THEY SAID ENOUGH IS
24 ENOUGH NOW---

25 THE COURT OUR GOOD FAITH ONLY GOES SO FAR

1 **MR DETWILER** OUR GOOD FAITH ONLY GOES SO FAR NOW,
2 EVERYBODY WAS MOVING FORWARD IN GOOD FAITH BUT COME ON \$40
3 MILLION? \$12 MILLION BOND ISSUE? AND THE TERMS OF THIS DEAL
4 WERE EVER EVOLVING, AND THAT GOES BACK TO OUR POINT WE'RE
5 NOT JUST TALKING ABOUT THE FIVE DEFINITIVE WRITTEN AGREEMENTS
6 THAT ARE IN THE M O U THAT WOULD BE ENOUGH, I WOULD SUBMIT
7 TO YOUR HONOR, TO SAY THAT THE DEAL WAS NOT SET FORTH IN THE
8 M O U , BUT THE ESSENTIAL TERMS OF THE DEAL WERE EVER
9 CHANGING AS REFLECTED ON THESE MODELS THAT THESE PLAINTIFFS
10 SUBMITTED TO THE CITY EVEN AFTER THE CORPORATION VOTED ON
11 FEBRUARY THE 11TH---

12 **THE COURT** HOW ABOUT THE -- WHEN DID THEY CHANGE FROM
13 NONTAXABLE TO TAXABLE?

14 **MR DETWILER** THAT WOULD HAVE BEEN -- THAT'S SHOWN ON
15 THIS, TOO, YOUR HONOR AND YOU HAVE -- I BELIEVE IN THAT NEW
16 SUBMISSION YOU HAVE ONE OF THESE IT MIGHT BE A LITTLE MORE
17 EASIER -- IT MIGHT BE A LITTLE BIT EASIER FOR YOU TO READ

18 **THE COURT** OKAY

19 **MR DETWILER** BUT IF YOU WILL -- WE PUT THAT POINT IN
20 HERE ON THE SECOND LINE HERE YOU KNOW, THE ORIGINAL DEAL
21 AND THE M O U ACTUALLY CALLS FOR TWO SERIES -- EITHER ONE OR
22 TWO SERIES OF TAX-EXEMPT BONDS, AND I'M VERY PLEASED THAT YOU
23 BROUGHT THAT SUBJECT UP I WAS ABOUT TO FORGET IT

24 **THE FIRST MODEL** THAT WE HAVE PRESENTED TO THE COURT
25 TODAY AFTER THE M O U WAS SIGNED DEALS WITH ONE SERIES

1 THAT'S CONSISTENT WITH THE M O U THE SECOND MODEL IS ONE
2 SERIES ALL THE WAY THROUGH FEBRUARY 11TH IT'S ONE SERIES
3 BUT WHEN YOU -- WHEN YOU GO TO THE 70,565,000 BOND ISSUE ON
4 MARCH THE 2ND, WE'RE SUDDENLY TALKING ABOUT TAXABLE AND NON-
5 TAXABLE OR TAXABLE AND TAX-EXEMPT BONDS WE'RE TALKING ABOUT
6 A MIX, AND FROM THAT POINT FORWARD WE'RE TALKING ABOUT A MIX

7 NOW THE MEMORANDUM OF UNDERSTANDING NEVER TALKS ABOUT
8 ANYTHING BEING TAXABLE, THAT THESE BONDS ARE NOT TAXABLE, OR
9 THAT THE M O U NEVER SPEAKS IN TERMS OF TAXABLE BONDS IT
10 ONLY SPEAKS IN TERMS OF NONTAXABLE, TAX-EXEMPT BONDS

11 THE COURT AND WHY DOES THAT MAKE A DIFFERENCE?

12 MR DETWILER IT MAKES A DIFFERENCE TO THE INVESTOR
13 IT MAKES A DIFFERENCE TO THE COSTS

14 THE COURT PEOPLE LIKE YOU THAT WANT TO BUY

15 MR DETWILER WELL, IT ALSO MAKES A DIFFERENCE TO THE
16 COST OF THE -- IN TERMS OF THE COST TO THE CITY BECAUSE --
17 BECAUSE THOSE ARE PRICED DIFFERENTLY AS I UNDERSTAND IT, IN
18 THE MARKETPLACE IN NEW YORK

19 IF I COULD FLIP BACK FOR JUST A MINUTE AND POINT A
20 COUPLE OF THINGS TO YOUR HONOR'S ATTENTION THAT DEAL WITH THE
21 DEFINITIVE WRITTEN AGREEMENTS ON TAB 18 -- IN TAB 18 OF THE
22 MATERIALS WE PRESENTED TO YOU TODAY IS A LETTER FROM MINDY
23 GROFT, IF I'M PRONOUNCING HER NAME RIGHT, DATED FEBRUARY 2ND,
24 2004 NOW THAT'S JUST A FEW DAYS BEFORE THE MEETING OF THE
25 N P C AND THERE ARE MAJOR ISSUES STILL FLOATING AROUND AT

1 THAT POINT IN TIME WITH REGARD TO THE DESIGN/BUILD AGREEMENT
2 BETWEEN TURNER AND THE ARCHITECTS ABOUT WHAT WAS GOING TO BE
3 INCLUDED IN THE G M P AND WHAT WASN'T GOING TO BE INCLUDED
4 IN THE G M P

5 THE QUALIFIED MANAGEMENT AGREEMENT WAS A MAJOR STICKING
6 POINT NOW, THAT IS THE HOTEL -- ALSO REFERRED TO AS THE
7 HOTEL MANAGEMENT AGREEMENT, THAT WAS THE AGREEMENT BETWEEN
8 HILTON AND THE CITY IT IS HILTON AND THE CITY, RIGHT?

9 MR FOSTER RIGHT

10 MR DETWILER AND, OF COURSE, THE M O U SPECIFICALLY
11 CALLED FOR THE CITY HAVING THE RIGHT TO APPROVE THE TERMS OF
12 THE Q M A , BUT ON TAB 15, YOUR HONOR, OF THOSE NEW MATERIALS
13 WE'VE HANDED YOU AN E-MAIL, A LONG E-MAIL, FROM HILTON'S
14 LAWYER NAMED---

15 THE COURT TAB WHAT?

16 MR DETWILER I'M SORRY 15 LONG E-MAIL FROM A
17 LAWYER IN DALLAS NAMED KATHLEEN WOO (PHONETIC) WHO WAS
18 HILTON'S LAWYER THAT'S DATED JANUARY 19TH OF '04, AND THERE
19 ARE MAJOR ISSUES WITH THE Q M A SET FORTH IN THAT DOCUMENT
20 ALONE AND THEN IF YOU'LL GO TO 16 AND 17, THERE'S AN E-MAIL
21 FROM JOHN VAN DUYS WHO IS HERE IN COLUMBIA WITH SINKLER AND
22 BOYD, I BELIEVE, AND TAB 17 IS A LETTER HE ATTACHED TO THAT
23 E-MAIL I'M NOT SURE WHY WE PUT THOSE IN SEPARATE TABS BUT
24 HE IS TALKING ABOUT WORKING ON A PROPOSED SOLUTION TO THE
25 EXECUTIVE COMPENSATION IN THE Q M A SIGNIFICANTLY THAT'S

1 ON FEBRUARY 27TH 2004 SO THEY'RE STILL WORKING ON THE
2 Q M A LONG AFTER FEBRUARY 11TH

3 BILL CORRADO TALKS ABOUT THE IMPORTANCE OF THE Q M A IN
4 HIS DEPOSITION, YOUR HONOR, AND HIS DEPOSITION IS PROVIDED TO
5 YOU AT TAB 12 AND ON PAGE 126 OF CORRADO'S DEPOSITION HE'S
6 TALKING ABOUT THE Q M A AND VAN DUYS' E-MAIL, AND HE REFERS
7 TO THAT AS A SIGNIFICANT UNRESOLVED ISSUE AS OF
8 FEBRUARY 27TH, 2004 JEFF SAXE (PHONETIC), WHO WAS AN
9 INDEPENDENT CONSULTANT WHO WAS HIRED BY THE CITY OF COLUMBIA
10 WHO IS AN EXPERT IN THIS CASE BUT HE WAS ALSO ON THE GROUND
11 WHEN ALL THIS WAS GOING ON -- IN FACT IT'S MY UNDERSTANDING
12 HE ACTUALLY CREATED THE FIRST DRAFT OF THE M O U , AND MR
13 SAXE REFERRED TO THE -- WHAT WAS GOING ON WITH THE QUALIFIED
14 MANAGEMENT AGREEMENT IN HIS DEPOSITION THIS WAY

15 HE SAID THAT EVERYONE WAS -- THAT THIS WAS A NEW
16 CONCEPT, THIS WHOLE HOTEL FINANCING -- PUBLICLY-FINANCED
17 HOTEL DEAL AND THE EXECUTIVE COMPENSATION IT WAS ALL UNDER
18 INTENSE SCRUTINY BY THE I R S DURING THIS PERIOD OF TIME,
19 AND JEFF SAXE IS EXPLAINING THAT IN HIS DEPOSITION THAT'S
20 TAB 13 AT PAGE 94 HE IS TALKING ABOUT -- HE SAYS EVERYONE
21 IS SCRATCHING THEIR HEAD AT THAT POINT TRYING TO FIGURE OUT
22 WHAT TO DO ABOUT HOW TO DEAL WITH THE EXECUTIVE COMPENSATION,
23 AND THAT IS EXACTLY WHAT VAN DUYS IS MENTIONING IN HIS
24 LETTER---

25 THE COURT THESE -- THOSE ARE THE ONES YOU GAVE ME THIS

1 MORNING?

2 MR DETWILER YES, SIR

3 THE COURT ALL RIGHT TELL ME ABOUT THE EXECUTIVE
4 COMPENSATION COMPENSATION FOR WHO?

5 MR DETWILER THAT WOULD BE THE EXECUTIVE COMPENSATION
6 FOR THE PEOPLE WHO -- THE INDIVIDUALS WHO ACTUALLY MANAGE THE
7 HOTEL UNDER HILTON'S DIRECTIVE

8 THE COURT ONCE IT'S BUILT

9 MR DETWILER PARDON?

10 THE COURT ONCE IT'S BUILT

11 MR DETWILER ONCE IT'S BUILT, YES, SIR BUT THAT'S A
12 -- THAT'S A CRITICAL POINT BECAUSE THAT AFFECTS THE CASH
13 FLOWS, HOW THEY GET PAID, AND ALSO MORE CRITICALLY AFFECTS
14 WHETHER THESE BONDS, THESE BONDS NOW, ARE ULTIMATELY GOING TO
15 BE TAX-EXEMPT BECAUSE IT'S MY UNDERSTANDING AND I'M NOT A TAX
16 PERSON, BELIEVE ME, BUT IT'S MY UNDERSTANDING THAT IF THESE
17 FOLKS -- IF THE EXECUTIVE COMPENSATION AGREEMENT DOES NOT
18 PASS MUSTER, THEN SOME OR ALL OF THESE TAX-EXEMPT BONDS MIGHT
19 NOT BE TAX-EXEMPT AT ALL

20 MR FOSTER RICK, CAN I MAKE A POINT HERE?

21 MR DETWILER YEAH

22 MR FOSTER YOUR HONOR THAT WOULD BE THE COMPENSATION
23 FOR THE HILTON MANAGERS, AND THE STICKING POINT IS THIS WAS A
24 NOT-FOR-PROFIT CORPORATION THAT WAS GOING TO OWN IT AND THE
25 I R S IS GOING TO SCRUTINIZE WELL, HOW MUCH ARE YOU PAYING

1 THE EXECUTIVES? ARE YOU PAYING THEM \$3 MILLION IN SALARY,
2 BUT YOU'RE MAKING THIS A NOT-FOR-PROFIT CORPORATION? SO IT
3 WAS -- IT WAS A RELATIVELY NEW ISSUE THAT WE NEVER GOT
4 RESOLVED THE I R S AT ONE POINT REJECTED THE WHOLE PLAN,
5 AND SO THE TAX GUYS HAD TO GO BACK TO THE DRAWING BOARD AND
6 THAT'S WHERE WE STARTED GETTING DIFFERENT BONDS

7 THE COURT SO THEY WOULD BE PAID BY THE CORPORA -- THE
8 HOTEL CORPORATION AND NOT BY HILTON

9 MR FOSTER THAT'S CORRECT THE OWNERS OF THE HOTEL,
10 THE NOT-FOR-PROFIT CORPORATION, WOULD BE PAYING ALL THE
11 SALARIES

12 MR DETWILER AND IN FACT -- I'M SORRY

13 MR NEWMAN JUDGE, AND I APPRECIATE MR FOSTER'S
14 PARTICIPATION, BUT HE'S -- AND I ADMIRE HIS KNOWLEDGE IN
15 GRASPING THE ISSUES, BUT I JUST WANT TO NOTE FOR THE RECORD
16 THAT HE'S NOT A MOVING PARTY IN THIS SITUATION TODAY WHILE
17 HE STILL HAS A MOTION PENDING BEFORE YOU FOR THE PURPOSES OF
18 THIS---

19 THE COURT SO YOU OBJECT TO HIM TALKING

20 MR NEWMAN I WOULD -- I THINK MOST OF US OBJECT TO HIM
21 TALKING, BUT JUST TO PRESERVE THE RECORD I WANTED TO NOTE
22 THAT

23 MR FOSTER AND YOUR HONOR, I AM A MOVING PARTY
24 WE'VE GOT THE EXACT SAME MOTION BEFORE THE COURT

25 THE COURT OKAY

1 **MR DETWILER** AND I APPRECIATE HIS BETTER GRASP OF THIS
2 THAN MINE AND I'M GLAD HE CHIMED IN YOU KNOW, IF YOU'LL
3 LOOK AT VAN DUYS' LETTER THAT HE'S WRITING TO THE TEAM
4 MEMBERS NOW, HE'S TALKING ABOUT PROPOSED SOLUTIONS AND WHO
5 WERE THESE EXECUTIVES ACTUALLY GOING TO BE EMPLOYED BY AND,
6 I MEAN, THAT WAS -- THAT WAS AN ISSUE THAT WAS STILL
7 UNRESOLVED ON THE 24TH OF FEBRUARY AFTER THE N P C HAD
8 ALREADY MET

9 **THE COURT** WHY WERE THE PROPOSALS SO DIFFERENT, IF YOU
10 WANT TO CALL IT A MILLION DOLLARS A MONTH OR IF YOU JUMP UP
11 TO 31 MILLION BETWEEN -- I CAN'T READ THAT LITTLE DATE,
12 FEBRUARY -- 53 MILLION TO 84 MILLION WHY WERE THOSE
13 CONTINUING TO GO UP IN SUCH A RELATIVELY SHORT PERIOD OF
14 TIME?

15 **MR DETWILER** IT INVOLVED LARGELY THESE TINY NUMBERS
16 THAT YOU PROBABLY CAN'T READ FROM THE BENCH AND THAT IS THE
17 DEBT COVERAGE RATIOS THE COST OF THE BRICKS AND MORTARS WAS
18 NOT FLUCTUATING WILDLY THEY WERE MOVING -- THEY WERE MOVING
19 MONEY FROM ONE ACCOUNT TO ANOTHER, CALLING ONE THING BRICKS
20 AND MORTAR AND THEN -- AND THEN LATER ON CALLING IT F , F ,
21 AND D , BUT IT WAS -- IT WAS NOT PARTICULARLY SIGNIFICANT
22 WHAT WAS DRIVING THE COST OF THIS UP WERE THE COSTS OF THE
23 BONDS, THE COST OF THE FINANCING ARRANGEMENT, AND KEEP IN
24 MIND---

25 **THE COURT** PROFESSIONALS FEES?

1 MR DETWILER NOT PROFESSIONAL FEES BUT THE -- WELL,
2 FOR INSTANCE, AMBAC WAS THE BOND INSURER SOME OF THESE
3 EARLIER MODELS DON'T EVEN FACTOR IN BOND INSURANCE IN ORDER
4 TO GET THESE MODELS TO WORK FROM A DEBT COVERAGE RATIO
5 PERSPECTIVE, AS I UNDERSTAND IT - SOME OF THESE OTHER FOLKS
6 CAN MAYBE EXPLAIN THIS BETTER THAN I - THEY STARTED BRINGING
7 IN BOND INSURANCE AND I WOULD -- THIS WOULD BE A GOOD TIME TO
8 MENTION THAT AMBAC ISSUED A COMMITMENT FOR BOND INSURANCE IN
9 THE AMOUNT OF \$63 MILLION, \$63,295,000 TO BE EXACT, BASED ON
10 THIS OCTOBER 22ND MODEL THEY ISSUED THAT ON FEBRUARY THE
11 17TH AFTER THE N P C HAD MET AND VOTED FOR THIS MODEL
12 SO THE BOND INSURANCE COMMITMENT WAS REALLY BASED ON A
13 MUCH SMALLER NUMBER AND, OF COURSE, NO BOND INSURANCE
14 COMMITMENT WAS EVER ISSUED AFTER THAT FOR THESE LARGER
15 MODELS BUT A LARGE PART OF THESE -- OF THIS JUMP WAS THE
16 COST OF BOND INSURANCE THERE WERE OTHER FEES IT WASN'T
17 JUST LAWYERS AND THAT KIND OF THING BUT THAT WAS -- THAT WAS
18 WHAT WAS, AS I UNDERSTAND IT, CAUSING THIS TO RATCHET UP SO
19 DRAMATICALLY, BUT THESE ARE REAL NUMBERS I MEAN, THIS ISN'T
20 JUST FLUFF THESE ARE REAL NUMBERS THE CITY'S BACKSTOP,
21 THE CITY'S STAND-BY SUPPORT, THOSE ARE REAL NUMBERS REAL
22 RISKS TO THE CITY AND AS -- AS JOHN LUMPKIN STATED IN HIS
23 DEPOSITION, THE CITY WAS NOT GOING TO WALK AWAY FROM THESE
24 BONDS EVEN -- EVEN IF THE CITY DIDN'T GUARANTEE SOME OF THEM
25 BUT GUARANTEED OTHERS, THE CITY WASN'T GOING TO WALK AWAY

1 FROM ANY OF THESE BONDS, AND SO THIS WAS A REAL RISK

2 JOHN LUMPKIN MENTIONED THE PROVISIONS IN SOME OF THESE
3 AGREEMENTS THAT WERE STILL UNDER NEGOTIATIONS AS OF
4 FEBRUARY 11TH, 2004 SOMETHING THAT'S VERY SIGNIFICANT THAT
5 WAS SUBMITTED PRIOR TO TODAY IS THE AFFIDAVIT OF JOEL
6 GOTTLIEB JOEL GOTTLIEB, YOUR HONOR, WAS THE CITY'S
7 ATTORNEY, AND HE HAS SUBMITTED AN AFFIDAVIT THAT COVERS A
8 NUMBER OF THINGS, BUT IT COVERS THE FACT OR IT SPEAKS TO THE
9 FACT THAT THERE WERE SIGNIFICANT TERMS IN THE Q M A AND IN
10 THE ROOM BLOCK AGREEMENT THAT WERE STILL TO BE NEGOTIATED
11 HE EVEN MENTIONS THAT IN THE MINUTES OF THE N P C MEETING
12 THAT ARE IN THE RECORD

13 SO IF YOU'D ALLOW ME, YOUR HONOR, TO SORT OF FILL IN
14 SOME OF THE GAPS ON THIS TIME LINE WHAT WE HAVE HERE IS A
15 MEMORANDUM OF UNDERSTANDING, A LETTER OF INTENT, AN AGREEMENT
16 TO AGREE IT CALLS FOR AT LEAST FIVE SEPARATE --
17 SPECIFICALLY FIVE SEPARATE AGREEMENTS THAT WERE NEVER
18 EXECUTED, THAT WERE NEVER VOTED ON BY THE COUNCIL, THAT WERE
19 NEVER EVEN FINALIZED

20 NOW, I WOULD POINT OUT THAT THEIR -- IT'S MY
21 UNDERSTANDING THAT THE PLAINTIFFS WILL SAY, WELL, JOHN
22 LUMPKIN SAYS, WELL, THEY WERE ALL BUT DONE TONY TRAUB SAYS
23 WELL, THEY WERE ALL BUT DONE AS FAR AS WE WERE CONCERNED,
24 THE DEAL WAS DONE

25 I WOULD LIKE FOR THEM TO STAND BEFORE THE COURT AND TELL

1 US WHICH OF THESE DEALS WAS THE DEAL WAS IT THIS DEAL OR
2 WAS IT THIS DEAL OR WAS IT THIS DEAL? WHAT WERE THE MATERIAL
3 TERMS OF THE AGREEMENT THAT THEY ARE TRYING TO SUE US ON
4 TODAY?

5 NONE OF THESE DOCUMENTS WERE EVER FINALIZED, AND AGAIN,
6 MORE IMPORTANTLY OR MOST IMPORTANTLY, THE CITY COUNCIL HAS TO
7 VOTE ON THESE AGREEMENTS AND THEY NEVER VOTED ON THESE
8 AGREEMENTS

9 THE COURT HOW MANY PEOPLE ON CITY COUNCIL WERE ON THE
10 CORPORATION BOARD?

11 MR DETWILER IT WAS -- THEY WERE ONE IN THE SAME BUT
12 THEY SAT DIFFERENTLY, AND AS YOUR HONOR KNOWS AND WE ALL
13 KNOW YOU KNOW FORM IS AS IMPORTANT AS SUBSTANCE SOMETIMES
14 WHEN WE'RE DEALING WITH A MUNICIPALITY AND THEY HAVE TO SIT
15 AS COUNCIL THERE HAS TO BE NOTICE TO THE PUBLIC ABOUT WHAT
16 THEY'RE SITTING ON AND THEY NEVER TOOK A VOTE AS COUNCIL
17 ABOUT ANY OF THESE MATTERS

18 THE COURT -- WHAT WAS THE DATE THEY FINALLY SAID ENOUGH
19 IS ENOUGH? MARCH 17TH?

20 MR DETWILER MARCH 17TH THEY VOTED TO DRAFT A NEW
21 R F P AND THEN THE R F P WAS ACTUALLY ISSUED ON APRIL THE
22 2ND 2004 AND IF I RECALL, THE PLAINTIFFS WHEN WE WERE
23 BEFORE YOU THE LAST TIME, INDICATED THAT EVERYBODY KNEW THAT
24 THE DEAL WAS DEAD AS OF -- I THINK THEY SAID APRIL 2ND I
25 WOULD SUBMIT THAT IT WAS REALLY MORE LIKE MARCH 17TH I

1 DON'T KNOW THAT IT'S SIGNIFICANT EXCEPT THAT WHAT IS
2 SIGNIFICANT IS THAT EVERYTHING WAS GOING -- YOU KNOW, THEY
3 WERE STILL WORKING ON TRYING TO COME UP WITH A MODEL THAT
4 WORKED AS LATE AS MARCH 15TH AND THEN TWO DAYS LATER THE
5 CITY SAYS ENOUGH WE'RE GOING TO DO A NEW R F P

6 THERE'S ANOTHER SIGNIFICANT ISSUE, YOUR HONOR, THAT
7 WAS -- THAT WAS AN ESSENTIAL TERM THAT WAS NEVER -- THAT'S
8 REALLY -- IT'S BEEN DOWNPLAYED A LOT IN THIS LITIGATION BY
9 EVERYONE, BUT IT WAS A VERY SIGNIFICANT POINT AND THAT IS
10 WHETHER THIS HOTEL, THE CITY THAT IS, WOULD BE REQUIRED TO
11 PAY PROPERTY TAX FOR THIS HOTEL

12 NOW, THE PROPERTY TAXES, OF COURSE, WOULD BE LEVIED BY
13 RICHLAND COUNTY IT WAS NEVER CLEAR THAT THE ISSUE OF
14 PROPERTY TAX WAS RESOLVED IN FACT, JOEL GOTTLIEB MENTIONS
15 THIS AT PARAGRAPH 10 OF HIS AFFIDAVIT THAT IT SPECIFICALLY
16 WAS NOT RESOLVED AND IT WAS A BIG ISSUE IN HIS MIND NONE OF
17 THESE MODELS -- AS MR CORRADO POINTS OUT, NONE OF THESE
18 MODELS CALL FOR THE CITY PAYING PROPERTY TAX IF THE COUNTY
19 SAID, OH, NO, YOU OWE US PROPERTY TAX ON THIS \$60 MILLION
20 HOTEL OR \$50 MILLION HOTEL - PICK A NUMBER WHICH ONE YOU WANT
21 TO USE - THEN THAT'S A SIGNIFICANT CASH FLOW ISSUE FOR THE
22 CITY AND FOR THE OPERATION OF THE HOTEL

23 THE COURT WHO WAS WORKING ON THAT ANGLE?

24 MR DETWILER MR GOTTLIEB AND THE TAX PEOPLE

25 THE COURT WAS ANYTHING EVER RESOLVED ON THAT?

1 MR DETWILER NO SIR, IT WAS NEVER RESOLVED
2 THE COURT WAS THAT TIED TO THE ISSUE OF IT BEING NOT
3 A -- THE LEGAL STATUS OF THE CORPORATION?

4 MR DETWILER I DON'T THINK SO, YOUR HONOR IT WAS
5 REALLY -- AND, AGAIN, I'M NOT A TAX PERSON MAYBE IT WAS
6 TIED TO WHETHER OR NOT IT WAS A NOT-FOR-PROFIT CORPORATION,
7 BUT IT WAS A DIFFERENT STATE TAX ISSUE THAN THE I R S ISSUE
8 WITH THE Q M A IT WAS SIMILAR, BUT IT WAS A DIFFERENT SORT
9 OF ISSUE, AS I UNDERSTAND IT A DIFFERENT SCRUTINY AMONG THE
10 TAXING AUTHORITIES

11 THE COURT WHERE IS GOTTLIEB'S AFFIDAVIT?

12 MR DETWILER IT WAS SUBMITTED -- IT'S AN EXHIBIT TO
13 THE REPLY MEMORANDUM, YOUR HONOR

14 THE COURT OKAY

15 MR DETWILER SO---

16 THE COURT THAT BASICALLY TAKES CARE OF THE FACTS THEN,
17 RIGHT?

18 --MR DETWILER -- WELL, IT TAKES CARE OF THE FACTS, YOUR
19 HONOR, BUT I THINK IT ALSO -- AND I WOULD SUBMIT RESPECTFULLY
20 TO ALL THAT THOSE FACTS ARE UNDISPUTED THESE NUMBERS ARE
21 UNDISPUTED THE TIME LINE IS UNDISPUTED THESE -- THERE IS
22 NO QUESTION BUT THAT -- AT LEAST I WOULD RESPECTFULLY SUBMIT
23 THAT THERE IS -- THAT THERE IS NO GENUINE ISSUE OF MATERIAL
24 FACT WITH REGARD TO THE M O U , AND THAT'S ALL I'M HERE TO
25 ARGUE ABOUT RIGHT NOW

1 I'M GOING TO STAND UP IN A MINUTE AND WE'LL TALK ABOUT
2 QUANTUM MERUIT AND SOME OF THOSE OTHER CAUSES OF ACTION, BUT
3 RIGHT NOW WE'RE DEALING WITH THE CONTRACT CAUSE OF ACTION AND
4 THEY RELY ON THE M O U AS BEING A CONTRACT THE M O U WAS
5 NOT A BINDING CONTRACT BECAUSE THE ESSENTIAL TERMS WERE NOT
6 SPELLED OUT, AND I'VE GONE THROUGH SEVEN OR EIGHT DIFFERENT
7 ESSENTIAL TERMS THAT WERE NOT SET FORTH

8 THE PRIMARY ONES ARE THE TERMS THAT WERE -- THAT WERE TO
9 BE NEGOTIATED IN THESE FIVE SEPARATE AGREEMENTS, BUT THEN
10 MORE IMPORTANTLY THE WHOLE FINANCING STRUCTURE AS I MEANT
11 TO SAY AWHILE AGO, THE -- THIS WASN'T JUST A DEAL TO BUILD A
12 HOTEL IT WAS A DEAL TO PROVIDE THE FINANCING FOR THE HOTEL
13 IT WAS A DEAL TO PUT THE WHOLE PACKAGE TOGETHER, TURNKEY,
14 TURN IT OVER TO THE OWNER WHO WOULD BE THE CITY, AND IT WOULD
15 BE RUN BY HILTON IT WAS A PACKAGE THAT INVOLVED MANY, MANY
16 MOVING PARTS AND THE---

17 THE COURT WHY DID THE CITY EVEN WANT TO DO THIS? WHY
18 DID THEY WANT -- WHY DID THEY WANT TO HAVE THE KEY? AND I'M
19 A LAYMAN ON THIS POINT WHY IN THE WORLD WOULD THE CITY EVER
20 WANT TO DO THIS?

21 MR DETWILER I HAVE OFTEN ASKED THAT QUESTION MYSELF
22 YOUR HONOR I THINK YOU HAVE TO PUT IT IN CONTEXT OF WHAT
23 WAS GOING ON AT THE TIME THIS WAS A FAIRLY NEW CONCEPT,
24 THIS WHOLE IDEA OF A PUBLICLY-FINANCED HOTEL IT WAS -- THE
25 WHOLE POINT WAS TO HAVE THIS HOTEL AS AN ADJUNCT TO THE

1 CONVENTION CENTER AND THERE WAS SOME CONCERN THAT A PRIVATE
2 DEVELOPER WOULDN'T GO INTO THE DEAL WITH THE KIND OF HOTEL
3 THEY WANTED TO GO WITH THE CONVENTION CENTER THE CONVENTION
4 CENTER HAD JUST RECENTLY BEEN BUILT, AND SO I THINK THAT'S
5 THE BACKDROP

6 THIS PUBLICLY-FINANCED HOTEL SCHEME, IF YOU WILL, WAS
7 NEW THESE DEVELOPERS HAD NOT DONE BUT I THINK ONE OTHER
8 ONE IT WAS -- OR MAYBE TWO OTHER ONES THEY WERE STILL A
9 WORK IN PROGRESS, AND I THINK, IN FACT, SOME OF THEM DIDN'T
10 WORK OUT THERE WAS ONE IN -- OR WORK OUT AS WELL AS
11 EVERYBODY HAD HOPED, LET'S PUT IT THAT WAY

12 THERE WAS ONE IN MYRTLE BEACH THE MYRTLE BEACH
13 CONVENTION CENTER HOTEL HAD RECENTLY BEEN BUILT, AND THE
14 THOUGHT WAS THAT THAT LOOKED GOOD AND THAT WOULD BE A WAY TO
15 PROVIDE THE CITY WITH THIS NICE HOTEL IN CONJUNCTION WITH THE
16 CONVENTION CENTER

17 THE COURT OKAY

18 MR. DETWILER AS IT TURNED OUT, ULTIMATELY AS YOUR
19 HONOR KNOWS, A PRIVATE DEVELOPER DID COME IN WITH A
20 SIGNIFICANTLY SMALLER HOTEL BUT A HILTON AND IT'S THERE NOW
21 IT'S A HOTEL THAT'S TWO-THIRDS THE SIZE OF WHAT THE
22 DEFENDANT, EXCUSE ME, THE PLAINTIFFS HAD PROPOSED AND AT A
23 COST MUCH, MUCH SMALLER AND AT VIRTUALLY NO RISK TO THE CITY
24 OR REALLY -- NOT VIRTUALLY AT NO RISK TO THE CITY

25 YOUR HONOR, THANK YOU FOR INDULGING ME AND I WILL SIT

1 DOWN AND LET THESE FOLKS YOU KNOW, COVER SOME OF THE BASES
2 THAT PERHAPS I MISSED

3 THE COURT ALL RIGHT

4 MR DETWILER AND IF YOUR HONOR WILL ALLOW ME, I'LL
5 RETURN IN A MOMENT AND WE'LL TALK ABOUT SOME OF THESE OTHER
6 CAUSES OF ACTION

7 THE COURT OKAY ALL RIGHT MR PAUL?

8 MR PAUL YES, SIR IF I CAN HAVE JUST A MINUTE TO
9 MOVE THESE BOARDS AND PUT MINE UP

10 THE COURT SURE

11 (PAUSE IN PROCEEDINGS)

12 THE COURT OKAY

13 MR PAUL ALL RIGHT

14 THE COURT ANY TIME YOU'RE READY

15 MR PAUL ALL RIGHT THANK YOU MR DETWILER HAS DONE

16 A GOOD JOB OF THE FACTS, AND I'M GOING TO ELIMINATE AS MUCH

17 DUPLICATION AS I CAN I'M NOT GOING TO TRY TO REARGUE

18 EVERYTHING HE'S ARGUED I HAVE BASICALLY TWO POINTS, ONE OF

19 WHICH IS ESSENTIALLY THE SAME AS MR DETWILER WITH A LITTLE

20 BIT DIFFERENT FOCUS BUT THE FIRST POINT IS THAT THE M O U

21 IS NOT AN ENFORCEABLE CONTRACT BECAUSE IT IS AN AGREEMENT TO

22 AGREE, AND IT REQUIRES FUTURE AGREEMENTS ON ITS FACE WHICH IS

23 THE SAME POSITION THAT THE CITY ASSERTS

24 OUR SECOND POINT IS NOT ONE THE CITY HAS ARGUED AND THAT

25 IS THAT EVEN IF SOMEHOW THE COURT WERE TO FIND THAT THE

1 M O U IS SUFFICIENTLY DEFINITE TO CONSTITUTE AN AGREEMENT,
2 ON ITS FACE IT IS SUBJECT TO CONDITIONS PRECEDENT UNDER THE
3 TEST FOR CONDITIONS PRECEDENT AND THOSE CONDITIONS DID NOT
4 OCCUR AND, THEREFORE, IT CANNOT BE AN ENFORCEABLE CONTRACT
5 THAT IS OUR SECOND POINT, AND MR DETWILER HAS NOT MADE THAT
6 ARGUMENT I DON'T THINK IT'S INCONSISTENT WITH ANYTHING HE'S
7 SAYING

8 BUT BASICALLY MR DETWILER WENT THROUGH THE FACTS AND HE
9 CAME AT THE END REALLY TO WHERE I WOULD START AND THAT IS
10 THAT THE AGREEMENTS THAT WE'RE TALKING ABOUT THE FIVE OR SIX
11 SEPARATE AGREEMENTS, ARE INTERRELATED AGREEMENTS, AND WHAT
12 I'VE GOT BEFORE THE COURT, OF COURSE, IS JUST AN ABSTRACT TO
13 SOME PROVISIONS OF THE M O U I ALSO HAVE EXHIBIT 40 FROM
14 THE CORRADO DEPOSITION IT'S A -- THIS IS JUST A LITTLE
15 BLURB FROM IT, BUT WE ALL WENT TO NEW YORK DECEMBER 22 OF
16 LAST YEAR AND TOOK CORRADO'S DEPOSITION AT CITIGROUP

17 AND WHAT I HAVE DONE IS TAKEN THE COVER PAGE OF
18 CORRADO'S PRESENTATION-TO-THE-BOND-RATING-AGENCIES-ON
19 OCTOBER 29 AND 30, 2003, AND THEN INSIDE OF THAT HE HAD A LOT
20 OF DIFFERENT SUBJECTS THIS IS ALL IN THE RECORD AS EXHIBIT
21 40 TO HIS DEPOSITION BUT CORRADO HAD A GRAPHIC DEPICTION OF
22 THE M O U AND I THINK WE -- DO WE HAVE HANDOUTS TO THIS?
23 CAN YOU PASS THEM OUT SO THE JUDGE CAN SEE THEM?

24 SO, AS MR DETWILER WAS SAYING AT THE END OF HIS
25 PRESENTATION AND AS I WANT TO MAKE CLEAR AT THE BEGINNING,

1 THE AGREEMENTS THAT ARE IN THE M O U ARE ALL DIRECTLY
2 INTERRELATED WITH EACH OTHER AND THEY ARE INTERDEPENDENT ON
3 EACH OTHER AND WHAT CORRADO WAS SHOWING HERE IN EXHIBIT 40
4 WHEN HE WAS MAKING HIS PRESENTATION TO THE RATING AGENCIES IS
5 THAT THERE IS A FOUNDATION OF AGREEMENTS THAT ARE SET OUT IN
6 THE M O U , AND THESE AGREEMENTS ARE THE FOUNDATION FOR THE
7 BOND ISSUE AND THE BOND ISSUE CANNOT GO FORWARD WITHOUT THE
8 FOUNDATION AGREEMENTS

9 AND SO CORRADO HAS TAKEN THE HOTEL OPERATING AGREEMENT
10 WHICH IS THE QUALIFIED MANAGEMENT AGREEMENT THAT WE WERE
11 TALKING ABOUT HE'S TAKEN THE ROOM BLOCK AGREEMENT HE'S
12 TAKEN THE DEVELOPMENT MANAGEMENT AGREEMENT THE DESIGN/BUILD
13 AGREEMENT, AND THERE'S A TECHNICAL SERVICE AGREEMENT NOBODY
14 HAS -- I HAVE MENTIONED IT IN THE BRIEF BUT WHAT HE IS
15 SHOWING IS THAT ALL OF THESE AGREEMENTS THAT ARE IN THE
16 M O U THAT I'LL ADDRESS VERY BRIEFLY ARE ALL INTERRELATED
17 WITH EACH OTHER AND THEY ARE ALL NECESSARY INGREDIENTS TO
18 EVEN GET TO THE BOND CLOSING, MUCH LESS CLOSE A BOND DEAL

19 AND SO IF YOU LOOK AT THE -- IF YOU LOOK AT THE M O U ,
20 AS THE COURT OBVIOUSLY HAS DONE, WHAT YOU SEE IS THAT IN
21 SECTION 5, ROMAN NUMERAL 5, THERE IS THE REQUIREMENT -- IT
22 DOESN'T SHOW ON THE BOARD, BUT PARAGRAPH 3 OF SECTION 5 SAYS
23 THE CITY WILL FORM THE NONPROFIT CORPORATION, AND THEN
24 SECTION 4 OF ROMAN NUMERAL 5 SAYS THE NONPROFIT CORPORATION
25 WILL RETAIN IN ESSENCE CORRADO THE UNDERWRITER TO GO

1 FORWARD WITH AN APPROXIMATELY \$60 MILLION BOND ISSUE, AND
2 THAT IS THE WAY THE TRANSACTION WOULD EVER COME TO PASS
3 THAT IS THE WAY IT WOULD COME TO PASS

4 AND AS MR DETWILER ESTABLISHED, THE BOND FINANCING
5 NEVER GOT FINALIZED IT COULD NOT GET FINALIZED BECAUSE OF
6 THE MOVING PARTS, AND WITHOUT BOND FINANCING, THE M O U --
7 IT WAS AN ESSENTIAL INGREDIENT OF THE M O U , AND IT HAD NOT
8 HAPPENED AT THE TIME THE M O U WAS SIGNED AND DID NOT EVER
9 HAPPEN

10 WHAT WE SHOWED WITH CORRADO'S DEPOSITION AND WHAT MR
11 DETWILER TOUCHED ON A LITTLE BIT WHEN HE WAS TALKING ABOUT
12 THE MOVING PARTS CORRADO TESTIFIED THAT THE DEBT SERVICE
13 COVERAGE RATIOS CHANGED DURING THE COURSE OF THE PROJECT
14 THAT IS, AS THE COURT KNOWS, DEBT SERVICE COVERAGE MEANS DOES
15 YOUR NET REVENUE AFTER PAYING OPERATING EXPENSES -- WHAT IS
16 THE RELATIONSHIP BETWEEN THE NET REVENUE AND OPERATING
17 EXPENSES AND THE DEBT THAT YOU PAY ON A MONTHLY OR QUARTERLY
18 BASIS, HOW EVER YOU PAY YOUR DEBT? AND WHEN THEY WENT INTO
19 THE DEAL CORRADO'S DEPOSITION SHOWS THAT THEY WERE WORKING
20 ON A TWO-TIMES DEBT SERVICE COVERAGE RATIO THAT IS, THE NET
21 REVENUE HAD TO COVER THE DEBT SERVICE BY TWO TIMES, TWICE AS
22 MUCH

23 BUT DURING THE COURSE OF THE PROJECT, THE UNDERWRITERS
24 -- UNDER CORRADO'S DEPOSITION THE UNDERWRITERS UNDERWRITING
25 THESE KINDS OF DEALS, WHICH WERE A NEW KIND OF BOND

1 FINANCING, CHANGED SO THE MARKET WENT TO A 2 25, THAT IS, TWO
2 AND A QUARTER TIMES DEBT SERVICE AS A DEBT SERVICE COVERAGE
3 RATIO AND SO BECAUSE THE UNDERWRITING GUIDELINES CHANGED,
4 AS CORRADO TESTIFIED -- I THINK IT'S AT PAGE 212 AND 213
5 BUT CERTAINLY IN HIS DEPOSITION, CORRADO TESTIFIED THAT THE
6 DEBT SERVICE COVERAGE RATIO HAS CHANGED NOT BECAUSE OF
7 ANYTHING THE PARTIES WERE DOING BUT BECAUSE THE MARKET
8 CHANGED THE MARKET CHANGED, AND THAT IS WHAT IS HAPPENING
9 WHEN YOU -- WHEN YOU HAVE AN M O U THAT SETS OUT THE INTENT
10 OF PARTIES TO REACH AGREEMENTS AND TIME PASSES AND IT TURNS
11 OUT THE AGREEMENTS CANNOT BE REACHED AND THAT'S WHAT'S --
12 WHAT HAS HAPPENED HERE

13 IT'S NOT THAT -- IT'S NOT EVEN THAT THE PARTIES CAN'T
14 AGREE IT IS THE MARKET HAS TURNED OVER, SO THE DEBT SERVICE
15 COVERAGE RATIO TURNED, AND BECAUSE THE DEBT SERVICE COVERAGE
16 RATIO HAS TURNED -- BUT THE REVENUE DIDN'T CHANGE JUST
17 BECAUSE THE DEBT SERVICE COVERAGE RATIO REQUIREMENT CHANGED
18 DIDN'T MEAN THE REVENUE PROJECTED BY THE HOTEL CHANGED SO
19 THE HOTEL WAS SHORT IN TERMS OF DEBT SERVICE COVERAGE RATIO

20 AND SO IN THE CORRADO DEPOSITION -- I THINK IT'S PAGE
21 299 AND 300 BUT IN ANY EVENT, IN THE CORRADO DEPOSITION
22 CORRADO TALKS ABOUT HOW THE CITY SUPPORT CHANGED FROM 40
23 PERCENT TO 50 PERCENT TO ULTIMATELY 70 PERCENT THAT IS, THE
24 STOP, THE BACKSTOP, AS MR DETWILER WAS SAYING, WENT FROM 40
25 TO 50 TO 70 PERCENT ON THE BONDS---

1 THE COURT BUT THAT WAS APPROVED OR THE CORPORATION
2 APPROVED THE 70 PERCENT ON FEBRUARY 11TH

3 MR PAUL THE NONPROFIT CORPORATION APPROVED IT, BUT AS
4 WE'RE ALL CLEAR, THE CITY NEVER DID APPROVE IT

5 THE COURT RIGHT

6 MR PAUL AND SO---

7 THE COURT WHERE -- ON HIS -- ON MR DETWILER'S POSTER
8 BOARDS, WHAT WOULD IT HAVE ULTIMATELY GONE UP TO IF IT
9 MATTERS, UNDER THE ONES THAT CAME UP AFTER FEBRUARY 11TH?

10 MR PAUL I CAN'T -- I BEST NOT ANSWER THAT QUESTION
11 MR DETWILER IS COMING BACK, SO LET'S LET HIM ANSWER IT I
12 KNOW AS OF DECEMBER 30 OF 2003 IT WAS ALREADY UP TO 70
13 PERCENT AS OF DECEMBER WHICH IS -- WHICH IS THE -- THE
14 EXHIBIT I WAS ASKING CORRADO ABOUT WAS A DECEMBER 30 E-MAIL
15 AND IT WAS ALREADY UP TO 70 PERCENT, THE BACKSTOP REQUIREMENT
16 AT THAT POINT, UP FROM 40 TO 50 TO 70

17 THE COURT ALL RIGHT NOW, YOU MENTIONED PAGES 212 AND
18 THEN 299 OF MR CORRADO'S DEPOSITION

19 MR PAUL RIGHT

20 THE COURT IN MR DETWILER'S HAND-UP TO ME, THE
21 DEPOSITION DOESN'T GO THAT FAR DO I HAVE IT IN ANOTHER
22 PACKET UP HERE? MR CORRADO'S DEPOSITION?

23 MR PAUL IT'S FILED -- THE ENTIRE DEPOSITION IS FILED
24 WITH THE COURT, BUT LET ME SEE WHAT

25 THE COURT YOU'RE TALKING ABOUT FILED IN THE CLERK'S

1 OFFICE?

2 MR PAUL YES, SIR, AND I THINK IT'S -- I'M NOT -- I
3 DON'T THINK WE SENT THE ENTIRE DEPOSITION TO THE COURT

4 THE COURT OKAY

5 MR PAUL WE SENT AN APPENDIX

6 THE COURT ALL RIGHT

7 MR PAUL HOLD ON A SECOND

8 THE COURT OKAY I'M WITH YOU SO FAR ON THE INCREASE
9 IN THE---

10 MR PAUL I DO HAVE A -- I DO HAVE PAGES IN MY APPENDIX
11 THAT ARE CALLED 299 TO 300

12 THE COURT OKAY

13 MR PAUL SO I'M SURE THAT THOSE ARE ALL THOSE PAGES IN
14 DETWILER -- I MEAN IN CORRADO'S DEPOSITION SO ON THE BOND
15 FINANCING, THE M O U , SECTION 5 SPECIFICALLY REQUIRES THE
16 BOND FINANCING IN ORDER TO EVEN GET THE JOB DONE, AND
17 CORRADO'S DEAL, GRAPHIC DEPICTION, SHOWS THAT EVERYTHING
18 LEADS TO THE BOND ISSUE, BUT IT'S CLEAR THE BOND ISSUE
19 DOCUMENTS WERE CERTAINLY NOT FINALIZED WHEN THE M O U WAS
20 SIGNED IN APRIL OF '03 AND, IN FACT, THEY WERE NEVER
21 FINALIZED

22 NOW, THE QUALIFIED MANAGEMENT AGREEMENT MR DETWILER HAS
23 SPOKEN OF, AND THAT IS ONE OF THE -- THAT IS ONE OF THE
24 FOUNDATION DOCUMENTS THAT CORRADO IS SHOWING, AS HE CALLS IT,
25 THE HOTEL OPERATING AGREEMENT, BUT IT'S THE QUALIFIED

1 MANAGEMENT AGREEMENT IT'S BETWEEN HILTON AND THE -- IN THIS
2 CASE THE NONPROFIT CORPORATION OR WHOEVER WOULD TAKE ITS
3 PLACE AND A NUMBER OF THE WITNESSES HAVE MADE CLEAR THAT
4 WITHOUT A QUALIFIED MANAGEMENT AGREEMENT, THAT IS, QUALIFIED
5 MEANING QUALIFIES UNDER THE REVENUE RULING, THERE CAN BE NO
6 TAX-EXEMPT BONDS BECAUSE THIS BOND ISSUE FITS IN A NICHE THAT
7 HAS REGULATIONS, AND ONE OF THEM RELATES TO THE MANAGEMENT OF
8 THE ASSET THAT IS ATTEMPTING TO QUALIFY FOR THE ISSUANCE OF
9 THESE BONDS

10 AND SO THE QUALIFIED MANAGEMENT AGREEMENT IS A
11 FOUNDATION DOCUMENT AS SHOWN ON CORRADO'S DEPICTION OF THE
12 WAY THINGS WORK, AND THE QUALIFIED MANAGEMENT AGREEMENT, OF
13 COURSE, IS REQUIRED BY ROMAN NUMERAL 10/2 OF THE M O U IT
14 WAS NOT SIGNED WHEN THE M O U WAS SIGNED IT HAD NEVER
15 HAPPENED AND THERE WERE -- MR GOTTLIEB'S AFFIDAVIT IS
16 SHOWING THAT THERE WERE ISSUES RELATED TO THE QUALIFIED
17 MANAGEMENT AGREEMENT THAT NEVER GOT NEGOTIATED IT WASN'T
18 JUST THAT IT DIDN'T GET SIGNED THERE WERE ISSUES THAT THE
19 PARTIES COULD NOT GET THROUGH

20 THE SAME WITH A -- THERE'S A -- THERE'S A JOINT USE
21 AGREEMENT THAT IS IN ROMAN NUMERAL 4, SECTION 5, OF THE
22 M O U THE JOINT USE AGREEMENT RELATES TO THE ALLOCATION OF
23 THE PARKING SPACES IN A PARKING LOT THAT HAD NEVER BEEN
24 BUILT BUT THE CITY WAS GOING TO BUILD A PARKING LOT AND THAT
25 WAS GOING TO RELATE TO THE CONVENTION CENTER AND TO THE HOTEL

1 THAT IS CONTEMPLATED BY THE M O U AND THE TESTIMONY IS THAT
2 HILTON -- MR DICKENS FROM HILTON TESTIFIED THAT HILTON WAS
3 NOT WILLING TO SIGN THE QUALIFIED MANAGEMENT AGREEMENT, THAT
4 IS, THE OPERATING AGREEMENT, UNTIL IT GOT WORKED OUT - THE
5 JOINT USE AGREEMENT RELATED TO THE PARKING LOT - BECAUSE THE
6 QUESTION WAS WAS HILTON GOING TO HAVE TO LEASE SPACES FROM
7 THE CITY AND TAKE THAT OUT OF ITS REVENUE FOR THE HOTEL OR
8 WAS HILTON GOING TO MAKE MONEY? THAT IS, WAS THE PARKING LOT
9 GOING TO BE AN EXPENSE TO HILTON IN THE OPERATION OF THE
10 HOTEL OR WAS IT GOING TO BE A MONEY MAKER FOR HILTON?

11 AND SO AT THE TIME THE M O U WAS SIGNED, DICKENS --
12 THIS IS -- HE'S TESTIFYING AT PAGES 127 AND 128 AND HE IS
13 SAYING -- DICKENS, WHO IS HILTON'S MAN IN CHARGE OF THIS
14 PROJECT FOR HILTON, IS SAYING THAT HILTON WOULD NOT SIGN THE
15 QUALIFIED MANAGEMENT AGREEMENT UNTIL THE JOINT USE AGREEMENT
16 RELATED TO THIS PARKING LOT WAS WORKED OUT BECAUSE IT WAS A
17 SIGNIFICANT ISSUE RELATED TO REVENUE AND IN FACT, IT
18 NEVER -- THE PARKING LOT HADN'T EVEN BEEN BUILT WHEN THE
19 M O U WAS SIGNED NOBODY KNEW THE CONFIGURATION OF IT

20 THE PARKING SPACES BETWEEN THE CONVENTION CENTER AND THE
21 HOTEL HAD NOT BEEN ALLOCATED, AND NOBODY KNEW HOW IT WAS
22 GOING TO GET PAID FOR IT WAS FINANCED WITH A BOND ISSUE OF
23 ITS OWN SO YOU HAD COMPETING REVENUE RELATED TO A BOND
24 ISSUE FOR THE PARKING LOT THAT WAS AN ENTIRELY DIFFERENT
25 ENTITY THAN HILTON

1 AND SO THAT JOINT USE AGREEMENT IS NOT A FOUNDATION
2 AGREEMENT AS SHOWN BY CORRADO, BUT IT IS -- IF YOU WILL, IT'S
3 AN INPUT INTO THE HOTEL OPERATING AGREEMENT AND IT IS
4 SPECIFICALLY CONTEMPLATED IN THE M O U IT HAD NOT BEEN
5 NEGOTIATED AT THE TIME OF THE M O U IT NEVER GOT NEGOTIATED
6 IN TERMS OF THIS DEAL HERE

7 THE ROOM BLOCK AGREEMENT THAT IS A FOUNDATION AGREEMENT
8 UNDER THE CORRADO DEPICTION OF THE TRANSACTION -- THE ROOM
9 BLOCK AGREEMENT IS BETWEEN HILTON AND THE CONVENTION
10 AUTHORITY, AND IT DEALS WITH HOW MANY ROOMS IS A HOTEL GOING
11 TO COMMIT IN ADVANCE TO RESERVE FOR CONVENTION USE AND WHAT
12 IS GOING TO BE PAID FOR THOSE ROOMS? AND THAT GOES DIRECTLY
13 TO REVENUE, DIRECTLY TO REVENUE AND THE AGREEMENT -- THE
14 ROOM BLOCK AGREEMENT HAD NOT BEEN NEGOTIATED WHEN THE M O U
15 WAS SIGNED IT NEVER GOT NEGOTIATED DURING THE LIFE OF THE
16 M O U IT WAS NEVER SIGNED AND IT WAS NEVER NEGOTIATED

17 AND SO THE REVENUE STREAM FOR THE HOTEL OBVIOUSLY IS
18 IMPACTED BY - WHAT IS THE LEVEL OF ITS COMMITMENT TO THE
19 CONVENTION CENTER ON HOW MANY ROOMS IS IT GOING TO PROVIDE
20 AND AT WHAT RATE? IT GOES DIRECTLY TO REVENUE, AND THAT
21 NEVER GOT WORKED OUT AND THAT IS THE TESTIMONY OF BOTH
22 GOTTLIEB AND SAYING -- WHO IS A LAWYER FOR THE CITY SAYING IT
23 NEVER GOT WORKED OUT AND CORRADO SAYING THE ROOM BLOCK
24 AGREEMENT NEVER GOT WORKED OUT AND SO IT WASN'T SIGNED AT
25 THE TIME AND IT NEVER GOT SIGNED

1 THE DESIGN/BUILD AGREEMENT IS AN AGREEMENT TO DESIGN AND
2 BUILD THE HOTEL, AND THAT IS THE AGREEMENT BETWEEN TURNER AND
3 THE CONVENTION CENTER AUTHORITY AND IT AGAIN IS ONE OF THE
4 PRIMARY FOUNDATION DOCUMENTS THAT IS THE PREDICATE FOR THE
5 ENTIRE BOND ISSUE, AND THE TESTIMONY FOR THAT ONE IS THAT
6 CERTAINLY IT WASN'T SIGNED AT THE TIME OF THE M O U AND IT
7 NEVER DID GET SIGNED

8 THE DEVELOPMENT MANAGEMENT AGREEMENT WHICH IS WHAT GARY
9 REALTY AND GARFIELD TRAUB ARE PARTIES TO, CLEARLY WASN'T
10 SIGNED AT THE TIME IT CLEARLY GOES TO THE HEART OF THE
11 TRANSACTION IN FACT, IT'S DEAD CENTER ON CORRADO'S
12 DEPICTION IT IS THE CENTERPIECE OF THE TRANSACTION OR A
13 CENTERPIECE IT NEVER GOT SIGNED, AND IT'S SPECIFICALLY
14 REQUIRED BY THE M O U

15 SO ALL OF THE AGREEMENTS THAT ARE REQUIRED ON THE FACE
16 OF THE M O U -- THE PLAINTIFFS HAVE SAID IN ONE OF THEIR
17 BRIEFS THESE ARE TANGENTIAL AGREEMENTS, THAT YOU CAN'T --
18 JUST BECAUSE YOU'VE GOT SOME TANGENTIAL AGREEMENT THAT ISN'T
19 SIGNED DOESN'T MEAN THAT THE WHOLE AGREEMENT FAILS THERE'S
20 NOTHING TANGENTIAL ABOUT THE AGREEMENTS WE'RE TALKING ABOUT
21 WE'RE NOT TALKING ABOUT, YOU KNOW LITTLE EMPLOYEE AGREEMENTS
22 OR SOMETHING I MEAN WE'RE TALKING ABOUT THE AGREEMENTS
23 THAT GO TO THE GUTS OF THIS DEAL, THE GUTS NONE OF THEM
24 WERE SIGNED NONE OF THEM EVER GOT SIGNED AND THEY ARE
25 DIRECTLY REQUIRED, THESE ARE, ON THE FACE OF THE M O U

1 NOW, THAT'S MORE DUPLICATION THAN I WANTED TO HAVE BUT
2 THAT'S OUR PERSPECTIVE ON THE POINT THAT WE MADE IN OUR BRIEF
3 THAT THERE -- THERE IS NO ENFORCEABLE M O U BECAUSE IT IS AN
4 AGREEMENT TO AGREE THAT WAS -- AND THE AGREEMENTS WERE NOT
5 MADE AT THE TIME THE M O U WAS SIGNED IN APRIL OF '03 AND,
6 IN FACT, THEY NEVER GOT SIGNED

7 NOW, THE OTHER POINT THAT WE MADE IS THE FAILURE OF
8 CONDITIONS PRECEDENT, AND I DON'T THINK THERE'S ANY DISPUTE
9 ABOUT THE SOUTH CAROLINA LAW BETWEEN THE AUGHTRY DEFENDANTS
10 AND THE PLAINTIFFS ON FAILURE OF CONDITION PRECEDENT I
11 MEAN, THE M&M BRICK CASE THAT WE CITED AND THEY CITE AND IT'S
12 -- I THINK IT'S PRETTY SIMPLE IN TERMS OF THE CONCEPT IT IS
13 THAT -- THE CASE SAYS THAT ANY FACT OTHER THAN LAPSE OF TIME
14 WHICH UNLESS EXCUSED, MUST EXIST OR OCCUR BEFORE A DUTY OF
15 IMMEDIATE PERFORMANCE -- IS A CONDITION PRECEDENT

16 SO WHEN YOU'RE LOOKING AT AGREEMENTS OR LOOKING AT
17 EVENTS TO DETERMINE WHETHER THAT EVENT OR THAT AGREEMENT IS A
18 CONDITION PRECEDENT TO THE AGREEMENT THAT IS AT ISSUE IN THE
19 CASE, THEN WE SAY - AND I DON'T THINK THERE'S DISAGREEMENT
20 ABOUT THAT - BUT THE TEST TO BE APPLIED IS IS IT AN EVENT
21 THAT MUST OCCUR BEFORE THERE IS A DUTY FOR IMMEDIATE
22 PERFORMANCE IN THE TRANSACTION THAT IS AT ISSUE IN THE COURT
23 CASE?

24 NOW THE SHORT VERSION IS THAT -- IT WON'T TAKE BUT A
25 MINUTE TO GET THROUGH THIS ARGUMENT, I DON'T THINK BUT THE

1 SHORT VERSION IS THAT EACH OF THE AGREEMENTS THAT I JUST GOT
2 THROUGH TALKING ABOUT THAT WE SAY WERE NECESSARY TO BE SIGNED
3 AT THE TIME OF THE M O U IF THE M O U WERE GOING TO BE
4 ANYTHING OTHER THAN AN UNENFORCEABLE AGREEMENT TO AGREE --
5 EACH OF THOSE IS A CONDITION PRECEDENT TO ANY DUTY TO
6 IMMEDIATELY PERFORM BY ANY PARTY

7 SO IF YOU TAKE THE BOND ISSUE AND YOU START WITH THE
8 BOND ISSUE, I MEAN CERTAINLY NOBODY WAS REQUIRED TO PUT A
9 SHOVEL IN THE GROUND OR START BUILDING A HOTEL OR HIRING
10 EMPLOYEES OR DOING ANYTHING ELSE ENVISIONED BY THE M O U AS
11 THE ULTIMATE TRANSACTION UNLESS THERE WAS A BOND ISSUE TO PAY
12 FOR IT BECAUSE THAT WAS THE ONLY WAY IT COULD GET PAID FOR
13 AND SO UNTIL THAT -- I THINK ALL OF THE WITNESSES AGREE THAT
14 UNTIL THERE WAS A BOND ISSUE, THERE WAS NOT GOING TO BE A
15 HOTEL AND NOBODY WAS GOING TO BUILD A HOTEL AND SO WE SAY
16 THAT IS A CONDITION PRECEDENT UNDER THE TEST

17 THE EVENT NEVER HAPPENED SO THERE WAS NO TRIGGER ON
18 ANYBODY TO GO FORWARD WITH THE PERFORMANCE IN TERMS OF
19 BUILDING THE HOTEL OR DOING ANYTHING ELSE REQUIRED BY THE
20 M O U OTHER THAN JUST THE PRELIMINARY STUFF TO GET IN A
21 POSITION TO GET THE BOND ISSUE DONE AND THE SAME IS TRUE
22 WITH THE QUALIFIED MANAGEMENT AGREEMENT

23 THE QUALIFIED MANAGEMENT AGREEMENT IS AN AGREEMENT THAT
24 -- IT IS AN EVENT THAT HAD TO OCCUR BEFORE THERE WOULD BE ANY
25 DUTY OF IMMEDIATE PERFORMANCE, NOT JUST BY HILTON WHO WAS A

1 PARTY TO THE QUALIFIED MANAGEMENT AGREEMENT BUT ALSO TO ANY
2 OTHER PARTY BECAUSE, AS WE POINTED OUT, WITHOUT THE QUALIFIED
3 MANAGEMENT AGREEMENT YOU COULDN'T HAVE THE TAX-EXEMPT BONDS
4 TO START WITH SO YOU COULDN'T HAVE BONDS AND SO UNTIL
5 THAT AGREEMENT WAS DONE, THERE COULD BE NO DUTY TO PERFORM ON
6 AN IMMEDIATE BASIS IT NEVER HAPPENED, AND SO THE
7 TRANSACTION FAILED FOR THAT CONDITION PRECEDENT JUST LIKE ALL
8 OF THE OTHERS

9 NOW, THE NEXT ONE IS THE JOINT USE AGREEMENT WITH THE
10 PARKING LOT THAT I TALKED ABOUT, AND THE SAME THING IS TRUE
11 BECAUSE OF WHAT HILTON IS SAYING HILTON IS SAYING THAT
12 WITHOUT AN ALLOCATION OF THE PARKING SPACES AND AN ALLOCATION
13 OF REVENUE RELATED TO THEM, THEY CAN'T GO FORWARD WITH THE
14 Q M A , THE QUALIFIED MANAGEMENT AGREEMENT THERE WERE
15 UNRESOLVED ISSUES RELATED TO IT IT NEVER GOT RESOLVED
16 DURING THE LIFE OF THIS PROPOSED TRANSACTION AND SO BECAUSE
17 THERE WAS NO JOINT USE AGREEMENT RELATED TO ALLOCATION OF
18 PHYSICAL SPACES OR RELATED TO ALLOCATION OF REVENUE AND
19 EXPENSES RELATED TO THE PARKING LOT, THERE COULDN'T BE A
20 QUALIFIED MANAGEMENT AGREEMENT AND WITHOUT THAT THERE COULD
21 NOT BE THE BOND ISSUE AND SO IT WAS A CONDITION PRECEDENT
22 IT HAD TO BE DONE TO TRIGGER A DUTY ON THE PART OF EVERYBODY
23 TO PERFORM IT NEVER HAPPENED

24 THE SAME IS TRUE WITH THE HOTEL ROOM BLOCK AGREEMENT I
25 WON'T SAY THAT SAME ARGUMENT OVER AND OVER, BUT THE POINT IS

1 THE HOTEL ROOM BLOCK AGREEMENT WAS AN AGREEMENT THAT WENT TO
2 THE HEART OF THE TRANSACTION UNTIL THAT AGREEMENT WAS DONE---

3 THE COURT EXPLAIN TO ME ABOUT THAT ROOM BLOCK
4 AGREEMENT I WANT TO MAKE SURE I UNDERSTAND

5 MR PAUL ALL RIGHT

6 THE COURT BECAUSE I GUESS WHAT AGAIN STRIKES ME IS --
7 AND I'M PROBABLY OVERSIMPLIFYING THINGS ALL OF THESE
8 ARGUMENTS ARE TIED TO SOMEBODY LIKE ME OR YOU COMING INTO
9 TOWN, PULLING INTO A PARKING SPACE AND CHECKING INTO A HOTEL
10 AND STAYING FOR THREE DAYS IN OTHER WORDS, THAT'S WHY
11 HOTELS ARE THERE THEN I GO TO A MEETING AT THE CONVENTION
12 CENTER SO, IN OTHER WORDS, ALL OF THESE---

13 MR PAUL LET ME EXPLAIN---

14 THE COURT ALL OF THESE STEPS WE'RE GOING THROUGH, WHAT
15 IT ALL BOILS DOWN TO WHEN PEOPLE COME IN AND RENT A ROOM
16 FOR THREE NIGHTS SO GETTING BACK TO MY OTHER QUESTION, THE
17 ROOM BLOCK AGREEMENT, HOW DID---

18 MR PAUL YES, SIR

19 THE COURT WHAT DID -- EXACTLY HOW DOES THAT WORK?

20 MR PAUL ALL RIGHT THE THING THAT'S DIFFERENT THAN
21 WHAT THE COURT WAS SAYING ABOUT YOU COMING HERE AND GOING TO
22 A MEETING THE CONVENTION CENTER, OF COURSE, WAS A PUBLIC
23 CITY CONVENTION CENTER, AND THE CITY HAD AN INTEREST IN
24 MAKING SURE THAT THE HOTEL MANAGEMENT WAS NOT GOING TO PRICE
25 THE ROOMS IN A WAY THAT WOULD BE A DETERRENCE TO THE

1 CONVENTION CENTER THE WHOLE IDEA WAS IT WAS GOING TO BE A
2 PUBLIC HOTEL AND A PUBLIC-MANAGED HOTEL AND THAT IT WAS GOING
3 TO BE A HOTEL THAT WORKED IN CONJUNCTION WITH THE CONVENTION
4 CENTER AND SO THE RATES THAT WERE GOING TO BE CHARGED HAD
5 TO BE APPROVED BY THE CITY AS A PART OF THIS, AND THE
6 RESERVATION OF BLOCKS OF ROOMS -- THAT IS, IF THE SOUTH
7 CAROLINA BAR ASSOCIATION WAS GOING TO COME TO COLUMBIA AND
8 HAVE A MEETING FOR ITS ANNUAL MEETING AND BOOK IT AT THE
9 SOUTH CAROLINA MIDLANDS CONVENTION CENTER THEN THE CITY WAS
10 GOING TO HAVE A SAY IN WHAT THOSE ROOM RATES WERE AND THE WAY
11 THEY WERE GOING TO DO IT IS WITH A ROOM BLOCK AGREEMENT

12 THAT IS, THE HOTEL MANAGEMENT, WHICH IS HILTON, HAD TO
13 COMMIT TO PROVIDE I THINK -- THE DOCUMENTS ARE TALKING ABOUT
14 250 ROOMS -- THIS WAS A 300-AND-SOMETHING-ROOM HOTEL --
15 TALKING ABOUT PROVIDE UP TO 250 ROOMS ON A RESERVE BASIS TO
16 USE AS A CONVENTION -- AT CONVENTIONS AT A RATE TO BE
17 NEGOTIATED THEY NEVER GOT TO AN AGREEMENT ON HOW MANY ROOMS
18 WOULD BE COMMITTED IN ADVANCE, ON WHAT BASIS AND AT WHAT
19 PRICE AND, OF COURSE, THAT GOES TO THE HEART OF REVENUE
20 THAT IS, IF THE CITY IS WANTING TO MODERATELY -- LET'S SAY
21 MODERATELY, FOR LACK OF A BETTER WORD, FIND ROOMS IN RELATION
22 TO WHAT THE MARKET WOULD BEAR AND HILTON IS WANTING THE BEST
23 RATES IT CAN GET IN RELATION TO WHAT THE MARKET WILL BEAR
24 THEN THERE'S GOT TO BE A RESOLUTION OF THAT ISSUE AND THERE
25 NEVER WAS A RESOLUTION OF THE ISSUE AND SO---

1 **THE COURT** IT'S PRICING AND THE NUMBER AVAILABLE
2 **MR PAUL** YES SIR BOTH OF THOSE POINTS WERE THE
3 SUBJECT OF THE ROOM BLOCK AGREEMENT AND THAT'S WHY CORRADO
4 WAS SAYING THAT THE ROOM BLOCK AGREEMENT WAS A FOUNDATION
5 DOCUMENT BECAUSE IT GOES DIRECTLY TO REVENUE THAT GOES TO THE
6 WHOLE FEASIBILITY OF THE BOND ISSUE SO -- AND SO FROM THE
7 STANDPOINT OF CONDITION PRECEDENT, MY POINT IS THAT AGAIN
8 YOU'RE DEAD INSIDE OF THE TEST WE SAY ON IS THIS A
9 CONDITION PRECEDENT? BECAUSE WITHOUT A ROOM BLOCK AGREEMENT,
10 THERE WAS NO DUTY OF PERFORMANCE ON ANYBODY BECAUSE THE
11 TRANSACTION JUST SIMPLY COULDN'T GO FORWARD IT WAS A
12 LOCKDOWN IT COULDN'T GO FORWARD, THE TRANSACTION COULDN'T
13 THE SAME IS TRUE WITH THE DESIGN/BUILD AGREEMENT THE
14 DESIGN/BUILD AGREEMENT, OF COURSE, IS AN AGREEMENT THAT HAD
15 IN IT THE GUARANTEED MAXIMUM PRICE BY TERM AND THE GUARANTEED
16 DELIVERY DATE BY TERM AND A NUMBER OF OTHER FACTORS, AND WHEN
17 YOU'RE DOING BOND ISSUE IN TERMS OF THE FEASIBILITY ANALYSIS
18 AND EVERYTHING ELSE, YOU HAVE TO BE ABLE TO SHOW THE THING
19 CAN BE BUILT THAT IS, THE HOTEL CAN BE BUILT FOR THE AMOUNT
20 OF THE FINANCING AND THE RESERVES FOR DEBT SERVICE, AND ALL
21 THE OTHER RESERVES THAT THEY HAVE AND THE EXPENSES THEY HAVE
22 CAN BE PAID BY THE BOND ISSUE AND SO THAT AGREEMENT, AS
23 GOTTLIEB TESTIFIED IN PARAGRAPH 13 OF HIS AFFIDAVIT WAS
24 NEVER SIGNED AND SO THAT AGREEMENT AGAIN IS DEAD CENTER OF
25 THE TEST OF CONDITION PRECEDENT THAT IS, WITHOUT THAT

1 AGREEMENT THERE WAS NO DUTY TO PERFORM BY ANYBODY

2 AND THEN FINALLY THE DEVELOPMENT MANAGEMENT AGREEMENT IS
3 THE AGREEMENT THAT SOME OF THESE PLAINTIFFS ARE PARTS OF, AND
4 EVERYBODY ADMITS IT NEVER GOT SIGNED IT CERTAINLY WASN'T
5 SIGNED AT THE TIME, BUT GOING TO CONDITION PRECEDENT WITHOUT
6 A SIGNED DEVELOPMENT MANAGEMENT AGREEMENT, THERE WAS NO DUTY
7 OF IMMEDIATE PERFORMANCE

8 AND SO IF YOU LOOK AT EVERY FOUNDATION DOCUMENT IN THIS
9 TRANSACTION AND YOU LOOK AT THE FACE OF THE M O U ON WHAT
10 WAS REQUIRED AND YOU ASK THE QUESTION WERE THE -- WERE THE
11 ESSENTIAL DOCUMENTS THAT TRIGGERED EVERYBODY'S DUTY TO GO
12 FORWARD EVER SIGNED AND WERE MOST OF THEM EVEN FULLY
13 NEGOTIATED, THE ANSWER TO THAT IS NO AND SO WE SAY THAT IN
14 ADDITION TO ON THE FRONT END OF BEING NO AGREEMENT TO --
15 THERE BEING NO AGREEMENT -- NO ENFORCEABLE AGREEMENT BECAUSE
16 IT IS AN AGREEMENT TO AGREE ON THE FRONT END, WE'RE SAYING
17 ALSO THAT EVEN IF YOU COULD SOMEHOW SLIP BY THAT HOWEVER---

18 THE COURT WELL, ARE THOSE -- ARE THOSE TWO ARGUMENTS
19 NOT THE SAME THAT IT'S AN AGREEMENT TO AGREE ON THOSE FIVE OR
20 SIX THINGS AND YOU'RE ALSO SAYING THAT YOU COULD CONSIDER
21 THOSE CONDITIONS PRECEDENT?

22 MR. PAUL YES, SIR, AND THEY'RE THE SAME AND THEY'RE A
23 LITTLE BIT DIFFERENT IN THE SENSE THAT IF THE COURT WERE TO
24 FIND CONTRARY TO OUR ARGUMENT THAT THERE WAS SOME FACT ISSUE
25 SOMEWHERE THAT WE HAVEN'T SEEN THAT A JURY COULD DECIDE ABOUT

1 WHETHER THESE AGREEMENTS THAT I'M MENTIONING - THEY'RE AN
2 AGREEMENT TO AGREE -- EVEN IF THE COURT FOUND A FACT ISSUE --
3 IF THE COURT FINDS NO FACT ISSUE AND WE WIN ON THE FIRST
4 ARGUMENT THERE'S NO NEED TO CONSIDER CONDITION PRECEDENT
5 IT IS CONCEIVABLE THOUGH WE DON'T THINK IT SHOULD
6 OCCUR THAT THE COURT COULD FIND A FACT ISSUE THERE, AND IF
7 THE COURT FOUND A FACT ISSUE THERE, THEN WE'RE SAYING IN ANY
8 EVENT THAT WOULD TRIGGER AN ANALYSIS ABOUT CONDITION
9 PRECEDENT SO THIS ARGUMENT ONLY COMES INTO PLAY IF THE
10 COURT FINDS THAT THERE'S SOME FACT ISSUE ABOUT WHETHER THERE
11 IS AN AGREEMENT TO AGREE AND, THEREFORE DENY SUMMARY
12 JUDGMENT WE SAY THAT YOU REALLY SHOULDN'T HAVE TO GET TO
13 THIS ARGUMENT BECAUSE OF WHAT WE'VE ALL SAID ABOUT AN
14 UNENFORCEABLE AGREEMENT TO AGREE THANK YOU
15 THE COURT ALL RIGHT ALL RIGHT ANYBODY NEED TO TAKE
16 A BREAK?
17 MR KALISH FIVE MINUTES WILL BE GREAT
18 THE COURT ALL RIGHT WE'LL TAKE ABOUT FIVE MINUTES
19 OKAY
20 (WHEREUPON A SHORT BREAK WAS TAKEN)
21 THE COURT OKAY ALL RIGHT KEEP YOUR SEATS MR
22 NEWMAN YOU'RE UP NEXT?
23 MR NEWMAN YES, SIR, YOUR HONOR AS WE MENTIONED
24 EARLIER, I REPRESENT STEVENS & WILKINSON, BUT A LARGE PORTION
25 -- IN FACT, THE VAST MAJORITY OF THE PLAINTIFFS' ARGUMENTS IN

1 OPPOSITION ARE CONFLICTED OVER ONE ANOTHER SO I WILL BE
2 ARGUING PRIMARILY ON BEHALF OF EVERYONE THAT -- LIKE I SAID,
3 THERE ARE SOME PERMUTATIONS THAT I'LL TRY TO NOTE, BUT IF YOU
4 SEE ME WANDERING OVER HERE IT'S BECAUSE THESE GUYS ARE
5 TELLING ME THAT I'M SCREWING UP THEIR CLIENT, AND THEN
6 PLEASE PLEASE PARDON THE -- I HOPE IT WILL BE FEW THROUGHOUT
7 MY ARGUMENT

8 JUDGE, I'D LIKE TO START IN REVERSE ORDER AND BEGIN WITH
9 MR PAUL'S ARGUMENT AS TO CONDITIONS PRECEDENT, AT LEAST
10 THAT'S HOW WE PRONOUNCED IT WHEN I WENT THROUGH LAW SCHOOL
11 AND MR PAUL QUOTED YOU A TEST OF HOW YOU DETERMINE IF
12 THERE'S A CONDITION PRECEDENT WITHIN A DOCUMENT THAT I DON'T
13 BELIEVE I'VE EVER READ BEFORE BUT THE M&M CASE DOES TELL US
14 THE QUESTION OF WHETHER A PROVISION IN THE CONTRACT - AND I'M
15 QUOTING HERE - CONSTITUTES A CONDITION PRECEDENT IS A
16 QUESTION OF CONSTRUCTION, DEPENDENT ON THE INTENT OF THE
17 PARTIES TO BE GATHERED FROM THE LANGUAGE THEY EMPLOY

18 NOW, THE REPRESENTATION HAS BEEN MADE BY THE AUGHTRY
19 DEFENDANTS THAT THE VARIOUS UNEXECUTED DOCUMENTS CONSTITUTED
20 CONDITIONS PRECEDENT THE PROBLEM THOUGH IS THAT THE M O U
21 DOES NOT SPECIFICALLY SPELL THAT OUT, AND SOUTH CAROLINA LAW
22 IS VERY CLEAR THAT A CONDITION PRECEDENT MAY NOT BE IMPLIED
23 WHERE IT MIGHT HAVE BEEN IMPLIED BEFORE BY AN EXPRESS
24 AGREEMENT

25 NOW, THESE WERE COMPLEX PARTIES THAT ARE INVOLVED IN

1 THESE TYPES OF DEALINGS ON A REGULAR BASIS THEY KNEW HOW TO
2 MAKE A CONDITION PRECEDENT IF THEY WANTED TO IN FACT, WHAT
3 THEY DID, JUDGE, IS THEY CREATED A CONDITION SUBSEQUENT IN
4 THE FORM OF THE FEASIBILITY PROVISION LITERALLY IT STATES
5 THAT IF THE CITY DETERMINES THAT IT IS NOT FEASIBLE TO
6 PROCEED WITH A HOTEL PROJECT IT SHALL HAVE NO LIABILITY
7 UNDER THIS M O U IN OTHER WORDS CITY, IF YOU MAKE THIS
8 AFFIRMATIVE DETERMINATION THAT THIS PROJECT IS NOT FEASIBLE,
9 THEN YOU CAN SLIP OUT THE BACK DOOR

10 THE COURT WELL, ISN'T THAT WHAT THEY DID?

11 MR. NEWMAN NO ABSOLUTELY NOT

12 THE COURT I'M TALKING ABOUT -- WAIT A MINUTE UNDER
13 -- UNDER THIS PLAN DID THEY NOT SAY THIS ISN'T FEASIBLE?

14 MR. NEWMAN THEY NEVER SAID THAT NEVER

15 THE COURT WELL -- ALL RIGHT WHAT WOULD THEY HAVE HAD
16 TO DO TO MAKE IT ANY CLEARER OTHER THAN SUBMITTING OR
17 REQUESTING NEW R F Q 'S?

18 MR. NEWMAN WELL, THROUGHOUT THIS LITIGATION THE CITY
19 HAS SAID THERE CAN BE NO ACT BY IMPLICATION ON THE CITY'S
20 PART, AND EXCEPT FOR---

21 THE COURT SO IF THEY HAD WRITTEN -- IF THEY HAD
22 WRITTEN YOU GUYS A LETTER AND SAID PURSUANT TO PARAGRAPH
23 SO-AND-SO, WE HEREBY NOTIFY YOU THAT WE HAVE DETERMINED THIS
24 PROJECT IS NOT FEASIBLE, THEN YOU WOULDN'T BE STANDING RIGHT
25 HERE

1 MR. NEWMAN IF THEY MADE AN AFFIRMATIVE
2 REPRESENTATION---

3 THE COURT WAIT A MINUTE LET'S JUST IF THEY HAD
4 WRITTEN YOU A LETTER SAYING WE HAVE MADE AN AFFIRMATIVE
5 DETERMINATION THAT THIS PROJECT IS NOT FEASIBLE, WOULD YOU BE
6 STANDING RIGHT HERE? WOULD YOU BE EXPLAINING ABOUT HOW THEY
7 DID THAT?

8 MR. NEWMAN EXACTLY AND YOU'RE HITTING ON WHAT MY
9 FOLLOW-UP WOULD HAVE BEEN WHAT WE WOULD HAVE SAID IS
10 CITY, YOU HAVE GOOD FAITH -- IT IS YOUR DUTY TO USE GOOD-
11 FAITH EFFORTS IN PURSUING THIS PUBLICLY-FINANCED HOTEL, AND
12 WE DON'T THINK THAT YOU HAVE USED GOOD FAITH BECAUSE, AFTER
13 ALL, A MONTH AGO YOU JUST APPROVED THIS, AND NOW ALL OF A
14 SUDDEN YOU'RE JERKING THE CARPET OUT FROM UNDERNEATH THIS

15 BUT I DON'T WANT TO GO DOWN THIS ROAD OF FEASIBILITY
16 MORE THAN WE HAVE TO BECAUSE, AFTER ALL, THEY HAVEN'T MOVED
17 FOR SUMMARY JUDGMENT ON THOSE GROUNDS THE GROUNDS BEFORE
18 YOU, JUDGE, ARE NUMBER ONE, THERE WAS NO INTENT FOR A

19 CONTRACT NUMBER TWO, THE ENVISIONED AGREEMENTS WITHIN THE
20 M O U RENDERED THE CONTRACT VOID OF INDEFINITENESS AND,
21 NUMBER THREE, THIS CONDITIONS PRECEDENT ARGUMENT WHICH I JUST
22 ADDRESSED BUT I THINK THAT THE FEASIBILITY ARGUMENT DOES
23 GIVE US VERY STRONG EVIDENCE THAT THE PARTIES INTENDED TO
24 FORM A CONTRACT AND THAT IS THAT WHEN YOU ENGINEER A
25 CONDITION SUBSEQUENT, THEN NECESSARY PRECEDENT FOR A

1 CONDITION SUBSEQUENT IS A BINDING CONTRACT AND, IN FACT, THE
2 CITY CHOSE TO USE THE WORD -- THE PHRASE NOT LIABLE WITHIN
3 THAT CONDITION SUBSEQUENT

4 WHAT DOES THAT MEAN? THAT MEANS IF THAT CONDITION DOES
5 NOT OCCUR, YOU ARE LIABLE UNDER THIS DOCUMENT, THIS M O U
6 AND---

7 THE COURT SAY THAT AGAIN

8 MR NEWMAN IF THE CONDITION SUBSEQUENT DOES NOT OCCUR,
9 THEN YOU ARE LIABLE UNDER---

10 THE COURT YOU ARE LIABLE?

11 MR NEWMAN ABSOLUTELY ABSOLUTELY THAT'S THE LAW OF
12 CONDITION SUBSEQUENT IT'S AN ESCAPE CLAUSE FOR A PARTY THAT
13 WANTS TO PRESERVE A CONTINGENCY AGREEMENT

14 COURT REPORTER I'M SORRY CAN YOU SPEAK UP JUST A
15 LITTLE BIT? YOU'RE DROPPING YOUR VOICE DOWN

16 MR NEWMAN I'M SORRY I APOLOGIZE NOW, I THINK IT'S
17 IMPORTANT TO NOTE THAT THE PARTIES ARE RELYING ON SECTION 1 1
18 IN ARGUING TO THIS COURT, AND THIS IS PRETTY MUCH THEIR SOLE
19 BASIS FOR ARGUING THAT THERE'S NO INTENT TO FORM A CONTRACT,
20 THAT THE PARTIES WERE TO PROCEED IN GOOD FAITH AND EXECUTE
21 DEFINITIVE WRITTEN AGREEMENTS WITH RESPECT TO THE BUSINESS
22 TERMS AND CONDITIONS CONTAINED HEREIN

23 WELL, WHAT IS NOT CITED, YOUR HONOR, IS 1 2, THE
24 SENTENCE IMMEDIATELY FOLLOWING, WHICH STATES THAT UNLESS
25 SUPERSEDED BY AN AMENDMENT TO THIS M O U OR FINAL

1 DEVELOPMENT MANAGEMENT AGREEMENT, THIS M O U IDENTIFIES THE
2 UNDERSTANDING OF THE PARTIES IN OTHER WORDS, UNLESS THERE
3 WAS ANOTHER AGREEMENT THAT CONTRADICTED THE TERMS CONTAINED
4 HEREIN, THIS DOCUMENT I'M HOLDING IN MY RIGHT HAND WAS GOING
5 TO CONTROL THE ACTIONS OF THE PARTIES ALL THE WAY UP THROUGH
6 I WOULD NOTE

7 THE COURT ALL THE WAY UP TO WHAT?

8 MR NEWMAN THE POST-CONSTRUCTION PHASE OF THE PROJECT
9 IN OTHER WORDS NOT ONLY HAS THE GROUND BEEN BROKEN AND NOT
10 ONLY HAS THE DESIGN BEEN CONCLUDED BUT, AS HAS BEEN SAID MANY
11 TIMES IN THIS LITIGATION THE STEAKS ARE IN THE FREEZER THE
12 KEYS ARE BEHIND THE DESK WE'RE READY TO ROCK AND ROLL AND
13 I THINK THAT IT'S---

14 THE COURT WELL, HOW DOES 1 2 MODIFY 1 1?

15 MR NEWMAN BECAUSE 1 2 NOTES THAT THE M O U WILL BE
16 THE CONTROLLING DOCUMENT THE M O U CONSTITUTES A MEETING
17 OF THE MINDS IT IS THE UNDERSTANDING OF THE PARTIES

18 THE COURT SO YOU'RE SAYING THIS EIGHT-PAGE DOCUMENT IS
19 GOING TO BE THE BE-ALL AND END-ALL OF THIS MULTI-MILLION-
20 DOLLAR HOTEL DEVELOPMENT

21 MR NEWMAN NO, I'M NOT SAYING THAT, AND I TURN THE
22 COURT'S ATTENTION TO THE CASE OF APERM OF SOUTH CAROLINA---

23 THE COURT WHAT'S THAT CASE?

24 MR NEWMAN APERM OF SOUTH CAROLINA VERSUS RUTH, AND
25 THERE THE---

1 THE COURT THE ONE WE TALKED ABOUT BEFORE

2 MR NEWMAN I BELIEVE SO AND THE COURT STATED THAT A
3 CONTRACT WILL NOT BE HELD UNENFORCEABLE FOR INDEFINITENESS
4 BECAUSE ITS PERFORMANCE IS, AS TO PARTICULAR DETAILS, LEFT
5 OPEN TO SUBSEQUENT AGREEMENT OF THE PARTIES NOW
6 IMPORTANTLY, IT GOES ON TO STATE THAT THIS IS ESPECIALLY TRUE
7 WHERE THE CONTRACT PROVIDES THE GUIDELINES FOR SUBSEQUENT
8 AGREEMENT

9 SO NOW MR -- MR DETWILER SAID THAT WE USED THE TERM
10 FRAMEWORK NOW, I'M NOT SURE IF WE INCLUDED THAT TERM WITHIN
11 ANY OF OUR BRIEFS, BUT WE CERTAINLY USED THE TERM GUIDELINES
12 AND THAT COMES DIRECTLY FROM THE APERM CASE, AND THAT'S WHAT
13 THE M O U DOES WITH REGARD TO THE FUTURE-ENVISIONED
14 AGREEMENTS IT SETS FORTH THE GUIDELINES BY WHICH THE
15 PARTIES CAN OPERATE TO EVENTUALLY AGREE UPON THE TERMS IN THE
16 SUBSEQUENT AGREEMENTS AND GO FORWARD WITH THE ENTIRE PROJECT
17 NOW, I THINK ONE OF THE PROBLEMS IN THIS CASE IS WE TEND
18 TO MAKE IT A LOT MORE COMPLICATED THAN IT REALLY IS, AND IT'S
19 EASY TO DO THAT WHEN YOU THROW A LOT OF FACTS UP BEFORE --
20 THROW A LOT OF--

21 THE COURT AND A LOT OF COMMAS, A LOT OF ZEROES

22 MR NEWMAN RIGHT

23 THE COURT IN OTHER WORDS, LIKE I PROBABLY SAID AT THE
24 LAST HEARING, THIS IS NOT BY ANY STRETCH BRAIN SURGERY, AND
25 IT'S NOT ROCKET SCIENCE

1 MR. NEWMAN RIGHT

2 THE COURT IT'S A DOCUMENT -- AN EIGHT-PAGE DOCUMENT
3 WHICH -- ACTUALLY IT'S SEVEN THE SIGNATURE PAGES SIGNED IN
4 WHATEVER GOES HIGHER THAN QUADRUPLICATE ARE MORE THAN --
5 THERE ARE MORE PEOPLE SIGNING THIS DOCUMENT THAN THE PAGES
6 WERE TO IT AND I KNOW THE NUMBER OF PAGES DOES NOT MAKE IT
7 ANY MORE OR ANY LESS BINDING, BUT HOW DO YOU -- HOW DO YOU
8 GET PAST THE POINT THAT THERE WAS SO MUCH TO AGREE ON THAT
9 WAS CONFLICTED AND THOSE -- THOSE -- THE M O U CLEARLY SAID
10 WE'VE GOT A LOT OF WORK TO DO WE'VE GOT A LOT OF AGREEMENTS
11 TO REACH AND THESE -- THIS M O U IS GOING TO KIND OF BE A
12 SPRINGBOARD HOW DO YOU GET PAST THAT?

13 MR. NEWMAN WELL, I THINK THAT THE FIRST THING -- THE
14 FIRST THING I WOULD DO AGAIN WOULD BE TO REITERATE THE APERM
15 CASE THAT I JUST QUOTED FROM WHICH IS THE M O U SET FORTH
16 THE GUIDELINES BY WHICH ALL OF THESE AGREEMENTS WOULD BE
17 NEGOTIATED AND REACHED THE SECOND THING I WOULD SAY WITH
18 REGARD TO WHETHER OR NOT THESE ARE MATERIAL TERMS THAT ARE
19 OMITTED FROM THE CONTRACT IS THE SOUTH CAROLINA COURTS HAVE
20 ESTABLISHED WHAT EXACTLY MATERIAL IS AND IT DOESN'T
21 NECESSARILY MEAN IMPORTANT

22 WHAT IT MEANS WITH REFERENCE TO THE QUESTION OF VOID OF
23 INDEFINITENESS IS WHETHER OR NOT THE COURT OR THE JURY CAN,
24 WITHOUT THOSE AGREEMENTS HAVING BEEN EXECUTED, HAVE A
25 REASONABLY CERTAIN BASIS TO ISSUE A REMEDY, AND IN THIS CASE

1 I THINK WE CERTAINLY HAVE THAT NOW, THE ISSUE OF PRICES
2 COME UP AND WE ARGUED WITHIN OUR BRIEFS -- BRIEF MAY BE
3 IRONIC

4 THE COURT ROOM PRICE YOU MEAN?

5 MR. NEWMAN THAT'S CORRECT

6 THE COURT YEAH, NONE OF THE BRIEFS WERE BRIEF

7 MR. NEWMAN AND SOMETIMES I'VE HEARD THERE SHOULD BE A
8 10-PAGE RULE WITH REGARD TO JUDGES

9 THE COURT NO, YOU'D GET AROUND THAT BY ATTACHING
10 ATTACHMENTS WAY BEYOND THE 10 PAGES

11 MR. NEWMAN THAT'S RIGHT

12 THE COURT SO WE HAVE -- SO YOU'RE SAYING -- HOW DOES
13 THE APERM CASE, WHICH I'M FAMILIAR WITH, GET YOU IN THE DOOR
14 IN THIS DOCUMENT?

15 MR. NEWMAN OKAY WE---

16 THE COURT THIS DOCUMENT

17 MR. NEWMAN WE GET IN THE DOOR THROUGH THE APERM CASE
18 BECAUSE THE M O U HAS SET FORTH THE GUIDELINES BY WHICH ANY
19 FUTURE AGREEMENTS WHICH MAY BE NECESSARY WILL BE REACHED
20 THAT GETS US THROUGH ON PAPER NOW, THE QUESTION IS WHETHER
21 OR NOT THESE AGREEMENTS WHICH WERE NOT EXECUTED WERE --
22 MATERIAL IS THE SECOND QUESTION NOW, MR. PAUL AND MR.
23 DETWILER ARGUE THAT THEY ARE MATERIAL BECAUSE THEY'RE VERY
24 IMPORTANT WELL---

25 THE COURT AND YOU SAY THAT'S A JURY ISSUE

1 MR. NEWMAN WELL NUMBER ONE, YES, IT'S A JURY ISSUE
2 NUMBER TWO, WHAT THE COURTS HOLD TO BE VERY IMPORTANT ARE A
3 LITTLE BIT DIFFERENT FROM WHAT THE PARTIES WOULD DEEM TO BE
4 IMPORTANT IN ANY GIVEN TRANSACTION WHAT'S IMPORTANT WITH
5 REGARD TO THE QUESTION ABOUT DEFINITENESS IS WHETHER OR NOT
6 THESE AGREEMENTS WOULD HAVE RENDERED IT -- RENDERED THE COURT
7 OR THE JURY INCAPABLE OF ISSUING A REASONABLY CERTAIN VERDICT
8 IN THIS CASE AND THEY DID

9 NOW, I THINK MR. PAUL MADE A GOOD POINT, BUT MAYBE NOT
10 ONE HE WAS INTENDING TO MAKE, WHEN HE STATED THAT WHAT ALL
11 THESE AGREEMENTS CONSTITUTED WAS I GUESS YOU'D SAY
12 CONTRIBUTING FACTORS IN THE FEASIBILITY OF THE PROJECT THEY
13 DIDN'T CONSTITUTE ANYTHING THAT WOULD GO INTO THE FINAL I
14 GUESS YOU WOULD SAY COMPENSATION TO THE INDIVIDUAL PARTIES
15 THAT WAS SET FORTH WITHIN THE M O U IN TERMS OF A GENERAL
16 PERCENTAGE OF G M P OR CONSTRUCTION COSTS, AND THE PARTIES
17 HAVE TESTIFIED THAT -- THERE WAS TESTIMONY THAT WE CITED IN
18 OUR BRIEFS THAT THAT IS THE GENERAL TRADE USAGE OF THIS TYPE
19 OF SITUATION YOU KNOW, THERE IS A NECESSARY AMOUNT OF
20 ESTIMATION OF PROSPECTIVE CALCULATION OF THE EVENTUAL FEE
21 AND SO WHEN YOU SET FORTH WHAT YOU'RE GOING TO EARN, YOU SET
22 IT FORTH NOT IN A HARD FIGURE BUT IN---

23 THE COURT I UNDERSTAND THE ROOM BLOCK -- ARE YOU
24 TALKING ABOUT THE ROOM BLOCK AGREEMENT?

25 MR. NEWMAN NO, SIR I'M TALKING ABOUT THE G M P

1 THE COURT I THOUGHT YOU WERE---

2 MR. NEWMAN I'M TALKING ABOUT THE WAY THE FEES ARE
3 CALCULATED WITHIN THE M O U IN OTHER WORDS, FOR EXAMPLE---

4 THE COURT WHAT PAGE?

5 MR. NEWMAN LET'S SEE PARAGRAPH 6 2 DEVELOPER IS TO
6 BE PAID A DEVELOPMENT FEE OF 4 75 PERCENT

7 THE COURT ALL RIGHT THAT'S IN THERE

8 MR. NEWMAN ALL RIGHT LET'S SAY PARAGRAPH 8 1
9 ARCHITECT IS TO BE A PAID A FEE OF 7 2 PERCENT

10 THE COURT OF WHAT?

11 MR. NEWMAN OF -- BASED ON HARD CONSTRUCTION COSTS
12 TOGETHER WITH DESIGN BUILDERS, GENERAL EXPENSES, AND FEES,
13 AND THAT'S THE WAY IT'S SET FORTH AND THAT'S THE WAY THEY DO
14 IT IN THESE AGREEMENTS

15 THE COURT ALL RIGHT THOSE ARE ALL -- THOSE ARE ALL
16 TERMS THAT YOU THINK ARE DEFINITE ENOUGH

17 MR. NEWMAN CORRECT

18 THE COURT BUT LOOKING AT IT FROM THE PERSPECTIVE OF
19 BOTH PARTIES AND IN THIS CASE THE CITY - NOT BOTH BUT ALL
20 PARTIES - BUT FROM THE PERSPECTIVE OF THE CITY, IN ITS
21 DETERMINATION OF WHETHER OR NOT THE PROJECT WAS FEASIBLE, IT
22 HAD TO DEAL WITH ALL THAT STUFF WHICH IN THEIR - AND I'M NOT
23 ADOPTING THEIR WORDING - EVERYTHING LEADS TO THE BOND ISSUE
24 THAT ALL THIS HAD TO BE DONE TO MAKE THIS A VIABLE PROJECT
25 FOR THE CITY SO DON'T YOU HAVE TO LOOK AT THAT?

1 MR. NEWMAN NO, SIR, BECAUSE OF THE RESTRICTIONS THAT
2 THE COURT PLACES ON THE CONSIDERATIONS OF MATERIALITY AND---

3 THE COURT IN APERM

4 MR. NEWMAN RIGHT NO, NOT IN APERM LET'S SEE IT'S
5 IN---

6 THE COURT SO YOU'RE SAYING THAT THERE'S AN IRONCLAD
7 CASE THAT SAYS THIS IS WHAT YOU LOOK AT TO DETERMINE WHAT'S
8 MATERIAL

9 MR. NEWMAN I HESITATE TO SAY THAT ANYTHING IS IRONCLAD
10 WITH REGARD TO APPELLATE LAW, BUT THE CASE THAT I HAVE QUOTED
11 IS PRESTWICK GOLF CLUB, INC , VERSUS PRESTWICK LIMITED
12 PARTNERSHIP, AND IT STATES THAT THE REQUIREMENT OF CERTAINTY
13 IN CONTRACTS ENSURES THAT THE PARTIES INTEND TO -- ONE,
14 INTEND TO---

15 THE COURT READ A LITTLE BIT -- READ A LITTLE BIT
16 SLOWER

17 MR. NEWMAN I'M SORRY THE REQUIREMENT OF CERTAINTY IN
18 CONTRACTS ENSURES ONE THAT THE PARTIES INTEND TO CONCLUDE A
19 BINDING AGREEMENT---

20 COURT REPORTER I'M SORRY CAN YOU SPEAK UP, TOO?

21 MR. NEWMAN I'LL SAY IT AGAIN FOR YOU

22 COURT REPORTER THANK YOU

23 MR. NEWMAN THE REQUIREMENT OF CERTAINTY IN CONTRACTS
24 ENSURES THAT THE PARTIES INTEND TO CONCLUDE A BINDING
25 AGREEMENT AND PROVIDES THE COURT A REASONABLY CERTAIN BASIS

1 FOR GRANTING A REMEDY SO THAT IS THE LAW WHICH ESTABLISHES
2 WHAT EXACTLY WE'RE LOOKING FOR AS FAR AS MATERIAL TERMS ARE
3 CONCERNED I HAVEN'T FOUND ANY OTHER CASE LAW IN SOUTH
4 CAROLINA THAT GIVES US ANY GUIDANCE WITH REGARD TO WHAT IS
5 MATERIAL AND WHAT IS NOT MATERIAL BUT WITH REGARD TO
6 EVERYTHING THAT WAS GIVING RISE TO THE M O U , IT'S
7 IRRELEVANT TO THE WAY THAT THE COURT, IF YOU WERE SITTING AS
8 A FACT FINDER OR THE JURY WOULD RENDER A VERDICT IN THIS
9 CASE

10 THE COURT ALL RIGHT SO A JURY SITTING THERE
11 LISTENING TO TESTIMONY AT SOME POINT IS GOING TO BE
12 DELIBERATING THIS CASE, AND YOU HAVE EVIDENCE THAT THE PRICE
13 OF POKER KEPT GOING UP AS FAR AS THE BONDS WERE CONCERNED
14 YOU DIDN'T HAVE ANY Q M A OR IN THE LITTLE PINK THING HERE A
15 HOTEL OPERATING AGREEMENT YOU HAD NO ROOM BLOCK AGREEMENT
16 YOU HAD NO TECHNICAL SERVICES AGREEMENT YOU HAD NO
17 MANAGEMENT AGREEMENT YOU HAD NO DESIGN/BUILD AGREEMENT
18 YOU HAD NO DESIGN AGREEMENT SO YOU'RE SAYING THOSE AREN'T
19 MATERIAL

20 MR NEWMAN NO, SIR BECAUSE THEY GO TO THE ISSUE OF
21 FEASIBILITY THEY DON'T GO TO THE ISSUE OF DAMAGES FOR A
22 REMEDY

23 THE COURT ALL RIGHT BUT FROM THE -- ALL RIGHT
24 THAT'S WHAT I'M HAVING TROUBLE -- THAT'S PEELING AWAY

25 MR NEWMAN YES, SIR

1 THE COURT SO YOU'RE SAYING YOU SHOULD -- WHAT WAS YOUR
2 FEE GOING TO BE?

3 MR. NEWMAN 7 25 PERCENT OF THE FINAL CONSTRUCTION
4 COSTS

5 THE COURT AND THAT WAS?

6 MR. NEWMAN AND THAT WAS -- WELL---

7 THE COURT TO BE DETERMINED

8 MR. NEWMAN YEAH RIGHT

9 THE COURT BASED ON WHAT?

10 MR. NEWMAN BASED ON -- WELL, THE G M P THAT WOULD BE
11 APPROVED BY THE CITY IF YOU GO BY WHAT WAS APPROVED BY THE
12 CITY---

13 THE COURT AND IF THE PROJECT ITSELF WASN'T FEASIBLE,
14 THAT HOTEL WOULD NEVER BE BUILT FOR YOU TO GET 7 25 PERCENT
15 OF RIGHT?

16 MR. NEWMAN IF THE PROJECT ITSELF WAS NOT FEASIBLE,
17 THEN---

18 THE COURT THAT BUILDING WITH BRICKS AND CEMENT AND
19 WINDOWS AND DOORS WOULD NEVER BE BUILT

20 MR. NEWMAN IF THE CITY USED A GOOD FAITH -- IF THE
21 CITY HAD USED GOOD-FAITH EFFORTS IN PURSUING PUBLIC
22 FINANCING---

23 THE COURT ALL RIGHT THAT'S WHERE -- DON'T WE START
24 GETTING CIRCULAR THERE?

25 MR. NEWMAN ABSOLUTELY

1 THE COURT THE CITY HAD TO MAKE THE DETERMINATION OF
2 WHETHER OR NOT THE PROJECT WAS FEASIBLE BASED ON ITS
3 WILLINGNESS TO KEEP WALKING THAT PLANK---

4 MR. NEWMAN RIGHT

5 THE COURT ---TO BUILD THIS THING

6 MR. NEWMAN SURE

7 THE COURT AND LET'S -- WHERE DID THEIR GOOD FAITH
8 STOP? WHERE DID THEY STOP USING IT?

9 MR. NEWMAN WELL---

10 THE COURT FEBRUARY 11TH MARCH 17TH, OR SOMEWHERE IN
11 BETWEEN?

12 MR. NEWMAN I THINK THEY STOPPED USING IT WHEN THEY IN
13 ESSENCE CHOSE TO GO FORWARD WITH THE PRIVATELY-FINANCED
14 HOTEL

15 THE COURT ALL RIGHT AND WHY DID THEY DO THAT?

16 MR. NEWMAN WE DON'T KNOW

17 THE COURT WE SAT HERE FOR FOUR HOURS ONE DAY AND WE'VE
18 BEEN IN HERE FOR AN HOUR AND A HALF TODAY WHERE DID THEY
19 STOP? WHY DID THEY STOP DOING IT?

20 MR. NEWMAN THAT'S A GOOD QUESTION, AND THE ONLY ANSWER
21 I HAVE IS THE CITY NEVER GAVE A REASON FOR WHY IT STOPPED
22 THE---

23 THE COURT AND YOU'RE SAYING THEY -- ARE YOU SAYING THE
24 84 MILLION OR 70 MILLION OR WHATEVER MILLION IS NOT A GOOD
25 REASON OR IT JUST WASN'T GIVEN TO YOU?

1 MR. NEWMAN NO REASON WAS GIVEN PERIOD THAT'S
2 EXACTLY RIGHT

3 THE COURT ALL RIGHT WHAT -- FROM THEIR ARGUMENTS
4 WHAT WAS THEIR REASON?

5 MR. NEWMAN THEIR ARGUMENTS APPEAR TO BE THIS -- THE
6 INCREASE OF THE PAR VALUE OF THE BONDS

7 THE COURT ALL RIGHT IF THEY HAD -- IF THEY HAD SAID
8 BACK IN FEBRUARY 11TH AND MARCH 17TH OF 2004, "LOOK, THIS IS
9 GETTING OUT OF HAND HERE---

10 MR. NEWMAN RIGHT

11 THE COURT ---AND WE SAY THIS IS NOT FEASIBLE," YOU
12 WOULD SAY, "YOU'VE STILL GOT TO PAY US OUR 7 25 PERCENT
13 BECAUSE THAT WAS SET IN STONE "

14 MR. NEWMAN WHAT WE WOULD SAY IS THAT YOUR
15 DETERMINATION OF FEBRUARY 11TH WAS NOT MADE IN GOOD FAITH
16 SO WE WOULD BE SITTING HERE ARGUING ABOUT GOOD FAITH AND
17 FEASIBILITY RATHER THAN MATERIALITY AND TERMS WHETHER OR NOT
18 THIS CONSTITUTED A CONTRACT

19 THE COURT OKAY ALL RIGHT I'M WITH YOU SO FAR

20 MR. NEWMAN YES, SIR IF YOUR HONOR -- BEG THE COURT'S
21 INDULGENCE?

22 THE COURT YES, SIR

23 (AN OFF-THE-RECORD DISCUSSION TAKES PLACE BETWEEN MR
24 NEWMAN AND MR. KALISH)

25 THE COURT AND I GUESS ONE OF MY -- I THINK I MAY HAVE

1 ASKED THIS BEFORE I THINK I ASKED MR FOSTER LAST TIME AND
2 HE SAID HE WOULDN'T -- HE DIDN'T KNOW OR HE DIDN'T KNOW WHO
3 COULD ANSWER THAT QUESTION I'M JUST WONDERING WHY THE CITY
4 DIDN'T HAVE SOME STRONGER LANGUAGE IN HERE ABOUT WHEN IS
5 ENOUGH IS -- WHEN IS ENOUGH ENOUGH

6 MR NEWMAN RIGHT

7 THE COURT WHO DRAFTED THIS -- THE DOCUMENT?

8 MR NEWMAN THE DOCUMENT WAS BY AND LARGE DRAFTED BY
9 THE STRATEGIC ADVISORY GROUP JEFF SAXE, I BELIEVE, PLAYED
10 THE MAJOR ROLE IN THAT HE WAS ACTUALLY, BELIEVE IT OR NOT
11 A RETAINED EXPERT BY THE CITY NOW, AND THE STRATEGIC ADVISORY
12 GROUP WAS ACTING AS THE AGENT OF THE CITY THEY HAD BEEN
13 HIRED BY THE CITY TO NEGOTIATE THE DOCUMENT---

14 THE COURT AND IT'S NOT LEGALLY NECESSARY BUT, YOU
15 KNOW, PUTTING AT THE BOTTOM OF EVERY PAGE THIS IS -- YOU
16 KNOW, SOMETHING THAT SAYS THIS AIN'T NO CONTRACT

17 MR NEWMAN RIGHT

18 THE COURT ALL OVER THIS STAMPED ALL OVER IT

19 MR NEWMAN AND EVERYBODY IN THE COURTROOM HAS SEEN
20 THAT, PARTICULARLY WITH REGARD TO LETTERS OF INTENT AND
21 EVERYTHING LIKE THAT THE PARTIES CLEARLY SET FORWARD -- I
22 MEAN, THEY HAD, YOU KNOW, THE BIG LAW FIRM OF SINKLER & BOYD
23 ON THIS THING AND NOT TO MENTION SEVERAL---

24 THE COURT THE SIZE OF THE LAW FIRM DOESN'T MAKE ANY
25 DIFFERENCE

1 MR. NEWMAN WELL, THAT'S TRUE, BUT IT CERTAINLY -- AS A
2 TWO-MAN LAW FIRM, I CAN TELL YOU WE CERTAINLY GO WITH QUALITY
3 OVER QUANTITY BUT IF THEY WANTED TO MAKE IT CLEAR THAT THIS
4 WAS NOT A BINDING INSTRUMENT, THEY COULD HAVE DONE SO THEY
5 DID NOT

6 THE COURT BUT THEY'RE SAYING IT'S JUST AS CLEAR AS IF
7 IT HAD BEEN STAMPED IN BOLD PRINT LANGUAGE

8 MR. NEWMAN EXCEPT THAT IT WASN'T STAMPED IN BOLD PRINT
9 LANGUAGE, AND THAT'S THE PROBLEM

10 THE COURT AND EVEN THAT WOULDN'T BE BINDING YOU HAVE
11 TO LOOK AT THE TERMS OF THE DOCUMENT

12 MR. NEWMAN CORRECT

13 THE COURT ALL RIGHT I'M OFF THE POINT HERE, SO I
14 APOLOGIZE FOR INTERRUPTING YOU

15 MR. NEWMAN AND I WANT TO TAKE A QUICK DETOUR REAL
16 QUICK BECAUSE WE'VE ALREADY BROUGHT UP THE FEBRUARY 11TH A
17 COUPLE OF TIMES IN MY ARGUMENT, JUDGE AND THE CITY HAS
18 ARGUED VOCIFEROUSLY THAT THEY CAN'T BE HELD TO THAT
19 FEBRUARY 11TH VOTE EITHER WITH RESPECT TO THE CONTRACT OR
20 WITH RESPECT TO ESTOPPEL

21 THE PROBLEM IS IS THAT THE CITY HAS ARGUED DIRECTLY TO
22 THE CONTRARY PREVIOUSLY WITHIN THIS CASE IN ISSUES THAT YOU
23 WEREN'T PRIVY TO BECAUSE JUDGE MANNING WAS HANDLING IT IN
24 FACT, THE PLAINTIFF PLAINTIFFS GARFIELD TRAUB AND GARY
25 REALTY SOUGHT TO DEPOSE SEVERAL CITY COUNCIL MEMBERS AND

1 THOSE DEPOSITIONS WERE OBJECTED TO ON THE GROUNDS OF
2 LEGISLATIVE PRIVILEGE

3 THE COURT IN OTHER WORDS, IN THEIR -- IN THEIR
4 CAPACITY AS BOARD MEMBERS, THEY SAID YOU CAN'T DEPOSE US
5 BECAUSE WE'RE REALLY CITY COUNCIL MEMBERS

6 MR NEWMAN EXACTLY EXACTLY

7 THE COURT YOU'RE SAYING THAT'S JUST KIND OF A JUDICIAL
8 ESTOPPEL ARGUMENT, THAT YOU CAN'T ARGUE ON THE ONE HAND AND
9 THEN ARGUE ON THE OTHER HAND?

10 MR NEWMAN YES, SIR YOU'RE HITTING ME OFF AT THE
11 PASS AND I -- JUST FOR THE RECORD, I'D LIKE TO READ ONE
12 PARAGRAPH OF THE ORDER WHICH WAS DRAFTED BY THE CITY AND
13 SIGNED BY JUDGE MANNING IN RESPONSE TO THAT IN WHICH HE
14 GRANTED THEIR ORDER OF PROTECTION AND JUDGE MANNING FOUND
15 THAT ANY DECISIONS MADE BY COUNCIL MEMBERS WHILE SITTING AS
16 THE BOARD OF DIRECTORS OF THE NONPROFIT CORPORATION WERE ALSO
17 WITHIN THE SPHERE OF THE LEGISLATIVE ACTIVITY AND ARE,
18 THEREFORE, ALSO ENTITLED TO PROTECTION BY LEGISLATIVE
19 PRIVILEGE

20 THE COURT ALL RIGHT MR DETWILER - HE CAN WRITE A
21 NOTE EXPLAINING TO ME HOW THAT'S CONSISTENT HE CAN DO THAT
22 IN JUST A FEW MINUTES BECAUSE I REMEMBER THAT COMING UP
23 BEFORE I REMEMBER SOMEBODY MENTIONING THAT SOME DEPOSITIONS
24 WERE NOT TAKEN FOR THAT REASON

25 MR NEWMAN AND I THINK YOUR HONOR HIT ON THIS POINT

1 WITH MR PAUL WHEN HE WAS SPEAKING THE ACTUAL MEMBERS OF
2 THE NONPROFIT WERE THE NON-ABSTAINING MEMBERS OF CITY
3 COUNCIL NOBODY ELSE JUST THOSE FIVE PEOPLE THE MEETING
4 ON FEBRUARY 11TH WAS HELD IN CITY COUNCIL CHAMBERS, AND THE
5 MINUTES OF THE FEBRUARY 11TH MEETING WERE PRINTED ON CITY
6 COUNCIL STATIONERY THE SEAL IS SITTING UP THERE IN THE TOP
7 RIGHT CORNER

8 SO WE FIND THAT SOMEWHAT HARD TO BELIEVE THAT THE CITY
9 WOULD TAKE ONE POSITION PREVIOUSLY AND COME BACK IN THIS --
10 IN THIS SITUATION BEFORE YOUR HONOR AND TAKE A TOTALLY
11 DIFFERENT POSITION

12 THE COURT BUT EVEN THE -- EVEN THE VOTE WHICH WAS FOUR
13 TO ONE DOESN'T SET ANYTHING ANY MORE IN STONE BECAUSE IN THE
14 INTERVENING OR THE SUBSEQUENT FIVE WEEKS THINGS CHANGED
15 AGAIN, DIDN'T THEY?

16 MR NEWMAN WELL, AT THE BEHEST OF THE CITY AND---

17 THE COURT HOW DID THEY CHANGE AT THE BEHEST OF THE
18 CITY?

19 MR NEWMAN AND I HATE TO -- I HATE TO GET OFF ON THIS
20 TANGENT AGAIN BECAUSE I THINK IT'S GOING MORE TO THE
21 FEASIBILITY ARGUMENT RATHER THAN THE DEFINITENESS TO THE
22 CONTRACT BUT IF YOU READ BILL CORRADO'S DEPOSITION WHICH
23 THEY QUOTED SEVERAL TIMES, PAGES 51 AND 52 AND 53 TALK ABOUT
24 HOW THE PAR VALUE OF THE BONDS INCREASED OVER THE PERIOD OF
25 TIME THAT YOU'VE SEEN UP ON THE BIG BOARD UP HERE AND THE

1 DRIVING FACTOR BEHIND THE INCREASE WAS THE CITY'S DECISION TO
2 INCORPORATE THE PARKING GARAGE AND THE PURCHASE COST OF THE
3 LAND INTO THE PUBLICLY-FINANCED DEAL THAT WAS NOT
4 ENVISIONED IN THE MEMORANDUM OF UNDERSTANDING

5 THE COURT WAS IT MENTIONED AT ALL?

6 MR. NEWMAN IT WAS MENTIONED TO THE EXTENT THAT THE
7 CITY WOULD PURCHASE THE LAND AND BUILD A GARAGE, BUT THOSE
8 WERE INDEPENDENT EXPENSES THAT WERE NOT GOING TO BE COVERED
9 BY THE 60 MILLION SO THAT TOTALED UP TO BE I THINK 7 OR 8
10 MILLION BUCKS NOW, THERE SHOULD HAVE BEEN A \$12 MILLION
11 INCREASE IN THE PAR VALUE OF THE BONDS THAT'S WHERE YOU'RE
12 GOING TO FIND THE MAJORITY OF YOUR INCREASE THERE

13 SO ESSENTIALLY WHAT'S HAPPENING IS THE CITY KEEPS MOVING
14 THE GOAL POSTS, AND THE PARTIES ARE TRYING TO MAKE THIS DEAL
15 WORK AND SO THEY KEEP TRYING TO HAMMER A SQUARE PEG IN A
16 ROUND HOLE, DOING THE BEST THEY CAN TO KEEP THIS THING
17 AFLOAT, AND NOW HERE WE ARE TODAY BUT NOW THEY'RE ARGUING
18 THAT, YOU KNOW, THAT THERE WAS THIS BIG INCREASE IN COST THAT
19 MADE EVERYTHING UNFEASIBLE WELL YOU KNOW, THE PROBLEM
20 IS---

21 THE COURT AND YOU'RE SAYING THAT THEY WERE RESPONSIBLE
22 FOR INCREASING THOSE COSTS

23 MR. NEWMAN NO DOUBT CONSTRUCTION COSTS WERE
24 FLUCTUATING WHICH IS WHY AGAIN IN GARY TRAUB'S DEPOSITION HE
25 SAID THAT YOU ESTABLISH AN ESTIMATED G M P WHEN YOU GO INTO

1 THIS TYPE OF DEAL BUT THE CITY DID INCORPORATE ADDITIONAL
2 THINGS INTO A PUBLICLY-FINANCED DEAL WHICH WAS A DRIVING
3 FACTOR, IF NOT THE DRIVING FACTOR, AND THE REASON WHY
4 EVERYTHING WAS GOING UP

5 AND IT'S -- AND, AGAIN I HATE TO GET OFF ON THAT
6 TANGENT WE COULD ARGUE ABOUT THAT ALL DAY LONG THAT'S
7 GOING TO BE A GREAT JURY ARGUMENT IF AND WHEN THIS THING GOES
8 TO TRIAL AS TO WHETHER OR NOT THE CITY WAS RESPONSIBLE FOR
9 ALL THAT BUT AT ANY RATE, I THINK IT'S -- AS I'VE SAID
10 ALREADY, I THINK IT'S NEITHER HERE NOR THERE WHEN IT COMES TO
11 WHETHER OR NOT THERE WAS A CONTRACT

12 THE COURT HOW ABOUT WHAT MR PAUL DEVOTED SOME TIME
13 TO, THE ROOM BLOCK AGREEMENT?

14 MR NEWMAN THE ROOM BLOCK AGREEMENT VERY INTERESTINGLY
15 -- WELL, LET'S TALK ABOUT ALL THE AGREEMENTS IN GENERAL
16 JOHN LUMPKIN, WHO IS QUOTED TO NO END IN THE VARIOUS BRIEFS,
17 STATED THAT IN HIS MIND A MEETING OF THE MINDS HAD BEEN
18 REACHED AS TO ALL CENTRAL TERMS WITH REGARD TO THOSE VARIOUS
19 AGREEMENTS THE ROOM BLOCK AGREEMENT TONY TRAUB TESTIFIED --
20 AND IT'S BEEN HEATEDLY DEBATED BETWEEN HILTON AND THE CITY
21 AND THEY REACHED AGAIN A CONSENSUS AS TO EVERYTHING THAT WAS
22 GOING TO BE IN THAT FINAL DOCUMENT THE -- AND IN FACT, IF
23 YOU LOOK AT I BELIEVE ATTACHMENT 18 THAT THE CITY HANDED UP,
24 THIS IS THE DESIGN/BUILD AGREEMENT ACTUALLY---

25 THE COURT DO WHAT NOW?

1 MR NEWMAN THIS IS -- I'M GETTING OFF A LITTLE BIT
2 THIS IS THE DESIGN/BUILD AGREEMENT THAT MINDY GROFT WAS
3 REFERRING TO, AND IT WAS REPRESENTED TO THE COURT THAT THERE
4 WERE SO MANY PROBLEMS THAT THIS THING -- THIS DEAL JUST
5 WASN'T GOING TO GO FORWARD THE PROBLEM IS IS WITHIN THAT
6 FIRST PARAGRAPH SHE STATES, "I THINK THAT WE CAN PICK SOME
7 DEFINITIONS AND SOLVE MOST OF THESE ISSUES " WHEN THIS THING
8 -- AS THE VARIOUS PARTIES STATE IN THEIR DEPOSITIONS, THIS
9 THING WAS READY TO GO TONY TRAUB SAYS WE WERE ROCKING AND
10 ROLLING BOBBY LYLE SAYS---

11 THE COURT BOBBY WHO?

12 MR NEWMAN BOBBY LYLE HE WAS THE CHIEF ARCHITECT FOR
13 MY CLIENT HE STATED WE'VE PRODUCED A FULL SET OF
14 CONSTRUCTION DOCUMENTS, NOT JUST WHAT WAS NECESSARY FOR THE
15 G M P , BUT EVERYTHING THAT WAS NECESSARY TO BUILD THAT
16 HOTEL SO THE NOTION THAT -- AND I THINK THAT I ALLUDED TO
17 IT EARLIER THAT WE DO TAKE ISSUE WITH THE IDEA THAT THE
18 SUBSEQUENT AGREEMENTS HAD ALREADY BEEN REACHED THE
19 SUBSTANCE OF THEM WAS NEGOTIATED THEY WERE READY TO BE PUT
20 IN STONE THE CITY RIPPED THE RUG OUT FROM UNDERNEATH THE
21 SEAT OF EVERYONE

22 THE COURT WHY DID THE CITY DO THAT?

23 MR NEWMAN YOU KNOW---

24 THE COURT GET SCARED OF THE BIG FIGURE?

25 MR NEWMAN I THINK AGAIN WE DON'T KNOW BECAUSE THE

1 CITY NEVER SAID I THINK ACTUALLY THE CITY DIDN'T EXPLICITLY
2 REJECT THE PUBLICLY-FINANCED HOTEL OPTION WHEN IT SENT OUT
3 THE SECOND REQUEST FOR PRODUCTION IT WAS GOING TO PAIR THE
4 PRIVATE HOTEL PROPOSALS ALONG WITH THE PUBLIC HOTEL
5 PROPOSALS AND SO NOT UNTIL AN OFFER WAS ACTUALLY ACCEPTED
6 WAS IT MADE EXPLICITLY CLEAR TO THE PROJECT TEAM THAT THEIR
7 PUBLICLY-FINANCED OPTION WAS NOT EVEN GOING TO GO FORWARD

8 NOW, THERE ARE A VARIETY OF REASONS THE CITY COULD HAVE
9 DONE IT, BUT OBVIOUSLY WE CONTEND ONE OF THE REASONS WAS THAT
10 MR AUGHTRY WAS ON THE SCENES PRESSING BUTTONS AND WHATNOT

11 THE COURT COMPELLING ALL THIS TO BE DONE OR EXCUSE
12 ME, KIND OF GREASING THE SKIDS OR---

13 MR NEWMAN SURE

14 THE COURT ---SCHMOOZING PEOPLE AND TRYING TO GET IT
15 UNDONE SO HE COULD JUMP IN

16 MR NEWMAN SURE EXACTLY EXACTLY ONE OF THE
17 THINGS THAT I THINK IS INTERESTING TO NOTE IS THAT, OR
18 IMPORTANT TO NOTE RATHER, IS THAT THE SUBSEQUENT ACTS OF THE
19 PARTIES IN THIS CASE GIVE RISE TO THE IMPLICATION THAT THEY
20 INDEED THOUGHT THAT THE M O U WAS A CONTRACT, AND WE WALKED
21 THROUGH THAT---

22 THE COURT HOW ABOUT -- AND THEN IF YOU -- IF YOU WANT
23 TO GO DOWN THAT PATH, YOU'LL HAVE TO ANSWER THE QUESTION OF
24 WHY YOUR MAIN MAN'S SON'S E-MAIL DOESN'T HAVE ANY WEIGHT IN
25 THIS CASE

1 MR NEWMAN NOW, THAT WOULD BE MR HINSON'S MAIN FOCUS

2 THE COURT WELL, OKAY THEN HE CAN EXPLAIN THAT---

3 MR NEWMAN OKAY

4 THE COURT ---AT SOME POINT BECAUSE THEY -- NOBODY ON
5 THAT SIDE WANTED TO EVEN TALK ABOUT THAT E-MAIL LAST TIME

6 MR NEWMAN RIGHT AND I THINK YOUR HONOR MAY BE
7 ALLUDING TO THE FACT THAT THE TERM "AT RISK" IS THROWN ABOUT
8 BY VARIOUS PARTIES IN THE E-MAILS AND I THINK IF YOU READ
9 BACK THROUGH THE DEPOSITIONS, THEY'RE CLEAR THAT THE TERM "AT
10 RISK" WAS IN DOING THE WORK NECESSARY TO GET TO THE G M P
11 ANY WORK PERFORMED BEYOND THAT WAS NOT TO BE AT RISK
12 ACTUALLY, JOHN LUMPKIN WAS VERY CLEAR ABOUT THAT

13 THE COURT TELL ME WHAT THAT MEANS

14 MR NEWMAN OKAY WELL, IN A CERTAIN AMOUNT OF -- FROM
15 MY CLIENT'S PERSPECTIVE ABOUT 30 PERCENT OF THE
16 ARCHITECTURAL WORK WAS REQUIRED TO REACH A GUARANTEED MAXIMUM
17 PRICE

18 COURT REPORTER I'M SORRY TO REACH?

19 MR NEWMAN ABOUT 30 PERCENT OF THE ARCHITECTURAL WORK
20 WAS REQUIRED TO REACH A GUARANTEED MAXIMUM PRICE ONCE
21 THAT---

22 THE COURT WHAT DOES THAT MEAN?

23 MR NEWMAN WELL I'M NOT AN ARCHITECTURAL GUY, SO I
24 COULDN'T TELL YOU WHAT EXACTLY WENT INTO IT BUT IN ORDER TO
25 FORMULATE HOW MUCH THE CONSTRUCTION COSTS ARE GOING TO BE,

1 THE DEVELOPER, TURNER CONSTRUCTION, WOULD NEED APPROXIMATELY
2 THE FIRST THIRD OF THE ARCHITECTURAL WORK, PRELIMINARY STUFF

3 THE COURT WHICH IS EXPENSIVE

4 MR NEWMAN RIGHT ABSOLUTELY AND SO THE IDEA WAS
5 THAT THE PARTIES WOULD WORK AT RISK UNDER THAT PERIOD OF
6 TIME, AND THE RISK PORTION OF IT WAS RELATED TO THE
7 FEASIBILITY

8 THE COURT AND, IN OTHER WORDS, IF THE THING DOESN'T
9 FLY WE JUST LOST THAT MONEY

10 MR NEWMAN RIGHT BUT, AGAIN, GOING BACK, THE
11 FEASIBILITY WAS A CONDITION SUBSEQUENT IT WAS NOT A
12 CONDITION PRECEDENT IT SAID THAT IF THE CITY DETERMINES
13 THAT THIS IS NOT GOING TO BE ABLE TO GO FORWARD, THEN THE
14 CITY GETS OUT SCOT-FREE SO THE SUBSEQUENT ACTS AS THE
15 PARTIES MOVED FORWARD, INDICATED THAT THEY FELT THAT THE
16 M O U WAS A BINDING CONTRACT

17 AND I THINK IT'S IMPORTANT TO NOTE THAT ACTUALLY THEY
18 WENT BEYOND THE M-O U BECAUSE THE CITY PAID STEVENS &
19 WILKINSON TO DO ADDITIONAL WORK THEY DIDN'T PAY THEM
20 EVERYTHING THEY WERE ENTITLED TO, BUT ACTUALLY JUDGE MANNING
21 HAS NOW -- HAS SUMMARILY ADJUDGED IN STEVENS & WILKINSON'S
22 FAVOR THAT THE JULY 30TH, 2003, AGREEMENT BY THE CITY TO PAY
23 THEM IN EXCESS OF THE M O U CONSTITUTED A CONTRACT

24 THE COURT ALL RIGHT SO HAVE YOU BEEN PAID THAT?

25 MR NEWMAN NO SIR NO, SIR WE WERE -- WHAT WE WERE

1 PROMISED WAS \$650,000 TO DO WORK UP TO BOND CLOSING WHICH AT
2 THAT POINT IN TIME WAS SCHEDULED FOR THE MIDDLE OF OCTOBER
3 AND ANOTHER, I BELIEVE, \$70,000 FOR EVERY WEEK THEREAFTER

4 THE COURT HOW MUCH HAVE YOU BEEN PAID?

5 MR. NEWMAN \$697,000 AND CHANGE

6 THE COURT ARE YOU SAYING THAT JUDGE MANNING'S ORDER
7 OBLIGATES THEM TO PAY YOU MORE?

8 MR. NEWMAN NO SIR JUDGE MANNING'S ORDER FOUND THE
9 EXISTENCE OF A CONTRACT AND---

10 THE COURT DOES THAT ENTER INTO ANYTHING THAT I'M
11 CONSIDERING?

12 MR. NEWMAN THE CITY DIDN'T ARGUE IT WHEN THEY WERE
13 BEFORE YOU, WHICH NOW THAT I'VE BROUGHT IT UP THEY WILL BUT
14 WHAT WE'RE GOING TO ARGUE IS THAT THE AGREEMENT WAS 650 UP TO
15 OCTOBER 15TH AND THEN \$70,000 A WEEK THEREAFTER FOR ANY OTHER
16 REQUIRED WORK AND THE CITY'S GOING TO ARGUE, WELL, IT WAS
17 ONLY 650 THE PROBLEM IS THEY PAID 697, THEREBY INDICATING
18 TO THE CONTRARY IN EFFECT THE DEAL INCLUDED WORK BEYOND
19 OCTOBER 15TH

20 THE COURT ALL RIGHT

21 MR. NEWMAN BUT, AGAIN, I'M TRYING TO STAY ON TASK

22 THE COURT WHAT DOES TURNER CONSTRUCTION WANT? HOW
23 MUCH MONEY DO THEY WANT?

24 MR. NEWMAN WHAT'S---

25 THE COURT WHAT'S YOUR ACTUAL DAMAGE?

1 MR KALISH OUR ACTUAL DAMAGES ARE IN THE REALM OF
2 \$750,000 AND THAT IS BASED ON THE COSTS INCURRED AND I'LL
3 GET INTO THAT ARGUMENT WHEN I PRESENT THAT

4 THE COURT HAVE YOU BEEN PAID ANY OF THAT?

5 MR KALISH WE HAVE NOT, BUT, YOUR HONOR, THE TEAM WAS
6 -- AS YOU'LL RECALL, THE DEFINITION OF OUR TEAM -- AND IT WAS
7 THE PAYMENT THAT WAS MADE TO STEVENS & WILKINSON AND THAT WAS
8 A -- THAT LED THE TEAM TO CONTINUE FORWARD WITH THE WORK THAT
9 THEY HAD PREVIOUSLY UNDERTAKEN

10 THE COURT OKAY

11 MR NEWMAN AND I THINK THAT JOHN LUMPKIN -- THE CITY
12 CITES MR LUMPKIN SEVERAL TIMES FOR THE NOTION THAT THERE WAS
13 NO INTENT TO FORM A CONTRACT HOWEVER, HE WAS CLEAR IN HIS
14 DEPOSITION THAT THE ACTIONS THAT HAD TAKEN PLACE BETWEEN THE
15 CITY AND BETWEEN THE VARIOUS PARTIES OF THE PROJECT TEAM
16 COULD WELL HAVE CHANGED THAT CONTRACTUAL RELATIONSHIP SO
17 EVEN IF WE TAKE HIS---

18 THE COURT WELL, WHAT---HIS LEGAL OPINION DOESN'T MAKE
19 ANY DIFFERENCE

20 MR NEWMAN CORRECT CORRECT BUT HIS -- HIS ANALYSIS
21 OF THE ACTS SUBSEQUENT TO THE EXECUTION OF THE M O U
22 INDICATED THAT THERE WERE REPRESENTATIONS FROM THE CITY THAT
23 YOU GUYS NEED TO CONTINUE WORKING AND FULL STEAM AHEAD
24 WE'RE GOING TO CLOSE THIS YOU KNOW, BOND FINANCING WAS
25 SCHEDULED OR BOND CLOSING WAS SCHEDULED I THINK THREE TIMES

1 THE LAST TIME WHICH WAS IN THE FEBRUARY 11TH---

2 THE COURT WHY DIDN'T IT CLOSE?

3 MR. NEWMAN WELL, ANOTHER GOOD QUESTION THERE ARE A
4 LOT OF SUPPOSITIONS TO BE MADE IN THIS CASE WE'VE BEEN
5 PROHIBITED FROM DOING A LOT OF DISCOVERY ON THE CITY ARGUING
6 LEGISLATIVE PRIVILEGE THERE ARE -- WE WOULD LOVE TO OPEN UP
7 THE MINDS OF CITY COUNCIL OVER THERE TO FIND OUT WHAT EXACTLY
8 WAS GOING ON, BUT WE CAN'T BECAUSE THEY ARGUE THAT THE
9 CONVENTION CENTER CORPORATION WAS ACTUALLY A CITY COUNCIL
10 ACT

11 AS TO -- WE'VE ALREADY DISCUSSED AT LENGTH THE VOID OF
12 INDEFINITENESS ISSUES I JUST OFFER A FEW FINAL THOUGHTS,
13 JUDGE, AND THAT IS THAT, YOU KNOW OBVIOUSLY THIS IS A VERY
14 DEFERENTIAL STANDARD TOWARDS THE PLAINTIFFS AT THIS POINT IN
15 TIME A MERE SCINTILLA OF EVIDENCE I THINK WE'VE GOT A LOT
16 OF CONFLICTING TESTIMONY IN THIS CASE AND A LOT OF ISSUES AS
17 TO WHETHER OR NOT THIS PROJECT WAS FEASIBLE, AND THEY'RE
18 GOING TO MAKE FOR A CONTESTED AND I'M SURE WELL-TRIED CASE,
19 BUT THEY'RE NOT POSSIBLE FOR SUMMARY JUDGMENT THEY'RE NOT
20 -- THEY DO NOT GIVE RISE TO SUMMARY JUDGMENT, YOUR HONOR

21 AND ONE THING THAT HOWARD KING TAUGHT ME WHEN I WAS
22 CLERKING FOR HIM FIVE YEARS AGO WAS IF IT TAKES YOU TWO
23 THREE-RING BINDERS TO PROVE THAT THERE'S NO GENUINE ISSUE OF
24 MATERIAL FACT, THEN YOUR MOTION IS PROBABLY NOT GOING TO WIN

25 THE COURT HOW MANY HAVE YOU SUBMITTED?

1 MR. NEWMAN THE PROBLEM IS IF THEY START THROWING THEM
2 AT YOU, YOU DON'T WANT TO LOOK LIKE YOU'RE NOT READY FOR A
3 FIGHT

4 THE COURT WELL, THAT'S

5 MR. NEWMAN BUT---

6 THE COURT WELL, BUT THEN AGAIN -- THEN AGAIN IT ALL
7 BOILS DOWN TO WHETHER OR NOT THAT SEVEN-PAGE DOCUMENT IS A
8 BINDING CONTRACT IF A JURY WERE TO DETERMINE OR A COURT
9 WERE TO DETERMINE AS A MATTER OF LAW THAT IT'S NOT A BINDING
10 AGREEMENT, THAT IT'S AN AGREEMENT TO AGREE OR HERE AN
11 AGREEMENT TO DISAGREE IS THERE ANYTHING LEFT IN THE CASE?

12 MR. NEWMAN YES, SIR FROM -- AGAIN SELFISHLY FROM MY
13 CLIENT'S PERSPECTIVE, WE'RE STILL IN THE CASE BECAUSE WE'VE
14 HAD THE CONTRACT ESTABLISHED IN PRIOR PROCEEDINGS

15 THE COURT YOU HAVE HAD AN ORDER ISSUED THAT THIS
16 M O U IS A CONTRACT

17 MR. NEWMAN NO, SIR THE JULY 30TH, 2003 PROMISE TO
18 PAY STEVENS & WILKINSON FOR ADDITIONAL ARCHITECTURAL
19 SERVICES

20 THE COURT SO THAT'S -- BUT THAT'S NOT -- THAT'S NOT
21 BEFORE ME NOW, IS IT?

22 MR. NEWMAN NO, SIR NO, SIR

23 THE COURT BECAUSE I HAVEN'T SEEN ANY REFERENCE TO
24 THAT

25 MR. NEWMAN IT'S BEEN ALLUDED TO WITHIN THE BRIEFS, BUT

1 THE GROUNDS FOR SUMMARY JUDGMENT ON THAT HAVE NOT BEEN SET
2 FORTH NOW, THERE ARE ADDITIONAL CAUSES OF ACTION---

3 THE COURT ALL RIGHT ASIDE FROM THAT THEN---

4 MR. NEWMAN YES, SIR

5 THE COURT ---IF THERE IS A DETERMINATION BY A JURY
6 THAT THE M O U IS NOT A CONTRACT, IS THERE ANY OTHER REMEDY
7 YOU HAVE?

8 MR. NEWMAN YES, SIR QUANTUM MERUIT AND ESTOPPEL
9 WHICH WE'LL ARGUE THAT

10 THE COURT AND YOU'RE GOING TO ARGUE THAT NOW OR ARE
11 YOU GOING TO WAIT FOR THEM TO ARGUE---

12 MR. NEWMAN I'M GOING TO WAIT FOR THEM TO ARGUE AND
13 ALSO I'D SAY IF YOU -- AS YOU STATED EARLIER THAT IF YOU
14 DECIDE AS A MATTER OF LAW THAT THE M O U WAS NOT A CONTRACT,
15 I'D LIKE TO POINT OUT THE CASE THAT WE CITED AT THE VERY
16 BEGINNING OF OUR BRIEF SAYS ACTUALLY IT'S A QUESTION OF FACT
17 AS TO WHETHER OR NOT THE PARTIES INTENDED FOR A CONTRACT TO
18 EXIST THAT IS ONE LEGAL ISSUE THAT WE TAKE---

19 THE COURT IS IT ALWAYS A QUESTION OF FACT? ALWAYS?

20 MR. NEWMAN WITH REGARD TO THE EXISTENCE OF A CONTRACT,
21 THE LAW THAT THE CITY STATES IS ACTUALLY A LAW THAT STEMS
22 FROM THE QUESTION OF HOW YOU INTERPRET A CONTRACT OR IT
23 PRESUMES THE EXISTENCE OF A CONTRACT THAT'S WHY THE
24 SURROUNDING CIRCUMSTANCES, THE WITNESS TESTIMONY AND THE
25 SUBSEQUENT ACTS OF THE PARTIES PLAY INTO THE SITUATION AND

1 THOSE ALL GIVE RISE TO NUMEROUS GENUINE ISSUES OF MATERIAL
2 FACT AS TO WHAT THE PARTIES INTENDED, AND THAT WHY THE CITY'S
3 MOTION AND MR AUGHTRY'S MOTION WITH REGARD TO THE EXISTENCE
4 OF A CONTRACT SHOULD BE DENIED IF YOUR HONOR WOULD ALLOW ME
5 TO BEG THE COURT'S INDULGENCE I'D LIKE TO CONFER WITH THESE
6 LADIES AND GENTLEMEN

7 THE COURT ALL RIGHT

8 (AN OFF-THE-RECORD DISCUSSION TAKES PLACE BETWEEN MR
9 NEWMAN AND HIS CO-COUNSEL)

10 THE COURT MR HINSON, DO YOU ECHO MR NEWMAN'S
11 ARGUMENTS ON THE POINTS THAT HE'S JUST MADE TODAY?

12 MR HINSON YES, SIR, I DO WHILE MR NEWMAN CONFERS,
13 IF I COULD HAVE JUST A MOMENT I WOULD ACTUALLY PROBABLY
14 SIMPLIFY IT A LITTLE BIT, AND THIS IS -- THIS IS SOMETHING I
15 CITED IN THE BRIEF IN REGARD TO HILTON'S MOTION FOR SUMMARY
16 JUDGMENT BUT SUMMARY JUDGMENT IS IMPROPER WHEN THERE'S A
17 QUESTION AS TO THE CONSTRUCTION OF A WRITTEN CONTRACT AND THE
18 CONTRACT IS AMBIGUOUS--BECAUSE INTENT OF THE PARTIES CANNOT BE
19 GATHERED FROM THE DOCUMENT ITSELF

20 AND THEN TO QUOTE DIRECTLY FROM H K NEW PLAN EXCHANGE
21 PROPERTY OWNERS WHICH AGAIN IS IN THE HILTON BRIEF WHERE A
22 CONTRACT IS UNCLEAR OR AMBIGUOUS AND CAPABLE OF MORE THAN ONE
23 CONSTRUCTION, THE PARTIES' INTENTIONS ARE MATTERS OF FACT TO
24 SUBMITTED TO A JURY AND SO WHAT REALLY -- I THINK, YOUR
25 HONOR, WHAT IT BOILS DOWN TO IS IF YOU CAN'T LOOK AT THE FOUR

1 CORNERS OF THE DOCUMENT AND YOU CAN'T LOOK AT THE CONTRACT
2 THAT THESE EIGHT PAGES, TEN PAGES - WE CAN ARGUE ABOUT, YOU
3 KNOW, AS TO HOW MANY PAGES THE DOCUMENT IS - BUT IF YOU CAN'T
4 LOOK AT THE DOCUMENT AND SAY THIS IS A CONTRACT OR THIS ISN'T
5 A CONTRACT, THEN SUMMARY JUDGMENT IS INAPPROPRIATE

6 THE COURT WELL, WHAT IF YOU CAN LOOK AT IT AND SAY
7 THIS ISN'T A CONTRACT?

8 MR HINSON WELL, IF YOU CAN LOOK AT IT AND WITHOUT
9 GOING INTO ANY OF THIS EXTRINSIC EVIDENCE, ALL THIS -- YOU
10 KNOW, WHAT HAPPENED LATER ON, WHAT HAPPENED AFTER THE M O U
11 WAS SIGNED, YOU KNOW, WHETHER OR NOT THE QUALIFIED MANAGEMENT
12 AGREEMENT WAS AGREED TO, IF WITHOUT LOOKING AT ALL THIS OTHER
13 STUFF I THINK ALL THIS OTHER STUFF---

14 THE COURT BUT DOESN'T THE M O U REQUIRE YOU TO
15 BECAUSE IT TALKS ABOUT FEASIBILITY?

16 MR HINSON YOUR HONOR, I THINK THE FEASIBILITY IS A
17 MATTER -- THE ISSUE OF FEASIBILITY IS WHETHER ONE OF THESE
18 CONDITIONS SUBSEQUENT OCCURRED, WHETHER OR NOT THIS TEAM, THE
19 GARFIELD TRAUB/STEVENS & WILKINSON TEAM, WAS ABLE TO PUT
20 TOGETHER A HOTEL PROPOSAL THAT WAS FEASIBLE, AND I THINK
21 THAT'S A FACT ISSUE RIGHT THERE SO, NO, I DON'T THINK YOU
22 GET INTO ALL THAT YOU HAVE TO JUST LOOK AT THE DOCUMENT
23 ITSELF AND SAY LOOKING AT THIS DOCUMENT DOES IT SHOW AN
24 INTENTION TO ENTER INTO A CONTRACT? AND I THINK -- HAND ME
25 THAT

1 MR DETWILER SAID -- THE WAY HE CHARACTERIZED THE M O U
2 EARLIER TODAY WAS IT WAS A DEAL TO PUT A PACKAGE TOGETHER,
3 AND I LIKE THE WAY HE CHARACTERIZED IT THAT'S WHAT THIS
4 M O U IS IT'S SAYING THIS TEAM, THIS TEAM THAT IS
5 DEVELOPERS AND ARCHITECTS AND REALTORS AND CONTRACTORS, WE'RE
6 GOING TO PUT TOGETHER A PACKAGE FOR YOUR CITY, AND IF WE PUT
7 TOGETHER A FEASIBLE PACKAGE AND YOU -- AND YOU -- AND IT IS
8 FEASIBLE, YOU'RE GOING TO GO THROUGH WITH IT AND THAT'S
9 WHAT THEY WORKED TO DO, AND THAT IS THE ESSENCE OF THE
10 CONTRACT THAT'S THE ESSENCE OF THE M O U

11 AND IF YOU LOOK AT THE LANGUAGE OF THE M O U AND WE
12 TALKED ABOUT THIS, YOU KNOW A MONTH AGO, THE M O U TALKS
13 ABOUT IN EXCHANGE FOR MUTUAL CONSIDERATION, AND MY CLIENT'S
14 CONSIDERATION WAS THAT THEY WERE GOING TO WORK AND THEY DID
15 WORK TO PUT THIS PACKAGE TOGETHER FOR THE CITY, AND THAT IS
16 -- THAT IS THE TERMS -- THAT IS TERMS OF THE CONTRACT

17 THE COURT SO WHAT WOULD BE SOMETHING WHERE YOU WOULD
18 ~~CONCEDE WOULD-MAKE-IT SUCH-THAT-THIS WAS NOT-A FEASIBLE~~
19 PROJECT FOR THE OTHER SIDE? WHAT -- WHAT -- WHAT -- EXCUSE
20 ME WHAT WOULD HAPPEN TO MAKE YOU SAY "YEAH YOU'RE RIGHT
21 THIS ISN'T FEASIBLE WE'RE GOING HOME WE GOT SCALDED, BUT
22 WE'RE GOING HOME"?

23 MR HINSON SURE I MEAN---

24 THE COURT WHAT WOULD BE SOMETHING?

25 MR HINSON THE PRICE OF BRICKS AND MORTAR COULD HAVE

1 RISEN EXPONENTIALLY OR JUST RISEN TO ENOUGH WHERE IT DROVE
2 THE COST OF THE CONSTRUCTION OF THE HOTEL SO MUCH THAT IT NO
3 LONGER BECAME FEASIBLE---

4 THE COURT ALL RIGHT THAT'S SOMETHING ELSE---

5 MR HINSON ---TO CONSTRUCT IT EVEN IF THAT HAPPENED,
6 YOUR HONOR, IT DOESN'T MEAN THAT THIS WASN'T A CONTRACT IF
7 THE PRICE OF BRICKS AND MORTAR DOUBLED AND THE HOTEL BECAME
8 INFEASIBLE, THAT DOESN'T MEAN THAT THE M O U WASN'T A
9 CONTRACT IT JUST MEANS---

10 THE COURT THAT IT'S NOT ENFORCEABLE I MEAN---

11 MR HINSON WELL, IT'S---

12 THE COURT WELL THAT THEY'RE NOT LIABLE UNDER IT

13 MR HINSON THAT THEY'RE NOT LIABLE UNDER IT BUT THAT
14 DOESN'T MEANT THAT IT NEVER WAS A CONTRACT EITHER IT WAS A
15 CONTRACT ON THE DATE IT WAS SIGNED OR IT WASN'T A CONTRACT ON
16 THE DAY---

17 THE COURT SO YOU'RE SAYING THERE'S A DIFFERENCE
18 BETWEEN BEING NOT LIABLE AND THERE NOT BEING A CONTRACT

19 MR HINSON ABSOLUTELY

20 THE COURT BUT IN THE END WHAT'S THE DIFFERENCE?

21 MR HINSON WELL---

22 THE COURT IF YOU PUT A DOLLAR SIGN IN FRONT OF IT,
23 WHAT'S THE DIFFERENCE?

24 MR HINSON AT THE END OF THE DAY -- WELL, FOR THE
25 PURPOSES OF TODAY THERE IS A DIFFERENCE BECAUSE THE QUESTION

1 OF WHETHER OR NOT IT WAS FEASIBLE IS SOMETHING THAT NEEDS TO
2 BE SUBMITTED TO THE JURY AND WHAT THE DEFENDANTS ARE SAYING
3 TO YOU TODAY IS YOU CAN RULE AS A MATTER OF LAW IT WAS
4 NEVER A CONTRACT AND WE TAKE THE POSITION YOU CAN'T RULE AS
5 A MATTER OF LAW IT WAS NOT A CONTRACT

6 THE COURT BECAUSE IT WAS AN AGREEMENT TO AGREE

7 MR HINSON YES, YOUR HONOR I MEAN, WHAT IT SEEMS TO
8 ME THAT THE DEFENDANTS WANT TO DO IS TO LOOK AT ALL THESE
9 THINGS THAT HAPPENED AFTER APRIL 2003 APRIL 2003, AND SAY
10 THAT IF ALL THIS STUFF HAPPENED IF THE -- IF THE QUALIFIED
11 MANAGEMENT AGREEMENT HAD BEEN SIGNED, IF THE ROOM BLOCK
12 AGREEMENT HAD BEEN SIGNED, THEN SOMEHOW MAGICALLY
13 RETROACTIVELY THE M O U WOULD HAVE BEEN A CONTRACT THAT'S
14 NOT THE WAY IT WORKS EITHER IT WAS AN AGREEMENT ON THE DAY
15 IT WAS SIGNED OR IT WASN'T

16 ALL THIS OTHER ISSUE, YOUR HONOR -- ALL THESE OTHER
17 ISSUES WITH THE BOND FINANCING AND WHETHER IT WENT UP OR DOWN
18 AND-HOW-MUCH DEBT-COVERAGE, THOSE-ARE-RED HERRINGS

19 THE COURT WHAT IS---

20 MR HINSON THE QUESTION IS WHAT WERE THE PARTIES
21 THINKING? WHAT WERE THEIR INTENTIONS WHEN THEY THEIR PEN --
22 WHEN THEY PUT PEN TO PAPER IN APRIL OF 2003?

23 THE COURT ALL RIGHT IF SOMEBODY WERE TO CONCLUDE,
24 JURY OR A JUDGE OR WHOEVER, THAT THIS WAS A CONTRACT, IS
25 THERE ROOM UNDER THE LAW FOR A RULING AS A MATTER OF LAW THAT

1 THEY'RE NOT LIABLE UNDER THE CONTRACT BECAUSE OF THE LACK OF
2 THESE OTHER DOCUMENTS THAT WERE -- OR OTHER AGREEMENTS THAT
3 WERE EVER ENTERED OR DOES THAT ALL GO INTO FEASIBILITY?

4 MR HINSON IT ALL GOES INTO FEASIBILITY, YOUR HONOR
5 NOW OUR ALLEGATION---

6 THE COURT AND THEY SAY EVERYTHING LEADS TO THE BOND
7 ISSUE I THINK THAT'S -- I THINK I WROTE THAT DOWN RIGHT
8 EVERYTHING -- EVERYTHING LEADS TO THE BOND ISSUE I CAN'T
9 REMEMBER IF IT WAS MR PAUL OR MR DETWILER WHO SAID IT, BUT
10 IF EVERYTHING LEADS TO THE BOND -- DO YOU ACCEPT THAT PREMISE
11 AT ALL?

12 MR HINSON THAT EVERYTHING LEADS TO

13 THE COURT THEIR OBLIGATION TO PERFORM OR WHETHER OR
14 NOT THIS IS OR ISN'T A CONTRACT, THEY SAID EVERYTHING LEADS
15 TO THE BOND ISSUE

16 MR HINSON NO, I WOULDN'T ACCEPT THAT PREMISE YOUR
17 HONOR

18 THE COURT ALL RIGHT

19 MR HINSON I MEAN, THE BOND ISSUE IS NECESSARY FOR THE
20 HOTEL TO ULTIMATELY BE BUILT, BUT WHETHER OR NOT THE BONDS
21 ARE ISSUED DOESN'T MATTER IT DOESN'T DETERMINE WHETHER OR
22 NOT THE M O U WAS A CONTRACT ON THE DAY IT WAS SIGNED

23 THE COURT SO THE CITY WOULD BE PAYING YOUR FOLKS TO
24 BUILD A HOTEL ON THE PUBLIC DOLLAR WHEN THEY DIDN'T HAVE

25 MR HINSON NO, YOUR HONOR I'M SORRY IF I DIDN'T MAKE

1 MYSELF CLEAR THERE WHAT I'M SAYING IS AGAIN IT GOES TO
2 FEASIBILITY IF THE BONDS COULDN'T CLOSE, THEN OBVIOUSLY IF
3 -- IF THE CITIBANK COULDN'T SELL THE BONDS IN THE MARKETPLACE
4 OR WHATEVER HAPPENED, PEOPLE JUST WEREN'T BUYING BONDS
5 ANYMORE---

6 THE COURT RIGHT

7 MR HINSON ---THEN MY TEAM, MY CLIENT'S TEAM, HAD NOT
8 PUT TOGETHER A FEASIBLE HOTEL---

9 THE COURT ALL RIGHT

10 MR HINSON ---AND THERE'S NO LIABILITY UNDER THE
11 M O U THERE'S NO LIABILITY UNDER THE CONTRACT BECAUSE WE
12 WOULD NOT HAVE PUT TOGETHER A FEASIBLE HOTEL

13 THE COURT ALL RIGHT

14 MR HINSON BUT, AGAIN, THAT'S NOT SAYING THAT IT
15 WASN'T A CONTRACT THE DAY IT WAS SIGNED JUST THAT THIS --
16 THE ABILITY TO PUT TOGETHER A FEASIBLE HOTEL HAD NOT BEEN
17 PROVEN

18 THE COURT ALL RIGHT OKAY ANYTHING ELSE YOU WANT TO
19 MENTION THAT MR NEWMAN HAS NOT, AT LEAST ON THE ISSUES THAT
20 WE'VE -- THAT THEY'VE ARGUED SO FAR?

21 MR HINSON JUST VERY BRIEFLY, YOUR HONOR I WOULD LIKE
22 TO HEarken BACK TO THE BRIEF IN REGARD TO HILTON'S MOTION
23 WHERE I QUOTED -- LET'S SEE

24 THE COURT ARE YOU GOING TO OBJECT TO MR FOSTER
25 TALKING? YOU REFERRED TO IT TWICE AND HE'S SITTING OVER

1 THERE AND -- HE PROBABLY -- PROBABLY WANTS TO SAY SOMETHING

2 MR HINSON WELL I'M JUST -- I DON'T OBJECT TO MR
3 FOSTER TALKING WELL, IT DEPENDS ON WHAT HE SAYS, YOUR
4 HONOR, BUT THIS IS -- WHAT I'M GOING TO QUOTE ACTUALLY IS
5 RELEVANT TO THE CITY AND TO AUGHTRY'S MOTION, AND IN AN
6 EFFORT NOT TO PAPER YOU TO DEATH, YOU KNOW, I WOULDN'T SUBMIT
7 A SECOND BRIEF THAT BASICALLY LOOKS EXACTLY LIKE THE HILTON
8 BRIEF

9 BUT THE ARCADIAN PHOSPHATES CASE HAS FIVE FACTORS FOR
10 THE COURT TO CONSIDER IN DETERMINING WHETHER A DOCUMENT
11 CONSTITUTED A BINDING AGREEMENT THOSE FIVE FACTORS WERE
12 ONE WHETHER THE LANGUAGE OF THE AGREEMENT INDICATES THE
13 PARTIES' INTENT TO BE BOUND TWO, THE CONTEXT OF THE
14 NEGOTIATIONS THREE, THE EXISTENCE OF OPEN TERMS FOUR,
15 PARTIAL PERFORMANCE AND, FIVE, WHETHER IT IS CUSTOMARY IN THE
16 RELEVANT INDUSTRY TO ACCORD BINDING FORCE TO THIS TYPE OF
17 INFORMAL AGREEMENT AT ISSUE

18 THE COURT ALL RIGHT TALK ABOUT NUMBER ONE

19 MR HINSON OKAY THE LANGUAGE OF THE AGREEMENT
20 INDICATES THE PARTIES' INTENT TO BE BOUND YOUR HONOR, I
21 WOULD STRONGLY ADVOCATE OR TAKE THE POSITION THAT THE
22 LANGUAGE OF THE AGREEMENT INDICATES THE INTENT TO BE BOUND

23 THE COURT ALL RIGHT AND -- AND EVEN SHORT OF THAT,
24 YOU SAY IT'S A JURY ISSUE

25 MR HINSON AND IF YOU CAN'T -- YEAH IF YOU CAN'T

1 DECIDE THAT IT'S A CONTRACT AND THERE WAS AN INTENT TO BE
2 BOUND THAT SHOULD BE A JURY ISSUE

3 THE COURT ALL RIGHT WHAT'S NUMBER TWO?

4 MR HINSON THE CONTEXT OF THE NEGOTIATIONS

5 THE COURT ALL RIGHT THAT MAKES YOU HAVE -- DOES THAT
6 MAKE YOU HAVE TO LOOK OUTSIDE THE DOCUMENT?

7 MR HINSON IN THAT SENSE I THINK YOU WOULD LOOK AT
8 WHAT THE PARTIES -- AGAIN I THINK IT'S SAYING WHAT DO THE
9 PARTIES INTEND WHEN THEY WERE DRAFTING THIS AGREEMENT? WHAT
10 WERE THE NEGOTIATIONS? HOW DID THEY UNDERSTAND THE AGREEMENT
11 TO BE?

12 THE COURT AND THE CITY'S WOULD BE WE'RE KIND OF
13 FLYING INTO THIS THING AND WE DON'T KNOW WHETHER THIS IS
14 SOMETHING WE CAN STOMACH, BUT WE'RE WILLING TO AT LEAST ENTER
15 INTO AN M O U TO GET THE BALL ROLLING

16 MR HINSON WELL, I WOULD SAY THAT THE CITY UNDERSTOOD
17 THAT THEY WOULD BE LIABLE IF A FEASIBLE PROJECT WAS PRESENTED
18 BECAUSE THEY SAID THE CONVERSE OF IT -- THEY SAID IF A
19 FEASIBLE PROJECT ISN'T PRESENTED, WE'RE NOT LIABLE SO THE
20 CONVERSE OF THAT IS IF A FEASIBLE PROJECT IS PUT TOGETHER, WE
21 ARE LIABLE

22 THE COURT ALL RIGHT WHAT'S NUMBER THREE?

23 MR HINSON NUMBER THREE THE EXISTENCE OF OPEN TERMS
24 AND I WOULD SUBMIT---

25 THE COURT WHAT IF THERE ARE OPEN TERMS?

1 MR HINSON WELL, THEN IT GETS INTO WHETHER THOSE TERMS
2 ARE MATERIAL TERMS OR NOT

3 THE COURT AND THEN YOU GO FALL BACK TO MR NEWMAN'S
4 ARGUMENT ABOUT WHAT IS OR IS NOT MATERIAL AND IT'S ALREADY
5 BEEN SETTLED

6 MR HINSON YES, YOUR HONOR, AND WHETHER---

7 THE COURT I'M NOT QUITE SURE I UNDERSTAND THE
8 RATIONALE OF HIS ARGUMENT WHAT DOES HE MEAN BY THAT OR WHAT
9 DO YOU -- WHAT DO -- WHAT -- TELL ME WHAT IS OR ISN'T
10 MATERIAL ABOUT WHETHER OR NOT YOU HAVE A DESIGN/BUILD
11 AGREEMENT OR A ROOM BLOCK AGREEMENT OR A PARKING LOT
12 AGREEMENT OR WHAT THEY CALL A JOINT USE AGREEMENT

13 MR HINSON WELL, I THINK, YOUR HONOR -- WELL FIRST OF
14 ALL, THE M O U PROVIDES A FRAMEWORK FOR HOW THAT'S GOING TO
15 BE IT TALKS ABOUT HOW MANY SPACES THERE IS -- HOW MANY
16 PARKING SPACES THERE'S GOING TO BE, HOW MANY ROOMS ARE GOING
17 TO BE IN THE ROOM BLOCK AGREEMENT THE M O U PROVIDES
18 GUIDANCE FOR WHAT THOSE DOCUMENTS ARE GOING TO BE WHICH I
19 THINK IT'S THE APERM CASE THAT WE QUOTED EARLIER THAT SAYS
20 IT'S OKAY FOR THERE TO BE OPEN TERMS IN A CONTRACT I MEAN,
21 THAT IN ITSELF DOES NOT MEAN THAT THE CONTRACT FAILS FOR
22 INDEFINITENESS AND I THINK THE GUIDANCE THAT THE M O U
23 PROVIDES FOR THOSE AGREEMENTS STRENGTHENS OUR POSITION THAT
24 THE M O U FORMED A BINDING CONTRACT AT THE TIME IT WAS
25 SIGNED

1 THE COURT ALL RIGHT WHAT'S NUMBER FOUR?

2 MR HINSON NUMBER FOUR IS PARTIAL PERFORMANCE YOUR
3 HONOR, AS MR DETWILER SAID, THIS WAS A DEAL THAT PUT A
4 PACKAGE TOGETHER THIS WAS A DEAL THAT PUT A HOTEL PACKAGE
5 TOGETHER, AND THAT'S WHAT OUR CLIENTS DID THEY WENT TO WORK
6 DILIGENTLY TO PUT A HOTEL PACKAGE TOGETHER FOR THE CITY WE
7 HAVE ABSOLUTELY HAD PARTIAL PERFORMANCE IN THIS CASE YOU
8 KNOW, TURNER SPENT 700 -- APPROXIMATELY \$750,000 WORKING ON
9 THIS ISSUE THAT'S, YOU KNOW, CERTAINLY PARTIAL PERFORMANCE

10 THE COURT OKAY WHAT'S FIVE?

11 MR HINSON WHETHER IT'S CUSTOMARY IN THE RELEVANT
12 INDUSTRY TO ACCORD BINDING FORCE TO THE TYPE OF INFORMAL
13 AGREEMENT AT ISSUE AND I THINK THAT'S POSSIBLY AS STRONG AS
14 ANY -- OF THE POINTS IN FAVOR OF THE PLAINTIFFS IN THIS CASE
15 IN THAT WHEN YOU GO TO BUILD A \$60 MILLION HOTEL, EVERY
16 LITTLE T CAN'T BEEN CROSSED AND I CAN'T BE DOTTED THERE'S
17 LOTS OF THINGS THAT HAVE TO BE WORKED OUT DOWN THE ROAD WE
18 DON'T KNOW, YOU KNOW, WHAT COLOR THE CARPET IS GOING TO BE,
19 ANY OF THE---

20 THE COURT WHAT TESTIMONY DO YOU HAVE THAT IT'S
21 CUSTOMARY IN THIS INDUSTRY TO ACCORD THIS DOCUMENT BINDING
22 FORCE?

23 MR HINSON WELL, MY CLIENTS BUILD HOTELS AND
24 COURTHOUSES OF SIMILAR STRUCTURE ALL OVER THE COUNTRY, YOUR
25 HONOR, AND THIS IS THE WAY THEY DO IT DAY IN AND DAY OUT

1 THEIR TESTIMONY WOULD BE THIS IS CUSTOMARY AN M O U SUCH
2 AS THIS IS CUSTOMARY IN OUR INDUSTRY AND THIS -- THIS CASE
3 RIGHT HERE REPRESENTS ONE OF THE FEW TIMES THEY'VE EVER RUN
4 INTO THIS TROUBLE I DON'T KNOW IT MAY BE THE ONLY TIME
5 THEY'VE RUN INTO THIS TROUBLE I CAN'T SAY FOR SURE

6 THE COURT IS THERE ANY EVIDENCE IN THE RECORD THAT YOU
7 COULD POINT TO THAT SAYS, "ALL RIGHT THIS IS WHY THE CITY
8 DITCHED US"? IN OTHER WORDS, THEY CHANGED HORSES IN THE
9 MIDDLE OF THE STREAM YOU SAY RIGHT?

10 MR HINSON YES, YOUR HONOR

11 THE COURT ALL RIGHT WHERE IS IT IN THE RECORD THAT
12 POINTS TO HOW THAT WAS DONE EITHER BEHIND THE SCENES, SNEAKY,
13 UP FRONT, WHATEVER? WHERE DID IT HAPPEN?

14 MR HINSON WELL, YOUR HONOR, THAT'S -- THAT'S
15 ABSOLUTELY ONE OF THE BIGGEST PUZZLES IN THIS CASE, AND WE
16 TRIED TO DEPOSE THE -- THIS ISSUE HAS BEEN BROUGHT UP
17 ALREADY, I KNOW, BUT WE TRIED TO DEPOSE THE BOARD MEMBERS FOR
18 THE NONPROFIT SLASH THE CITY COUNCIL MEMBERS AND WE WERE
19 TOLD, NO, THAT'S A LEGISLATIVE PRIVILEGE ISSUE SO WE DIDN'T
20 HAVE THE OPPORTUNITY TO ASK THE CITY WHY DID YOU DITCH US?

21 THE CITY HAS NEVER PASSED ANY SORT OF RESOLUTION, ANY
22 SORT OF -- THERE'S NOTHING IN THE MEETING MINUTES WHERE THEY
23 SAY, "WE'RE NOT GOING TO GO WITH THE GARFIELD TRAUB/STEVENS &
24 WILKINSON/TURNER TEAM BECAUSE OF X , Y , Z " THEY NEVER
25 SAID SO, QUITE HONESTLY, THE ANSWER IS WE DON'T KNOW

1 THERE IS SOME SPECULATION AND I THINK THE -- YOU KNOW
2 IF WE'RE ALLOWED TO PRESENT THIS AT TRIAL, THE EVIDENCE IS
3 GOING TO SAY THAT THE REASON THEY DITCHED IT -- DITCHED US IS
4 BECAUSE BO AUGHTRY INTERFERED WITH THIS AGREEMENT, WITH THIS
5 -- WITH THIS CONTRACT, THAT BO AUGHTRY HAD A SMEAR CAMPAIGN
6 TO LOBBY TO GET THE CITY TO BREACH ITS CONTRACT WITH OUR
7 CLIENTS

8 THE COURT CAN'T -- WHO DID YOU DEPOSE FROM HIM?

9 MR HINSON WHO DID WE DEPOSE?

10 THE COURT WHO DID YOU DEPOSE ON HIS SIDE?

11 MR HINSON WELL, I MEAN, WE OBVIOUSLY DEPOSED BO

12 AUGHTRY ANOTHER THING AND THIS IS---

13 THE COURT AND YOU'RE SAYING HE JUST DENIED EVERYTHING

14 MR HINSON WELL, HE DID, AND RECENTLY WE HAVE THE

15 AFFIDAVIT OF DONNA JUMPER WHICH WAS SUBMITTED AS AN EXHIBIT

16 TO THE CONSPIRACY CAUSE OF ACTION, AND MS JUMPER WAS THE

17 SECRETARY TO STEVE GANTT AND STEVE GANTT IS THE SPECIAL --

18 ~~WAS AT THE TIME THE SPECIAL PROJECT MANAGER FOR THE CITY~~

19 AND MS JUMPER'S AFFIDAVIT, AGAIN WHICH IS PART OF THE

20 EXHIBITS TO OUR CONSPIRACY MEMORANDUM -- MS JUMPER'S

21 AFFIDAVIT SAYS THAT MR AUGHTRY WAS CALLING STEVE GANTT ALL

22 THE TIME THAT HE WAS IN VIOLATION OF THE SECOND R F P WHICH

23 SAID YOU HAD TO CONTACT ONLY THROUGH E-MAIL, FACSIMILE, OR

24 U S P S , THAT MR AUGHTRY WAS CALLING STEVE GANTT HE WAS

25 MEETING WITH MEMBERS OF CITY COUNCIL

1 THE COURT THAT WAS AFTER THE SECOND R F P WAS ISSUED
2 MR HINSON AND BEFORE SHE SAYS IT WAS BEFORE AND
3 AFTER
4 THE COURT AND THAT RUNS ON INTO THE NOERR-PENNINGTON
5 DOCTRINE ARGUMENT THEY HAD LAST TIME?
6 MR HINSON IT'S VERY MUCH RELATED TO THAT, TOO
7 THE COURT ALL RIGHT TELL ME ABOUT YOUR E-MAIL, THE
8 E-MAIL FROM YOUR -- THE SON OF SOMEBODY?
9 MR HINSON IT'S GREG GARFIELD, YES, SIR
10 THE COURT TELL ME---
11 MR HINSON IT'S RAY GARFIELD'S SON
12 THE COURT TELL ME WHAT HE SAID
13 MR HINSON WELL---
14 THE COURT WITHOUT -- WITHOUT COLORING IT WHAT DID HE
15 SAY?
16 MR HINSON WELL---
17 THE COURT WHAT DID HE SAY?
18 MR HINSON RAY GARFIELD SAYS---
19 THE COURT NO
20 MR HINSON I'M SORRY GREG GARFIELD
21 THE COURT WHAT GREG GARFIELD SAYS
22 MR HINSON GREG GARFIELD SAYS -- WOULD YOU LIKE ME TO
23 QUOTE IT?
24 THE COURT YEAH
25 MR HINSON I HAVE THE QUOTE---

1 THE COURT YEAH

2 MR HINSON ---RIGHT HERE "I DON'T THINK WE NEED A
3 TEAM AGREEMENT WITH HILTON OR SOLOMON SMITH BRADLEY AT THIS
4 STAGE NOW THAT WE HAVE BEEN DESIGNATED THE DEVELOPER " HE
5 SAYS, "TEAM AGREEMENTS ARE ONLY NECESSARY DURING THE
6 COMPETITION PHASE TO MAKE SURE THAT EVERYONE IS EXCLUSIVELY
7 DEVOTED TO OUR TEAM "

8 WHAT GREG GARFIELD IS SAYING IS NOW THAT WE'VE WON THE
9 BID, EVERYONE IS EXCLUSIVE TO EACH OTHER ANYWAY NOW THAT
10 WE'VE WON THE BID, THERE ARE NO OTHER COMPETING TEAMS WE
11 HAVE A DEAL---

12 THE COURT LAST TIME YOU ARGUED THAT HE DIDN'T HAVE
13 AUTHORITY TO SPEAK FOR YOUR CLIENT

14 MR HINSON AND HE DIDN'T HE AT THAT TIME WAS NOT A
15 PRINCIPAL HE WAS NOT AWARE OF HIS -- OF RAY GARFIELD HIS
16 FATHER'S NEGOTIATIONS WITH HILTON TO BE EXCLUSIVE TO THE
17 TEAM

18 THE COURT I THOUGHT THERE WAS SOMETHING ELSE IN THE
19 E-MAIL OTHER THAN THAT WHERE HE---

20 MR HINSON HE GOES ON FOR SEVERAL PARAGRAPHS

21 THE COURT I THOUGHT HE'D SAID SOMETHING AT THE POINT
22 THAT THE M O U IS NOT AN AGREEMENT DID HE EVER SAY THAT OR
23 AM I

24 MR HINSON HE DOES NOT SAY THE M O U IS NOT AN
25 AGREEMENT NO, SIR

1 THE COURT ALL RIGHT

2 MR HINSON HIS TESTIMONY IS HE BELIEVED THE M O U TO
3 BE A BINDING AGREEMENT

4 THE COURT OKAY

5 MR HINSON I SHOULD POINT OUT, TOO, THAT THIS E-MAIL
6 WAS SENT BEFORE THE M O U WAS SIGNED THIS E-MAIL THAT
7 YOU'RE ASKING ABOUT IS AFTER THE PLAINTIFFS' TEAM HAD BEEN
8 SELECTED BUT BEFORE THE M O U HAD BEEN FINALIZED AND SIGNED
9 BY THE PARTIES

10 THE COURT OKAY

11 MR HINSON AND I WOULD ALSO JUST POINT OUT THAT -- AND
12 THIS CAME UP EARLIER THAT THE CITY'S AGENT, S A G , DRAFTED
13 THE M O -- JEFF SAXE SAID AT HIS DEPOSITION, "I WROTE THE
14 M O U , " AND CONSEQUENTLY ANY AMBIGUITIES IN THE CONTRACT
15 SHOULD BE CONSTRUED AGAINST THE DRAFTER SO IF THERE'S ANY
16 QUESTION AS TO WHETHER OR NOT THIS WAS INTENDED TO FORM A
17 CONTRACT, BECAUSE THE CITY'S AGENT DRAFTED THIS DOCUMENT,
18 THOSE AMBIGUITIES SHOULD BE CONSTRUED IN FAVOR OF THE
19 PLAINTIFFS

20 THE COURT ALL RIGHT ANYTHING ELSE?

21 MR HINSON NOT AT THIS TIME, YOUR HONOR

22 THE COURT THANK YOU ALL RIGHT YES, SIR

23 MR KALISH YOUR HONOR, BRIEFLY MAY IT PLEASE THE
24 COURT?

25 THE COURT YES, SIR

1 MR KALISH PAGE KALISH FOR TURNER CONSTRUCTION, YOUR
2 HONOR I WOULD JUST LIKE TO STAND UP AND ADOPT AND
3 INCORPORATE BY REFERENCE THE ARGUMENTS MADE BY MR NEWMAN
4 EARLIER AS WELL AS THE BRIEFING AND THE DOCUMENTS THAT HE
5 SUBMITTED INTO EVIDENCE IN OPPOSITION FOR THE MOTION FOR
6 SUMMARY JUDGMENT

7 I WOULD FURTHER LIKE TO DIRECT THE COURT'S ATTENTION,
8 BECAUSE WE WERE NOT PART OF THAT ORIGINAL MEMORANDUM, TO
9 SECTION 7 OF THE M O U WHICH TALKS ABOUT THE ROLE OF THE
10 CONTRACTOR AND AS TO HOW THE CONTRACTOR IS TO BE PAID, TURNER
11 CONSTRUCTION BEING THAT CONTRACTOR AND FINALLY I WOULD LIKE
12 TO CORRECT THE RECORD FROM EARLIER WHERE I SAID \$750,000
13 OUR CLAIM FOR RELIEF IS \$570 000 MINUS SOME \$2500 OF TICKETS
14 WE BOUGHT FOR A BENEFITS SUPPER

15 THE COURT MINUS WHAT?

16 COURT REPORTER TICKETS YOU BOUGHT FOR?

17 MR KALISH TICKETS WE BOUGHT FOR A BENEFITS SUPPER

18 THE COURT ALL RIGHT WHAT DID THEY HAVE TO EAT?

19 MR KALISH I'M NOT PRIVY TO THAT INFORMATION, YOUR
20 HONOR

21 THE COURT ALL RIGHT

22 MR KALISH THANK YOU, YOUR HONOR

23 THE COURT MR DETWILER, LET ME ASK YOU A COUPLE OF
24 QUESTIONS

25 MR DETWILER YES, SIR

1 THE COURT I DON'T KNOW WHETHER YOU THINK IT WILL MAKE
2 A DIFFERENCE OR NOT, BUT YOU -- FOR A FEW MINUTES YOU WENT TO
3 -- YOU MADE THE POINT THAT THE VOTE AT THE HOSPITAL, EXCUSE
4 ME, THE HOTEL CORPORATION BOARD WAS NOT A VOTE OF CITY
5 COUNCIL THEN WHY COULDN'T THOSE -- AND I KNOW JUDGE MANNING
6 HAS RULED, BUT WHY COULDN'T THOSE PEOPLE BE DEPOSED IN THAT
7 CAPACITY?

8 MR DETWILER YOUR HONOR, THE CITY -- AS I MENTIONED
9 EARLIER WHEN YOU ASKED ME QUESTIONS ABOUT THAT, THE BOARD OF
10 THE NONPROFIT AND THE COUNCIL ARE THE SAME PEOPLE

11 THE COURT SAME PEOPLE BUT WEARING DIFFERENT HATS

12 MR DETWILER WEARING DIFFERENT HATS, YES, SIR
13 HOWEVER, THEY WANTED TO DEPOSE COUNCIL THERE'S NO QUESTION
14 THAT---

15 THE COURT THEY WANTED TO DEPOSE PEOPLE

16 MR DETWILER THEY WANTED TO DEPOSE---

17 THE COURT THOSE FIVE PEOPLE

18 MR DETWILER THEY WANTED TO DEPOSE MEMBERS OF COUNCIL
19 THOSE FIVE PEOPLE THAT'S CORRECT

20 THE COURT THEY WANTED -- THEY SAID THEY WANTED TO
21 DEPOSE MEMBERS OF THE BOARD SO WHAT DIFFERENCE DOES IT
22 MAKE? IF YOU SAY YOU'RE ENTITLED TO SOME TYPE OF PRIVILEGE
23 OR SOME TYPE OF IMMUNITY FROM BEING DEPOSED, HOW CAN THAT BE
24 SO IF YOU'RE AT THE SAME TIME SAYING THAT THAT WAS NOT A VOTE
25 OF CITY COUNCIL?

1 **MR DETWILER** WELL, YOUR HONOR, THERE ARE TWO THINGS I
2 WANT TO -- TWO POINTS I WANT TO MAKE ON THAT ONE IS KEEP IN
3 MIND THIS IS AN EVIDENTIARY RULING THAT JUDGE MANNING MADE
4 HE MADE THAT YOU CAN'T DO THAT YOU CAN'T GET INTO THE HEADS
5 OF COUNCIL NOW, IT IS TRUE THAT THE NONPROFIT SAT THERE AND
6 MADE A -- AND TOOK A VOTE ON FEBRUARY THE 11TH WITH REGARD TO
7 ITS FUNCTION AS THE NONPROFIT

8 NONETHELESS, YOU KNOW, HAD IT BEEN COUNCIL, THERE WERE
9 FORMALITIES THAT NEEDED TO BE ADDRESSED AND COUNCIL WOULD
10 HAVE HAD TO -- IN ORDER TO -- LET ME BACK UP JUST A MOMENT
11 AND TALK ABOUT EXACTLY WHAT THEY VOTED FOR AND WHAT THEY
12 DIDN'T VOTE FOR WHAT THEY VOTED FOR, THE NONPROFIT, WAS
13 LIMITED TO THE FINANCING STRUCTURE THAT WAS PROPOSED ON THAT
14 SAME DAY ON THE FEBRUARY 11TH, 2004, DAY KEEP IN MIND IT
15 CHANGED MULTIPLE TIMES AFTER THAT SUBSTANTIALLY THEY DID
16 NOT VOTE TO PASS AN ORDINANCE BECAUSE THEY COULDN'T PASS AN
17 ORDINANCE TO ISSUE BONDS

18 **THE COURT** ALL RIGHT THEN WHY COULDN'T THEY BE
19 DEPOSED ON WHY THEY VOTED FOR IT, THAT FINANCING STRUCTURE?

20 **MR DETWILER** BECAUSE IT -- ALL OF -- EVENTUALLY THOSE
21 SAME PEOPLE WOULD HAVE TO VOTE TO APPROVE THE ESSENTIAL PARTS
22 OF THIS DEAL

23 **THE COURT** BUT YOU SAID LATER THAT THAT DYNAMIC WOULD
24 CHANGE BECAUSE YOU WOULD HAVE PUBLIC INPUT YOU'D HAVE AN
25 ORDINANCE YOU'D HAVE A READING---

1 MR DETWILER THAT'S RIGHT

2 THE COURT ---AND A PUBLIC HEARING AND ALL THAT SO IF
3 YOU GET RIGHT UP TO THIS, THE DAY OF THE FEBRUARY 11 VOTE,
4 WHY COULDN'T THEY BE DEPOSED ON THAT ISSUE? IN OTHER WORDS,
5 GIVE ME A NAME OF ONE CITY COUNCIL MEMBER

6 MR DETWILER WELL, THE MAYOR MAYOR COBLE IS A MEMBER
7 OF COUNCIL

8 THE COURT HE VOTED FOR IT?

9 MR DETWILER HE VOTED FOR IT

10 THE COURT WHY COULDN'T HE BE DEPOSED ON WHY HE VOTED
11 FOR IT AS A BOARD MEMBER?

12 MR DETWILER AS A -- BECAUSE I DON'T THINK YOU CAN
13 SEPARATE THE TWO WITH RESPECT TO THEIR THOUGHT PROCESSES
14 AND KEEP IN MIND THE LEGISLATIVE IMMUNITY IS THERE TO
15 PROTECT THE THOUGHT PROCESSES OF COUNCIL MEMBERS---

16 THE COURT BUT AT THE---

17 MR DETWILER AS COUNCIL MEMBERS

18 THE COURT AT THE SAME TIME, BECAUSE THE PROCESS WOULD
19 LATER CHANGE, YOU'RE SAYING THAT THE VOTE MIGHT WELL HAVE
20 CHANGED BECAUSE OF DIFFERENT INPUT IN OTHER WORDS, FOUR TO
21 ONE, A BOARD VOTE MIGHT NECESSARILY HAVE CHANGED TO A TWO TO
22 THREE CITY COUNCIL VOTE

23 MR DETWILER THAT'S CORRECT, AND IT COULD VERY -- AND
24 KEEP THAT---

25 THE COURT MR NEWMAN, ONE QUESTION A YES OR NO

1 ANSWER IF THIS THING HAD GONE FORWARD AFTER A FOUR TO ONE
2 HOS - I KEEP ON SAYING HOSPITAL BOARD - HOTEL BOARD VOTE AND
3 THEN CITY COUNCIL VOTED IT DOWN THREE TO TWO, WHAT COULD YOU
4 DO ABOUT THAT?

5 MR NEWMAN YOU WANT A YES OR NO?

6 THE COURT WELL

7 MR NEWMAN I'M TRYING TO THINK

8 THE COURT I TAKE THAT BACK MY QUESTION WAS WRONG
9 WHAT COULD YOU DO ABOUT THAT?

10 MR NEWMAN I THINK YOU'D STILL HAVE THE ISSUE OF
11 WHETHER OR NOT IT WAS A GOOD-FAITH DECISION NOT TO GO
12 FORWARD

13 THE COURT BY A LEGISLATIVE BODY

14 MR NEWMAN CORRECT

15 THE COURT OKAY

16 MR DETWILER YOUR HONOR, I---

17 THE COURT SO THEY WOULD HAVE BEEN LEGALLY COMPELLED TO
18 VOTE YES -- A DELIBERATIVE LEGISLATIVE BODY WOULD HAVE BEEN
19 COMPELLED TO VOTE YES

20 MR NEWMAN WELL THEY WOULD HAVE BEEN COMPELLED TO USE
21 GOOD FAITH IN HOW EVER THEY WOULD VOTE AND -- BUT I DON'T
22 KNOW -- AGAIN, I THINK YOU ASKED MR HINSON IF THERE WAS
23 SOMETHING THAT HAD HAPPENED BETWEEN FEBRUARY 11TH AND MARCH
24 18TH THAT COULD HAVE BEEN -- YOU KNOW, IF THE PAR BOND VALUE
25 HAD INCREASED TO \$500 MILLION, I DON'T THINK ANYBODY IS

1 CONTENDING IT WOULD HAVE BEEN A FEASIBLE PROJECT BUT
2 THAT'S

3 **THE COURT** OKAY ALL RIGHT GO AHEAD, MR DET---

4 **MR HINSON** YOUR HONOR, IF I COULD JUST FOR ONE
5 SECOND I THINK PART OF IT IS THAT THIS LEGISLATIVE BODY
6 IS BEHAVING IN A COMMERCIAL CAPACITY WHEN THEY ENTERED INTO
7 THIS AGREEMENT TO BUILD A HOTEL

8 **THE COURT** SO BOTH OF Y'ALL ARE NOW ARGUING THE OTHER
9 SIDE'S POINT ABOUT WHY THEY COULD OR COULD NOT BE DEPOSED
10 SO I -- IT'S A LOT OF THAT THERE GO AHEAD

11 **MR DETWILER** THANK YOU, YOUR HONOR YOUR HONOR, WHEN
12 I WAS UP BEFORE, I ASKED RHETORICALLY FOR THE PLAINTIFFS'
13 COUNSEL TO STAND BEFORE THIS COURT AND TELL US -- IF THE
14 M O U WAS A CONTRACT, TELL US WHAT THE TERMS WERE I'VE
15 BEEN LISTENING FOR AN HOUR OR MORE TO ALL THESE GOOD LAWYERS
16 TALK ABOUT THE M O U BEING A CONTRACT, AND NOT ONE OF THEM
17 HAS TOLD US WHAT THE CONTRACT MEANT, WHAT THE TERMS WERE,
18 WHAT THE ESSENTIAL TERMS WERE WAS IT A \$60 MILLION HOTEL
19 BOND ISSUE, A NON -- TAX-EXEMPT OR WAS IT AN 82 OR \$72
20 MILLION PARTIALLY TAX-EXEMPT, PARTIALLY TAXABLE BOND ISSUE?
21 WHAT WAS THE CITY'S BACKSTOP? WAS IT A THIRD OF \$58 MILLION
22 OR WAS IT \$91 MILLION? WHAT WERE THE ESSENTIAL TERMS?

23 **THE COURT** THEY'RE SAYING THAT YOU WERE DRIVING THE
24 PRICE OF THE BONDS UP BY CHANGING THE GAME A LITTLE BIT

25 **MR DETWILER** SHOW US THE PROOF OF THAT THAT'S NOT --

1 THAT'S NOT AT ALL -- THEY WERE THE -- THEY WERE RESPONSIBLE
2 FOR PUTTING TOGETHER A DEAL THAT WAS ACCEPTABLE TO THE CITY
3 THE BACKSTOP WAS ACCEPTABLE TO THE CITY AND THE -- AND KEEP
4 IN MIND NOW THAT THE BRICKS AND MORTAR PART OF THE COST OF
5 THIS DEAL REALLY DIDN'T CHANGE THROUGHOUT THIS -- NOT MUCH
6 THROUGHOUT THIS ENTIRE PROCESS THE BRICKS AND MORTAR---

7 THE COURT SO WHAT WAS DRIVING THE PRICE OF THE BONDS
8 UP?

9 MR DETWILER AND YOU ASKED ME THAT QUESTION EARLIER
10 AND I -- AND I WANT TO CALL YOUR ATTENTION TO MR CORRADO'S
11 DEPOSITION AT PAGE 71, I BELIEVE IT IS

12 THE COURT WELL, THEY WANT YOU TO LOOK AT PAGES 50
13 THROUGH 53 DOES THAT MAKE ANY DIFFERENCE?

14 MR DETWILER I DON'T---

15 THE COURT WHAT'S HE SAY ON PAGE 71?

16 MR DETWILER WHAT HE DOES IS HE EXPLAINS THAT THE COST
17 WAS BEING DRIVEN UP BY SEVERAL COMPONENTS ONE WAS THE BOND
18 INSURANCE WAS A SUBSTANTIAL COMPONENT AND CAPITALIZED
19 INTEREST, THAT IS BORROWING MONEY TO PAY THE INTEREST AND
20 THE PRINCIPAL REDUCTIONS IN THE FIRST FEW YEARS THAT HAD
21 CHANGED SUBSTANTIALLY, AND THE INTEREST RATE ON THE BONDS HAD
22 ALSO CHANGED AND YOU'LL SEE THAT AT CORRADO'S DEPOSITION,
23 THAT'S OUR TAB 12 -- PAGES 71 AND 75 I'M NOT SURE HOW THOSE
24 COULD BE LAID ON THE DOORSTEPS OF THE CITY HOW IS IT THAT
25 THOSE ISSUES WERE THE CITY'S FAULT?

1 THE COURT THEY SAID YOU FOLDED THE PRICE OF THE LAND
2 IN

3 MR DETWILER PARDON?

4 THE COURT THEY SAID SOMETHING ABOUT YOU FOLDING THE
5 PRICE OF THE LAND IN

6 MR DETWILER YOUR HONOR, NONE OF THOSE MODELS THAT WE
7 SHOWED UP THERE THAT ARE IN YOUR PACKAGE -- NONE OF THOSE
8 MODELS INVOLVED LAND AS BEING IN THE CALCULATION, AS I
9 UNDERSTAND IT AND -- BUT YOU MAY RECALL -- I'LL, YOU KNOW,
10 DROP IT THERE BUT NONE OF THOSE MODELS INVOLVED LAND AND SO
11 FORTH, BUT EVERY ONE OF THOSE MODELS, THEY -- YOU KNOW THEY
12 KEPT CHANGING FROM THE BEGINNING AND THE CITY'S BACKSTOP,
13 YOUR HONOR -- FORGET FOR A MOMENT THE BOND ISSUE THE CITY'S
14 BACKSTOP -- WHERE IS IT THAT THE M O U SAYS WHAT THE CITY'S
15 BACKSTOP IS? THE M O U SAYS THAT THE CITY'S STAND-BY
16 SUPPORT PAYMENT WILL BE IN AN AMOUNT ACCEPTABLE TO THE CITY
17 THAT'S ALL IT SAYS

18 THE COURT TOTALLY OPEN-ENDED

19 MR DETWILER TOTALLY OPEN-ENDED

20 THE COURT SO IF IT HAD DROPPED TO 45 AFTER YOUR FOUR-
21 TO-ONE VOTE, YOU COULD HAVE STILL SAID "WE THOUGHT ABOUT
22 IT EVEN THOUGH IT'S GONE DOWN \$30 MILLION, WE'VE CHANGED
23 OUR MIND "

24 MR DETWILER I THINK THEORETICALLY THAT'S TRUE

25 THE COURT AND DOES THAT COLLIDE WITH YOUR OBLIGATION

1 TO USE GOOD FAITH AND WOULD THAT CREATE A FACTUAL ISSUE AS TO
2 WHETHER OR NOT THIS WAS A FEASIBLE PROJECT?

3 MR DETWILER IF THOSE WERE FACTS, THEN PERHAPS THEY
4 WOULD BE MAKING AN ARGUMENT THAT'S A LITTLE DIFFERENT THAN
5 THE ONE THEY'RE MAKING NOW REGARDING GOOD FAITH

6 THE COURT ALL RIGHT HOW ABOUT -- THEY SAID YOU NEVER
7 GAVE A REASON WHY YOU PULLED THE PLUG

8 MR DETWILER YES, SIR, AND I'M -- YES, WE NEVER GAVE A
9 -- THERE'S NOTHING IN THE M O U OR IN ANY OTHER DOCUMENT
10 THAT REQUIRES US TO GIVE A REASON THEY COMPLAINED THAT WE
11 DIDN'T TELL THEM I DON'T KNOW WHAT COULD BE MORE PLAIN THAN
12 THE -- THAN THE MARCH 17TH, '04, VOTE AND THEN THE SUBSEQUENT
13 APRIL 2ND, '04, VOTE TO GO FORWARD WITH A NEW PRIVATELY-
14 FUNDED R F P PROJECT OR SCHEME BUT -- AND KEEP IN MIND
15 THAT THE M O U DOES NOT REQUIRE ANY NOTICE OF ANY KIND BUT
16 MAYBE MORE IMPORTANTLY THAN BOTH OF THOSE THINGS IS THE FACT
17 THAT THESE FOLKS PARTICIPATED IN THE SUBSEQUENT R F P LET'S
18 DON'T FORGET---

19 THE COURT THEY SAID LAST TIME THEY DID IT BECAUSE THEY
20 FELT LIKE THEY HAD TO

21 MR DETWILER THEY DID IT AND THEY PARTICIPATED THEY
22 PARTICIPATED WILLINGLY, AND THEY MADE A PROPOSAL FOR A
23 PRIVATELY-FUNDED HOTEL AND THE PRIVATELY-FUNDED HOTEL THAT
24 THEY PROPOSED WAS REJECTED BY THE HOTEL SELECTION
25 COMMITTEE---

1 THE COURT DOES IT---

2 MR DETWILER ---WHICH IS NOT COUNCIL BY THE WAY

3 THE COURT DOES IT CHANGE ANYTHING IN LIGHT OF MS

4 JUMPER'S AFFIDAVIT WHERE SHE SAYS THAT MR AUGHTRY WAS

5 REPEATEDLY CALLING MR GANTT EVEN BEFORE THE SECOND R F P

6 WAS REQUESTED?

7 MR DETWILER I THINK THAT WOULD ONLY -- WELL, NO I

8 DON'T THINK IT CHANGES A THING FIRST OF ALL, I DON'T KNOW

9 THAT SHE -- FIRST OF ALL, I DON'T KNOW HOW ADMISSIBLE THAT

10 IS YOU'RE TALKING ABOUT SOMEBODY WHO IS GOING TO TESTIFY AS

11 A SECRETARY OF THE ACTING CITY ADMINISTRATOR OF MY CLIENT

12 THAT THIS PERSON WAS CALLING SHE DIDN'T HEAR THE PHONE

13 CALL SHE DOESN'T KNOW WHAT THEY WERE TALKING ABOUT TO MY

14 KNOWLEDGE, SHE DOESN'T, YOU KNOW HAVE ANY---

15 THE COURT HAS MR GANTT BEEN DEPOSED?

16 MR DETWILER MR GANTT HAS BEEN DEPOSED NOT ONCE BUT

17 TWICE

18 THE COURT WHAT DID HE SAY ABOUT THAT?

19 MR DETWILER HE WASN'T ASKED -- IF I DON'T RECALL IF

20 HE WAS EVEN ASKED ABOUT MS JUMPER MS JUMPER'S AFFIDAVIT

21 WAS JUST PRESENTED RECENTLY SHE WAS ONLY RECENTLY

22 IDENTIFIED AS A WITNESS AND AS IT TURNS OUT MS JUMPER,

23 YOUR HONOR WHO WAS MY ADMINISTRATIVE SECRETARY IS NOW BOBBY

24 LYLES' SECRETARY

25 THE COURT WHO?

1 MR DETWILER BOBBY LYLES, THE PRESIDENT OF S AND W ,
2 STEVENS & WILKINSON, THE ARCHITECTS

3 THE COURT AH

4 MR DETWILER AH

5 THE COURT WELL, THAT'S A CREDIBILITY ISSUE

6 MR DETWILER IT IS IT IS IT IS

7 THE COURT WHEN DID HER AFFIDAVIT GET SIGNED?

8 MR DETWILER I DON'T---

9 MR NEWMAN AUGUST 3RD

10 THE COURT AUGUST 3RD OF THIS YEAR?

11 MR NEWMAN YES, SIR

12 MR DETWILER A MONTH AGO

13 THE COURT AUGUST 3RD? TWO WEEKS AGO, RIGHT?

14 MR NEWMAN THAT'S CORRECT IT WAS FILED -- I'M

15 SPEAKING FOR MR HINSON HERE IT WAS FILED IN SUPPORT OF MR

16 HINSON'S MEMORANDUM OF OPPOSITION TO MR PAUL'S MOTION FOR

17 SUMMARY JUDGMENT AS TO HIS CONSPIRACY CAUSE OF ACTION

18 MR DETWILER AND SHE WAS ONLY RECENTLY NAMED

19 THE COURT ALL RIGHT WHO DO---

20 MR HINSON THAT'S INCORRECT---

21 THE COURT WHO DO YOU REPRESENT?

22 MR HINSON ---YOUR HONOR

23 THE COURT WAIT ONE AT A TIME

24 MR DETWILER YOUR HONOR---

25 MR HINSON THAT'S ALL---

1 THE COURT WAIT WAIT WAIT

2 COURT REPORTER I CAN'T TAKE YOU ALL AT THE SAME TIME

3 THE COURT ONE AT A TIME MR NEWMAN, WHO DO YOU
4 REPRESENT?

5 MR NEWMAN STEVENS & WILKINSON

6 THE COURT WHY DIDN'T YOU FILE HER AFFIDAVIT?

7 MR NEWMAN BECAUSE I DID NOT FILE A CONSPIRACY CLAIM

8 THE COURT WHY NOT?

9 MR NEWMAN I DON'T KNOW I THINK I WAS WORKING AS A
10 SUMTER COUNTY PUBLIC DEFENDER AT THE TIME WHEN THIS CASE WAS
11 FILED, JUDGE, SO

12 THE COURT OKAY ALL RIGHT MR DETWILER SO YOU SAY
13 THE CITY WOULDN'T HAVE TO GIVE A REASON, BUT YOU SAY IT
14 COULDN'T HAVE BEEN ANY CLEARER THAT THE ORIGINAL PROJECT OR
15 THE ORIGINAL TEAM EFFORT WASN'T GOING TO HAPPEN WHEN YOU
16 ASKED FOR THE SECOND R F Q

17 MR DETWILER THAT'S CORRECT, YOUR HONOR

18 THE COURT IS THERE A DIFFERENCE BETWEEN AN R F Q AND
19 R F P ?

20 MR DETWILER NOT SIGNIFICANTLY OR SUBSTANTIVELY AS FAR
21 AS I KNOW

22 THE COURT ALL RIGHT OKAY HOW ABOUT MR HINSON'S
23 ARGUMENT THAT THERE'S A DIFFERENCE BETWEEN NOT BEING LIABLE
24 AND THERE NOT BEING A CONTRACT?

25 MR DETWILER I WOULD SAY OKAY I'M NOT -- YOU KNOW,

1 THERE IS---

2 THE COURT WELL, BOTH MR NEWMAN AND MR HINSON SEEM TO
3 SAY THAT THE FACT THAT YOU MIGHT NOT BE LIABLE DOES NOT MEAN
4 THAT THERE'S NOT A CONTRACT, AND IF YOU'RE NOT TO BE LIABLE
5 FOR GOOD FAITH OR FEASIBILITY REASONS, THAT'S WHAT THE JURY
6 HAS TO LOOK AT

7 MR DETWILER OKAY I'M NOT SURE I -- LET ME MAKE SURE
8 I---

9 THE COURT IS THAT WHAT YOU SAID, MR NEWMAN?

10 MR NEWMAN YES, SIR I THINK YOU PHRASED IT MUCH
11 BETTER THAN I DID

12 THE COURT ALL RIGHT

13 MR DETWILER OKAY SO THE ARGUMENT IS THAT EVEN
14 THOUGH THERE MIGHT NOT BE A CONTRACT IN THE M O U ---

15 THE COURT NO IF THEY'RE -- THEY'RE SAYING THAT THE
16 LANGUAGE OF THE DOCUMENT SAYS IF SUCH AND SUCH AND SUCH AND
17 SUCH, THEN YOU'RE NOT LIABLE UNDER THAT M O U THEY'RE
18 SAYING THAT PRESUPPOSES THAT THERE IS AN AGREEMENT -- YOU JUST
19 MIGHT NOT BE LIABLE UNDER IT, AND THE ONLY WAY THAT IT CAN BE
20 DETERMINED WHETHER OR NOT YOU'RE LIABLE IS FOR A JURY TO
21 RESOLVE THAT AND I ASKED HIM THE QUESTION WELL, STILL
22 COULDN'T THERE BE MATTERS OF LAW OR ISSUES DECIDED AS A
23 MATTER OF LAW?

24 MR DETWILER THERE'S NO QUESTION BUT THAT THIS IS AN
25 ISSUE OF LAW BASED UPON THE CIRCUMSTANCES OF THIS CASE IF

1 WE COULD BE LIABLE UNDER THE M O U IF THAT IS EVEN A JURY
2 QUESTION, THEN THESE FOLKS NEED TO STAND UP BEFORE THIS COURT
3 AND TELL US WHAT THE TERMS OF THAT M O U WERE WHAT ARE THE
4 TERMS OF THE CONTRACT UPON WHICH THEY ARE SUING US? WHAT ARE
5 THOSE TERMS? IS IT BASED UPON THE 50 MILLION, 60 MILLION, 80
6 MILLION, 90 MILLION DEAL? WHAT EXACTLY ARE THE TERMS OF THAT
7 CONTRACT? AND WE CANNOT BE HELD LIABLE FOR A CONTRACT THAT
8 DOES NOT HAVE THE ESSENTIAL TERMS DEFINED

9 WHY IS IT THAT JOHN LUMPKIN SAYS THAT THEY WERE STILL AS
10 OF APRIL, EXCUSE ME FEBRUARY 11TH, 2004, THEY WERE STILL
11 WORKING ON TERMS - AND THESE ARE HIS WORDS, NOT MINE -
12 CENTRAL TO THE TRANSACTION? WHAT ELSE DOES THAT MEAN BUT
13 THAT THE TERMS OF THE M O U DO NOT DEFINE ALL OF THE CENTRAL
14 TERMS OF THE CONTRACT?

15 THE COURT HOW COULD YOU EXPECT THESE FOLKS TO SPEND
16 ALL THIS MONEY AND TO GO OUT ON THE LIMB THAT THEY'VE GONE
17 OUT ON -- AND ADMITTEDLY A LOT OF THESE THINGS IN THE M O U
18 ARE A MOVING TARGET AND THEY HAVE TO BE

19 MR DETWILER RIGHT

20 THE COURT SO AT WHAT POINT IS IT LEGALLY UNFAIR TO
21 LEAVE THEM HOLDING THE BAG?

22 MR DETWILER THIS IS THE DEAL THAT THEY MADE THE
23 M O U CONTEMPLATES GOING INTO A FRAMEWORK TO COME UP WITH A
24 DEAL ULTIMATELY THAT WOULD BUILD A HOTEL ACCEPTABLE TO THE
25 CITY AND THEY WOULD BE PAID -- ALMOST LIKE A CONTINGENCY FEE

1 FOR A LAWYER, THEY WOULD BE PAID A PERCENTAGE RATHER THAN
2 BEING PAID BY THE HOUR FOR THEIR WORK, THEY WANTED TO BE PAID
3 FEES THERE WAS A -- THERE WAS A BIG PAYDAY AT THE END AND
4 THEY TOOK THE RISK

5 THAT'S WHY ALL OF THE E-MAILS, THAT'S WHY THE CONTRACT
6 -- THE M O U ITSELF AND ALL OF THE E-MAILS TALKED IN TERMS
7 OF BEING AT RISK THEY WERE AT RISK UNTIL THE BONDS CLOSED
8 AND THAT'S WHAT THE M O U SPECIFICALLY SAYS THE EMPHASIS
9 IN THE M O U IS UPON THE BOND CLOSING SO THAT WAS THE
10 DEAL -- THAT WAS THE ARRANGEMENT THEY MADE, AND THEY DID IT
11 BECAUSE OF THE BIG PAYDAY AT THE END RISK REWARD IT WAS
12 A -- IT WAS A BALANCE THAT THEY WEIGHED AND TOOK THAT CHANCE

13 THE COURT ALL RIGHT HOW ABOUT THIS GREG GARFIELD
14 E-MAIL?

15 MR DETWILER I'M PLEASED THAT YOU WOULD BRING IT UP
16 WHAT GREG GARFIELD IS SAYING I THINK IN CONTEXT IS THAT THE
17 M O U -- WE DON'T WANT TO BE -- WE DON'T WANT ANYTHING TO BE
18 TOO BINDING ON US BECAUSE WE WANT TO BE -- IN THIS PARTICULAR
19 CONTEXT I THINK HE WAS TALKING ABOUT HILTON WE WANT TO BE
20 ABLE TO THROW HILTON UNDER THE BUS IF WE DON'T LIKE HILTON
21 DOWN THE ROAD, EVEN THOUGH WE'VE SIGNED THIS M O U OR ONE OF
22 THESE OTHER DOCUMENTS, WE WANT TO BE ABLE TO THROW THEM UNDER
23 THE BUS THAT'S WHAT HE'S SAYING

24 AND GREG GARFIELD IS NOT JUST A BIT PLAYER AS THE
25 COUNSEL WOULD LIKE FOR THE COURT TO BELIEVE GREG GARFIELD

1 IS NOW I THINK THE CHIEF FINANCIAL OFFICER OF GARFIELD TRAUB
2 HE WAS THE SON OF THE PRINCIPAL AT THAT TIME HE AT THAT
3 TIME DID NOT OWN SHARES OR WASN'T A MEMBER AT THAT POINT IN
4 TIME, I THINK, BUT HE WAS AN IMPORTANT PLAYER WHY ELSE WAS
5 HE INVOLVED IN THESE E-MAILS? AND I THINK HE EVEN TESTIFIED
6 THAT HE EVEN CAME TO COLUMBIA REPRESENTING GARFIELD TRAUB AT
7 THE TIME ALL OF THIS WAS IN ITS FORMATION STAGES

8 BUT GREG GARFIELD'S E-MAIL IS A CLASSIC -- JUST ONE OF
9 MANY CLASSIC EXAMPLES OF WHAT THEY THOUGHT THE M O U WAS AND
10 IT WAS AN AGREEMENT TO AGREE IT WAS A LETTER OF INTENT IT
11 WAS NOT INTENDED TO BE BINDING THEY WANTED AN OUT, AND AS
12 JOHN LUMPKIN SAID, IT WAS NOT BINDING ON EITHER PARTY IT
13 WAS NOT BINDING ON THE CITY, AND IT WASN'T BINDING ON THE
14 PARTIES AND THE TEAM THAT REPRESENTED THE TEAM

15 GOING BACK TO THE ESSENTIAL TERMS WHY WAS IN -- WHY
16 WERE IN APRIL, EXCUSE ME -- IN FEBRUARY OF '04 AND MARCH OF
17 '04 WHY WERE KATHLEEN WOO AND JOHN VAN DUYS AND BILL CORRADO
18 STILL NEGOTIATING ESSENTIAL TERMS IF THIS WAS A CONTRACT?

19 THE COURT WELL, THEY SAY THAT ALL -- THAT THEY'RE
20 EQUATING ALL THESE ARGUMENTS THAT EVERYBODY IS MAKING TODAY
21 WITH ESSENTIALLY JURY ARGUMENTS SO WHY ISN'T ALL THIS A
22 JURY QUESTION?

23 MR DETWILER WELL, I HEARD THAT AND I WANT TO ADDRESS
24 THAT MORE CLEARLY WHAT THEY'RE TRYING TO DO IS HAVE THE
25 POINT WE'RE TRYING TO MAKE TO THE COURT BLEED INTO THIS ISSUE

1 OF FEASIBILITY, AND FEASIBILITY IS WHAT THE CITY DECIDED AT
2 THE END OF THE DAY BUT WHAT WE'RE SAYING -- THE POINT WE'RE
3 TRYING TO MAKE IS THAT ALL OF THESE MODELS, THESE CHANGING
4 MODELS, DEMONSTRATE THAT THE M O U DID NOT SPELL OUT THE
5 ESSENTIAL TERMS OF ANY SORT OF CONTRACT AND, IN FACT, THERE
6 NEVER WAS AN ESSENTIAL TERMS -- THERE NEVER WERE ESSENTIAL
7 TERMS DEFINED

8 ALL OF THOSE AGREEMENTS -- AND THERE'S NO POINT IN GOING
9 BACK THROUGH ALL THOSE AGREEMENTS, BUT THOSE WERE ESSENTIAL
10 AGREEMENTS THAT THE M O U CONTEMPLATED THAT DEFINE THE TRUE
11 NATURE OF THE DEAL AND THE RELATIONSHIP OF THE PARTIES BUT
12 THEN WE HAD THE CITY BACKSTOP WE HAD THE BOND AMOUNTS ALL
13 OF THOSE THINGS WERE ESSENTIAL TERMS THAT NEVER WERE PINNED
14 DOWN I DEFY THESE FOLKS TO STAND BEFORE YOU AND TELL US
15 EXACTLY WHAT THE TERMS WERE THAT ULTIMATELY DEFINED THE DEAL
16 BECAUSE THEY WERE NEVER AGREED TO---

17 THE COURT ALL RIGHT MR NEWMAN, WHAT WERE THE TERMS?
18 MR DETWILER HAS RHETORICALLY CHALLENGED YOU ABOUT EIGHT
19 TIMES TELL US WHAT THE TERMS OF THE DEAL WERE

20 MR NEWMAN I FEEL LIKE I'M IN THE MIDDLE OF A MONTY
21 PYTHON MOVIE JUDGE, I WOULD START WITH QUOTING FROM
22 MCPETERS VERSUS YEARGIN CONSTRUCTION COMPANY, INCORPORATED,
23 WHICH STATES THAT WHERE A CONTRACT DOES NOT FIX A DEFINITE
24 PRICE, THERE MUST BE A DEFINITE METHOD FOR ASCERTAINING IT
25 AS I WALKED THROUGH MY PRESENTATION, ONE POINT I MADE TO YOUR

1 HONOR WAS THAT ALL THE PLAINTIFFS HAD THEIR PRICES, THEIR
2 COMPENSATION, FIXED AS PERCENTAGE -- AS A PERCENTAGE OF
3 CONSTRUCTION COSTS WHICH IT WOULD BE, AND THAT'S THE DEFINITE
4 METHOD FOR ASCERTAINING THE MONIES THAT WE WERE GOING TO GET
5 THAT'S THE DEAL THAT WE ENTERED INTO THAT'S WHAT WE'RE IN
6 COURT HERE THAT WE'RE ARGUING ABOUT TODAY

7 THE COURT ALL RIGHT WHAT'S WRONG WITH HIS ANSWER?

8 MR DETWILER IT'S INCOMPLETE HE TALKS ABOUT THE --
9 HOW THE -- HIS FEE IS DETERMINED BUT HIS FEE IS ONLY ONE
10 PART, AN IMPORTANT PART, BUT IT'S ONLY ONE PART OF THIS
11 OVERALL SCHEME TO COME UP WITH A DEAL THAT WORKED FOR THE
12 CITY HE DOESN'T MENTION -- AND YOU'RE RIGHT I BAITED HIM
13 ABOUT EIGHT TIMES AND HE STILL HASN'T MENTIONED EXACTLY WHAT
14 THE AMOUNT OF THE BONDS WERE GOING TO ULTIMATELY BE UNDER HIS
15 IDEA OF---

16 THE COURT TO MAKE IT FEASIBLE

17 MR DETWILER IT WAS FEASIBLE IT WAS -- IT WAS -- IT
18 WAS SOMETHING FOR THE CITY TO DECIDE THE CITY BACKSTOP WAS
19 SOMETHING FOR THE CITY TO MAKE -- TO DECIDE AND---

20 THE COURT AND THEY DIDN'T HAVE ANY INPUT OR CONTROL
21 OVER WHAT THAT WAS GOING TO BE BECAUSE ALL THEY WERE DOING
22 WAS BUILDING THE BUILDING

23 MR DETWILER THEY HAD -- I THINK THEY HAD ALL SORTS OF
24 INPUT OVER WHAT THAT WAS GOING TO BE

25 THE COURT FOR DESIGNING

1 MR DETWILER PARDON?

2 THE COURT THEY WERE THE ARCHITECT, I'M SORRY

3 MR DETWILER WELL, YOU HAVE TO LOOK AT THEM AS THE
4 TEAM THEY ARE EVERYTHING WE'RE JUST THE OWNER THEY ARE
5 THE ARCHITECT THEY ARE THE DESIGN -- THEY ARE THE
6 CONTRACTOR TURNER IS THE CONTRACTOR YOU HAVE GARFIELD
7 TRAUB WHO IS THE DEVELOPER WHO WAS PUTTING ALL THIS TOGETHER
8 WE HAVE EDENS & AVANT YOU HAVE ALL OF THESE -- ALL OF THESE
9 FOLKS WHO ARE GOING TO ULTIMATELY WORK TOWARD PUTTING A
10 PACKAGE TOGETHER, AND THAT PACKAGE HAD TO BE ACCEPTABLE TO
11 THE CITY

12 THAT'S -- THAT IS THE -- YOU KNOW, THAT IS THE
13 METHODOLOGY, IF YOU WILL, THAT MR NEWMAN WANTS ME TO ADDRESS
14 AND WANTS THE COURT TO LOOK AT THE METHODOLOGY FOR
15 DETERMINING WHAT THE DEAL WAS WAS, YOU KNOW, THE -- YOU KNOW
16 LARGELY THE CITY'S I WON'T SAY DISCRETION, BUT LARGELY IT
17 WAS FOR THE CITY TO DETERMINE WHAT WAS -- WHAT WAS GOING TO
18 WORK FOR IT, AND IT ULTIMATELY DETERMINED THAT A PUBLICLY-
19 FINANCED HOTEL PROPOSED BY THESE FOLKS DIDN'T WORK

20 BUT, AGAIN, WE'RE GOING BACK -- WE'RE GETTING AHEAD A
21 LITTLE BIT THE POINT OF OUR MOTION AT THIS POINT IS THAT
22 THE M O U WAS NOT A CONTRACT BECAUSE IT FAILS FOR THE
23 INDEFINITENESS OF THE TERMS, AND ALL OF THE TESTIMONY IS THAT
24 THEY WERE STILL WORKING ON TRYING TO DEFINE THE TERMS OF THIS
25 AGREEMENT ALL THE WAY PAST FEBRUARY 11TH, 2004, AND EVEN ON

1 PAST WHEN THE CITY VOTED TO GO TO THE SECOND R F P THEY'RE
2 STILL WORKING ON TERMS

3 THE COURT HOW ABOUT WHAT MR NEWMAN THREW IN ABOUT THE
4 \$697,000?

5 MR DETWILER YEAH

6 THE COURT DO YOU OWE -- DO YOU OWE THEM ANYTHING?

7 MR DETWILER NO, SIR, AND I'M GLAD THAT MR NEWMAN
8 BROUGHT THAT UP BECAUSE IT IS PART OF OUR MOTION AND IT NEEDS
9 TO BE -- IT NEEDS TO BE RULED UPON BY THIS COURT IN OUR VIEW
10 LET'S BACK UP FOR JUST A MOMENT AND TALK ABOUT WHAT OCCURRED

11 IN JULY OF 2003 STEVENS & WILKINSON HAD DONE A SET OF
12 PLANS THAT THEY FELT WERE SUFFICIENT ENOUGH FOR TURNER TO DO
13 TAKE-OFFS AND THEN DO THE G M P , THE GUARANTEED MAXIMUM
14 PRICE THERE WAS DISCUSSION ABOUT -- THERE WERE ALL SORTS OF
15 OTHER MOVING PARTS GOING ON AT THAT TIME STEVENS &
16 WILKINSON CAME TO CITY COUNCIL AND SAID, "WE'RE PUTTING OUR
17 PENCILS DOWN WE'VE DONE ALL WE CAN DO AT THIS POINT IN TIME
18 UNTIL THESE OTHER MOVING PARTS ARE IN PLAY," AND THERE WAS
19 SOME DISCUSSION ABOUT WHETHER THAT WAS -- HOW LONG THAT WOULD
20 BE IT LOOKED LIKE THE BOND AT THAT POINT -- THE BOND ISSUE
21 AT THAT POINT WAS GOING TO CLOSE IN OCTOBER OF 2003

22 SO THE CITY COUNCIL -- SO STEVENS & WILKINSON MADE THIS
23 PROPOSAL THEY SAID "WE WILL CONTINUE WORKING FROM THIS
24 POINT FORWARD BUT YOU'VE GOT TO PAY US AND YOU'VE GOT TO PAY
25 US -- IT'S \$650 000 PLUS WE ESTIMATE IT MIGHT BE \$75,000 A

1 WEEK AFTER THAT " OKAY?

2 THE COURT DO WHAT WITH THE 75,000?

3 MR DETWILER JUST TO -- WELL, THAT'S WHAT THEY SAID
4 FOR -- TO CONTINUE THE WORK ON THE -- YOU KNOW, ON GETTING
5 THE PLANS TO MAYBE A BUILDABLE STAGE I THINK IS WHAT WE'RE
6 TALKING ABOUT THE CITY COUNCIL VOTED THIS THEY VOTED TO
7 APPROVE PAYMENT OF INTERIM ARCHITECTURAL FEES OF \$650,000
8 THEY MADE NO MENTION OF THE \$75,000 A WEEK WHATSOEVER

9 THE COURT HOW ABOUT -- WHY DID YOU PAY HIM 697?

10 MR DETWILER BECAUSE A BILL WAS PRESENTED AT THE END
11 OF THE DAY THAT RAN ACTUALLY THROUGH DECEMBER AND IT HAD
12 INTERIM ARCHITECTURAL FEES AND SOME OTHER COSTS ASSOCIATED
13 WITH IT

14 THE COURT SO Y'ALL JUST PAID IT

15 MR DETWILER AND IT WAS PAID IT WAS PAID AND
16 THAT'S -- THAT'S REALLY THE BEST EXPLANATION I CAN HAVE I
17 WOULD POINT OUT TO THE COURT THAT AT NO POINT SINCE THAT TIME
18 HAS A BILL, AN INVOICE, OR ANYTHING ELSE BEEN PRESENTED TO
19 THE CITY TO PAY \$75,000 A WEEK

20 THE COURT DID JUDGE MANNING MAKE A RULING THAT YOU
21 WERE OWED THE MONEY OR DID---

22 MR DETWILER WHAT JUDGE MANNING SAID IS THIS HE
23 CONFINED HIS RULING -- EVEN AFTER OUR 59(E) MOTION, HE
24 CONFINED HIS RULING TO THE EXISTENCE OF A CONTRACT THAT WAS
25 FORMED IN JULY WHEN THESE FOLKS MADE A PROPOSAL AND CITY

1 COUNCIL VOTED TO APPROVE \$650 000

2 THE COURT SO YOU PAID ONLY AFTER THAT ORDER WAS
3 ISSUED WHAT DID HIS ORDER MAKE YOU DO?

4 MR DETWILER OH, HIS ORDER DIDN'T MAKE US DO ANYTHING
5 LET ME BACK UP IN CONTEXT THIS WAS BEFORE THIS LITIGATION
6 EVER BEGAN

7 THE COURT RIGHT

8 MR DETWILER OCT -- EXCUSE ME JULY OF '03 THEY MAKE
9 A PROPOSAL THE SAME MONTH IT'S APPROVED BY CITY -- A
10 VERSION IS APPROVED BY CITY COUNCIL THEY APPROVED JUST
11 \$650 000 THEY PRESENT A BILL IN DECEMBER, NOT THROUGH --
12 AND IT WAS FOR FEES FROM JULY TO OCTOBER, IF I RECALL WHAT
13 EVERYBODY CONTEMPLATED AT THAT POINT IN DECEMBER THEY
14 PRESENT A BILL FOR \$697,000, AND IT WAS PAID PROMPTLY AT THAT
15 POINT

16 THE COURT SO IF IT WAS PAID BEFORE ANY LITIGATION
17 STARTED, WHAT DID JUDGE MANNING'S ORDER HAVE TO DO WITH
18 ANYTHING?

19 MR DETWILER WE'RE WONDERING THAT OURSELVES AND IT
20 WOULD -- WE'RE ASKING THE COURT TO DETERMINE -- ALL JUDGE
21 MANNING HAS FOUND IS THAT THERE WAS A CONTRACT A
22 CONTRACT---

23 THE COURT IN JULY OF '03

24 MR DETWILER A CONTRACT EXISTED WITH REGARD TO THAT
25 PAYMENT OF INTERIM ARCHITECTURAL FEES FOR \$650,000

1 THE COURT WHAT'S THE LEGAL IMPORT OF THAT IF IT HAD
2 ALREADY BEEN PAID? ARE THEY TRYING TO BOOTSTRAP SOMETHING?

3 MR DETWILER THEY'RE TRYING TO BOOTSTRAP -- WHAT
4 THEY'RE TRYING TO SUGGEST, AS I UNDERSTAND IT -- AND, QUITE
5 FRANKLY I THINK WE'RE ON THE SECOND OR THIRD AMENDED
6 COMPLAINT BUT I THINK WHAT THEY'RE TRYING TO SAY IS THAT
7 THAT WAS A CONTRACT AND THAT THE TERMS OF THAT CONTRACT MEANT
8 THAT WE HAD TO PAY THEM \$75,000 A WEEK UNTIL WHENEVER IT'S
9 A LITTLE UNCLEAR AS TO EXACTLY HOW LONG THAT WOULD HAVE GONE
10 ON I PRESUME---

11 THE COURT SO THEIR RISK IS PRETTY MUCH GONE

12 MR DETWILER PARDON?

13 THE COURT IS THEIR RISK PRETTY MUCH GONE IF THEY'VE
14 BEEN PAID \$700,000?

15 MR DETWILER THAT'S -- THAT WOULD BE OUR POINT YOU
16 KNOW WHAT THEY'RE SAYING IS THAT THAT WAS A DEAL THAT
17 CHANGED EVERYTHING AND AT THAT POINT THEY WERE NO LONGER AT
18 RISK -- THAT'S NOT WHAT HAPPENED -- THAT'S NOT WHAT THE --
19 DOCUMENTS REFLECT THAT'S NOT -- NOBODY SAID THAT AT THAT
20 POINT IN TIME ALL THEY SAID -- ALL WE -- AND, IN FACT, THIS
21 IS AN IMPORTANT POINT THE \$650 000, OR WHATEVER WAS PAID,
22 WAS TO BE CREDITED AGAINST WHATEVER FEE THEY ULTIMATELY WERE
23 TO RECEIVE UNDER THE SCHEME IF THE BONDS CLOSED THAT IS
24 CLEAR FROM WHAT WAS PROPOSED AND ALL THE CORRESPONDENCE THAT
25 WENT AROUND THAT TRANSACTION

1 AND SO, YOUR HONOR, WHAT WE ARE SUGGESTING TO YOU AS
2 PART OF OUR MOTION FOR SUMMARY JUDGMENT IS THAT IT IS CLEAR
3 THAT THERE WAS A -- THAT THERE WAS A PROPOSAL OF 650 PLUS 75
4 A WEEK AFTER THAT THE -- THERE WAS A COUNTER PROPOSAL BY
5 THE CITY THAT SAID, "OKAY WE'LL PAY YOU \$650,000," AND THEY
6 ACCEPTED THAT AND THEY PRESENTED A BILL, ALBEIT A LITTLE BIT
7 MORE, AND THAT BILL WAS PAID AT THE END OF THE DAY AND WE
8 HAVE FULFILLED THAT CONTRACT NOW, JUDGE MANNING'S RULING
9 DOES NOT GO THAT FAR AND WE'RE ASKING THIS COURT TO---

10 THE COURT YOU'RE SAYING IT STUMPS WHATEVER MIGHT BE
11 AVAILABLE UNDER THE M O U

12 MR DETWILER WE'RE SAYING THAT WITH REGARD TO THAT,
13 QUOTE, CONTRACT, IF, IN FACT, A CONTRACT WAS FORMED, THAT
14 THAT CONTRACT HAS BEEN FULFILLED THERE HAS BEEN NO BREACH
15 OF THAT CONTRACT

16 THE COURT ALL RIGHT

17 MR DETWILER AND I THINK THAT THAT IS SOMETHING
18 DIFFERENT THAN WHAT THEY'RE SUGGESTING UNDER THE M O U

19 THE COURT ALL RIGHT ANYTHING ELSE, MR DETWILER?

20 MR DETWILER I WOULD JUST POINT OUT THAT -- AND I
21 CAN'T REMEMBER WHICH OF THESE GENTLEMEN SAID IT BUT I THINK
22 MAYBE MR NEWMAN SAID THAT THERE WAS A LOT OF CONFLICTING
23 TESTIMONY WHAT IS THE CONFLICTING TESTIMONY? THERE REALLY
24 ISN'T ANY CONFLICTING TESTIMONY WITH REGARD TO THE MODELS,
25 WITH REGARD TO THE CHANGES IN THE MODELS, WITH REGARD TO THE

1 AGREEMENTS THAT WERE STILL IN PLAY, THE ESSENTIAL TERMS THAT
2 WERE NOT DEFINED THERE'S NO CONFLICTING TESTIMONY ABOUT
3 THAT, AND THEY HAVE YET TO TELL US WHAT THE ESSENTIAL TERMS
4 WERE TO THIS SO-CALLED CONTRACT THAT THEY WANT TO NOW HAVE
5 THIS COURT SEND TO THE JURY SUMMARY JUDGMENT IS
6 APPROPRIATE, YOUR HONOR WE WOULD ASK THAT IT BE GRANTED ON
7 BEHALF OF THE CITY

8 THE COURT HAVE YOU -- HAS THE CITY BEEN SUED FOR
9 CONSPIRACY BY ANYBODY?

10 MR DETWILER NO SIR

11 THE COURT ALL RIGHT WHO'S BEEN -- AUGHTRY'S BEEN
12 SUED FOR CONSPIRACY?

13 MR DETWILER AUGHTRY HAS BEEN SUED FOR CONSPIRACY BUT
14 NOT THE CITY

15 THE COURT AND I KNOW THERE'S A CASE THAT SAYS THAT
16 SOMEONE WHO CONSPIRES WITH ANOTHER PARTY TO DO SOMETHING THAT
17 THE OTHER PARTY HAS A LEGAL RIGHT TO DO CAN'T BE HELD LIABLE
18 FOR CONSPIRACY I KNOW THERE'S A CASE THAT SAYS THAT I
19 DON'T REMEMBER THE NAME OF IT, BUT ARE Y'ALL FAMILIAR WITH
20 THAT CASE?

21 MR DETWILER I'M FAMILIAR WITH THE CONCEPT AND I, YOU
22 KNOW

23 MR WARD YOUR HONOR, I THINK BEFORE THE COURT TODAY -
24 WE HAVEN'T REACHED IT YET - IS A MOTION BY THE AUGHTRY
25 DEFENDANTS FOR SUMMARY JUDGMENT AND TO DISMISS THE CONSPIRACY

1 CLAIM

2 THE COURT IS THAT YOUR -- THAT'S YOUR CAUSE OF ACTION,
3 MR HINSON?

4 MR HINSON YES, YOUR HONOR, THAT---

5 THE COURT I DON'T WANT TO DISCUSS IT NOW, BUT YOU'RE
6 THE ONLY ONE THAT'S FILED THE CONSPIRACY CAUSE OF ACTION?

7 MR HINSON YES, SIR, AND WE WERE -- ACTUALLY, THERE'S
8 A -- THERE'S A RECENT CASE THAT CAME OUT ON AUGUST 12TH OF
9 THIS YEAR FROM THE SOUTH CAROLINA COURT OF APPEALS, AND AFTER
10 READING THAT CASE WE HAVE DECIDED TO WITHDRAW OUR CONSPIRACY
11 CAUSE OF ACTION HOWEVER, I WOULD ASK THAT OUR -- THE BRIEF
12 WE FILED AND THE EXHIBITS TO THE BRIEF STILL BE BEFORE YOU
13 FOR CONSIDERATION ON ALL THESE OTHER ISSUES

14 THE COURT WHAT'S THE NAME OF THE NEW CASE?

15 MR HINSON THE NAME OF THE NEW CASE IS HACKWORTH,
16 H-A-C-K-W-O-R-T-H, VERSUS HAMMETT H-A-M-M-E-T-T

17 THE COURT WHAT'S IT SAY?

18 MR HINSON WELL, IT GOES THROUGH SOME OF THE ISSUES
19 WITH CONSPIRACY AND DISCUSSES THAT THE -- AMONG OTHER THINGS
20 THAT THE CONSPIRACY ALLEGED HAS TO BE SEPARATE AND THE FACTS
21 OF THE CONSPIRACY ALLEGED HAVE TO BE DIFFERENT FROM ANY OTHER
22 -- OTHER UNDERLYING CAUSES OF ACTION

23 THE COURT LIKE THE INTENTIONAL INTERFERENCE WITH A
24 CONTRACT

25 MR HINSON ESSENTIALLY, YES, SIR WE---

1 THE COURT ALL RIGHT OKAY THAT'S ALL I NEED ON THAT
2 RIGHT NOW

3 MR HINSON AGAIN, YOUR HONOR, I WOULD ASK THAT THE
4 EXHIBITS STILL BE BEFORE YOU FOR CONSIDERATION

5 THE COURT AND -- ALL RIGHT

6 MR WARD IF I MAY APPROACH I HAVE A COPY OF A CASE
7 FOR YOUR HONOR

8 THE COURT OKAY NOW, MR PAUL AND MR WARD, ANY --
9 ANYTHING ELSE OTHER THAN WHAT MR DETWILER HAS STATED IN
10 RESPONSE TO THEIR ARGUMENTS TO THIS POINT?

11 MR PAUL YES, SIR, I HAVE A FEW POINTS AND I ALWAYS
12 GET DRAWN WHEN IT'S TIME TO GO EAT SO I CAN---

13 THE COURT BETTER THAN BEING RIGHT AFTER

14 MR PAUL ALL RIGHT THAT'S FINE I'LL DO IT AS
15 QUICKLY AS I CAN

16 THE COURT AND, BY THE WAY, WOULD THIS BE A LOGICAL
17 PLACE TO STOP AFTER MR PAUL FINISHES OR DO YOU WANT A BRIEF
18 OPPORTUNITY TO RESPOND EVEN THOUGH THEY'RE THE MOVING PARTY
19 AND THEY HAVE THE RIGHT TO HAVE THE LAST WORD?

20 MR NEWMAN I WOULD LIKE A BRIEF OPPORTUNITY TO
21 RESPOND, YOUR HONOR

22 THE COURT ALL RIGHT

23 MR NEWMAN IT WILL TRULY BE BRIEF AS OPPOSED TO MY
24 BRIEFS WHICH WERE NOT

25 THE COURT OKAY ALL RIGHT MR PAUL?

1 MR PAUL ALL RIGHT YOUR HONOR THE REPLY ARGUMENT
2 AND THE RESPONSE ARGUMENT AND THE RESPONSE BRIEFS WE SAY HAVE
3 GOT A NUMBER OF DIVERSIONS IN THEM THAT FROM A STRATEGIC
4 STANDPOINT ARE, WE THINK DESIGNED TO CREATE FACT ISSUES
5 WHERE WE SAY THERE ARE NONE THE ARGUMENT OF INTENT HERE I
6 THINK THE LAW IS CLEAR THAT IT DOESN'T MATTER HOW MUCH
7 PARTIES INTEND TO MAKE A CONTRACT IF THE PAPER THEY SIGN IS
8 NOT A CONTRACT ON ITS FACE OR IF IT FAILS FOR OTHER REASONS,
9 INTENT DOESN'T SAVE A FAILED CONTRACT

10 SO IF A PIECE OF PAPER IS AN UNENFORCEABLE AGREEMENT TO
11 AGREE IT DOES NOT MATTER HOW MUCH YOU -- BOTH PARTIES INTEND
12 FOR IT TO BE A CONTRACT THERE STILL HAS TO BE A CERTAINTY
13 THERE STILL MUST BE CONSIDERATION THERE STILL MUST BE
14 MUTUAL ASSENT AND SO ALL OF THE ARGUMENTS ABOUT INTENT THAT
15 ARE MADE IN THE RESPONSE BRIEF AND THE RESPONSE HERE WE SAY
16 DO NOT MEET THE ARGUMENT THAT THIS IS AN UNENFORCEABLE
17 AGREEMENT TO AGREE AND DO NOT MEET THE ARGUMENT THAT THE FIVE
18 OR SIX AGREEMENTS THAT WE HAVE ENUMERATED ARE ALL CONDITIONS
19 PRECEDENT IN THAT THEY MUST COME INTO EXISTENCE TO TRIGGER
20 IMMEDIATE PERFORMANCE REQUIREMENTS, AND THAT'S SEPARATE FROM
21 INTENT AND SO FACT ISSUES THAT ARE DESIGNED TO TALK ABOUT
22 INTENT DON'T MEET THE ARGUMENTS THAT WE'RE PRESENTING, AND SO
23 I WANT TO TRY TO MAKE THAT AS CLEAR AS I CAN BECAUSE NONE OF
24 THAT -- NONE OF THAT MATTERS ON THE ARGUMENTS THAT WE'RE
25 MAKING

1 SO THE CITATION -- THEY CITED THE CASE OF PRESTWICK GOLF
2 CLUB WHICH IS AN INTENT CASE INVOLVING TEE TIMES BETWEEN
3 PRIVATE COUNTRY CLUB MEMBERS AND PUBLIC MEMBERS AND THE --
4 YOU CAN'T GET ANY MORE BITTER THAN PEOPLE FIGHTING OVER TEE
5 TIMES, BUT THEY WERE -- THEY WERE HAVING AT IT

6 THE COURT YEAH, YOU CAN RETIREE HOMEOWNER
7 ASSOCIATIONS---

8 MR PAUL THAT'S RIGHT BUT THESE PEOPLE ARE MOSTLY
9 RETIRED, SO YOU'VE GOT THE BEST OF BOTH WORLDS THERE WAS AN
10 AGREEMENT ON ALLOCATING TEE TIMES BETWEEN PRIVATE AND PUBLIC
11 PEOPLE AND THE AGREEMENT HAD IN IT WORDS THAT SAID THE
12 POLICY IS FLEXIBLE AND CAN BE CHANGED THE TRIAL COURT
13 GRANTED SUMMARY JUDGMENT SAYING NO AGREEMENT -- AN AGREEMENT
14 TO AGREE IS NOT ENFORCEABLE THE COURT OF APPEALS REVERSED
15 SAYING THERE COULD BE AN ISSUE OF FACT FOR THE JURY ON
16 WHETHER OR NOT THE POLICY WAS REALLY INTENDED TO SAY -- THE
17 POLICY STATEMENT WAS REALLY INTENDED TO SAY, WELL, WE CAN
18 CHANGE THIS IF WE BOTH AGREE TO CHANGE IT, BUT IF WE DON'T,
19 THIS IS THE DEAL

20 BUT THE POINT IS THAT HAS -- THAT INTENT CASE DOES NOT
21 MEET THE ARGUMENTS THAT WE'RE MAKING, AND WE'RE SAYING
22 ARGUMENTS ABOUT INTENT ARE DIVERSIONARY HERE IN TERMS OF THE
23 MOTION FOR---

24 THE COURT SO WHETHER -- THE ARGUMENTS CONCERNING
25 INTENT DON'T TOUCH UPON MR DETWILER'S POSITION THAT IT'S A

1 SLAM DUNK IF IT'S NOT FEASIBLE TO US, IT'S JUST NOT
2 FEASIBLE DOES MY QUESTION MAKE ANY SENSE?

3 MR PAUL I WANT TO BE SURE I UNDERSTAND IT BEFORE I
4 ANSWER IT BUT---

5 THE COURT THEY TALK ABOUT INTENT, INTENT, INTENT
6 IT'S A FACTUAL ISSUE MR DETWILER SAID THAT WHETHER OR NOT
7 IT'S FEASIBLE, A FEASIBLE PROJECT, IS FOR THE CITY TO
8 DETERMINE

9 MR PAUL RIGHT

10 THE COURT PERIOD

11 MR PAUL I---

12 THE COURT THAT DOESN'T HAVE ANYTHING TO DO WITH
13 INTENT

14 MR PAUL THAT HAS NOTHING TO DO WITH INTENT IT HAS
15 TO DO WITH THAT DETERMINATION THE -- THERE'S ANOTHER --
16 THERE WAS ANOTHER WE SAY DIVERSIONARY ARGUMENT MADE IN THE
17 BRIEF AND HERE TODAY ABOUT SUBSEQUENT ACTS OF THE PARTIES IN
18 TERMS OF PERFORMANCE, AND THE CONTENTION IS THAT YOU CAN LOOK
19 AT WHAT THE VARIOUS PARTIES DID AFTER APRIL 17 WHEN THE
20 M O U WAS SIGNED AND FROM THAT LOOKING AT SUBSEQUENT ACTS TO
21 DETERMINE WHETHER OR NOT THERE WAS AN AGREEMENT

22 WELL, THE CASE THEY CITED IN THEIR BRIEF THAT THEY
23 DIDN'T CITE HERE WAS A CASE CALLED WRIGHT AGAINST TRASK
24 IT'S A GRANDFATHER/GRANDSON CASE WHERE THE GRANDFATHER MADE A
25 DEAL WITH HIS GRANDSON THAT IF YOU QUIT YOUR JOB AND COME

1 BACK AND MANAGE THE RANCH, I'LL LEAVE THE RANCH TO YOU AND
2 ALL THE COWS AND ALL THE EQUIPMENT THEN HE WENT ALL OVER
3 THE COUNTY TELLING EVERYBODY THAT HE KNEW THAT HE HAD MADE
4 THAT DEAL, THAT IS, THAT HE HAD MADE A DEAL WITH HIS
5 GRANDSON COME BACK, COME HOME RUN THE RANCH, AND I'LL
6 LEAVE IT TO YOU TOLD EVERYBODY THAT WOULD LISTEN AND THEN
7 ULTIMATELY GOT IN A SPAT WITH HIS GRANDSON AND TRIED TO
8 RENEGE ON AN ORAL AGREEMENT TO MAKE A WILL

9 NOW, IN THE MEANTIME THERE WAS A SUBSEQUENT PERFORMANCE
10 OF AN ORAL CONTRACT WHICH CAME IN ON THE ISSUE OF STATUTE OF
11 FRAUDS AND THERE WAS ADMISSIONS AGAINST INTEREST THAT WERE
12 ADMISSIBLE UP UNDER THE HEARSAY RULE WHERE HE ADMITTED A
13 CONTRACT BECAUSE THIS WAS AN ORAL CONTRACT WELL, THAT CASE
14 -- AND THERE WAS ANOTHER ONE VERY SIMILAR TO -- AN ORAL
15 CONTRACT TO MAKE A WILL CASE WAS CITED NEITHER OF THOSE
16 CASES AND ARGUMENTS ABOUT SUBSEQUENT ACTS OF PERFORMANCE CAN
17 MAKE A CONTRACT THAT IS UNENFORCEABLE AT THE OUTSET BECOME
18 ENFORCEABLE UNLESS THERE'S SOME OTHER FURTHER AGREEMENT, BUT
19 JUST SAYING THAT YOU'VE GOT SOMETHING AFTER YOU SIGN
20 SOMETHING THAT IS UNENFORCEABLE DOES NOT MAKE IT ENFORCEABLE

21 AND SO WE THINK, JUST LIKE THE INTENT ARGUMENT, THE
22 ARGUMENT THAT THERE HAVE BEEN SUBSEQUENT ACTS OF PERFORMANCE
23 -- WELL, AS MR DETWILER JUST SAID, THE M O U DID REQUIRE
24 THE DEVELOPER TO GO FORWARD WITH PRELIMINARY -- OR THE
25 DESIGNER TO GO FORWARD WITH PRELIMINARY DESIGN WORK BECAUSE

1 THEY COULDN'T GET A PRICE TO DETERMINE THE BONDS UNTIL THEY
2 GOT SOME PRELIMINARY DESIGN WORK DONE FOR WHICH THEY GOT
3 PAID THEY NEVER GOT PAID FOR THAT BUT THAT DOES NOT MEAN
4 THAT -- THE FACT THAT YOU HAD SUBSEQUENT PERFORMANCE IN TERMS
5 OF EVERYBODY DOING WHAT YOU DO ON A CONTINGENT BASIS TO TRY
6 TO MAKE A DEAL HAPPEN, THAT DOES NOT MEAN THAT THE ULTIMATE
7 DEAL IS AN ENFORCEABLE DEAL JUST BECAUSE PEOPLE WERE WORKING
8 TRYING TO GET TO THE GATE -- TO GET OUT OF THE GATE TO START
9 THE PROJECT AND THERE'S---

10 THE COURT AND YOU'RE SAYING ALL OF THAT IS SUSCEPTIBLE
11 OF A RULING AS A MATTER OF LAW

12 MR PAUL YES, SIR I AM SAYING THAT BECAUSE THE --
13 WE'RE SAYING, AS WE'VE ARGUED TODAY, THAT THE M O U IS AN
14 AGREEMENT TO AGREE, AND THE CONDUCT OF THE PARTIES, TO THE
15 EXTENT IT IS CONSIDERED, CANNOT CHANGE THE FACT THAT THIS IS
16 AN AGREEMENT TO AGREE AND IT CANNOT CHANGE THE FACT THAT EVEN
17 IF THAT RAISED A FACT ISSUE -- AND THAT GOES TO THE COURT'S
18 QUESTION TO ME ABOUT AREN'T -- MY ARGUMENT ABOUT
19 UNENFORCEABLE AGREEMENT TO AGREE AND MY ARGUMENT ABOUT
20 FAILURE OF CONDITIONS PRECEDENT ARE THE SAME MY ANSWER WAS
21 IF YOU WERE TO FIND THERE'S SOME FACT ISSUE ON THE FRONT END
22 ON AN AGREEMENT TO AGREE OR BECAUSE OF THESE ARGUMENTS ABOUT
23 SUBSEQUENT PERFORMANCE, THEN WHEN YOU GET TO THE BACK END
24 THE CONDITIONS PRECEDENT THAT TRIGGER PERFORMANCE, THESE ALL
25 -- THESE GO TO THE HEART OF IT

1 THE THIRD WE SAY DIVERSIONARY ARGUMENT -- IT'S GETTING
2 CLOSER TO BEING PERTINENT, BUT THE THIRD ARGUMENT THAT
3 ULTIMATELY IS A DIVERSION IS BASED ON THE APERM CASE I THINK
4 IS THE WAY THEY PRONOUNCE IT BUT THE COURT ASKED THE
5 QUESTION ABOUT THE AGREEMENT TO AGREE ARGUMENT AND WHY THIS
6 WASN'T AN AGREEMENT TO AGREE, AND MR NEWMAN SAID THE ANSWER
7 TO THAT WAS THE APERM CASE

8 NOW, THE APERM CASE IS A -- THE COURT SAID IT WAS
9 FAMILIAR WITH IT, SO I WON'T TAKE LONG THE APERM CASE IS A
10 ROYALTY CASE WHERE THE GUY INVENTED SOME COMPOUND HE PUT ON
11 ROOFS THEY AGREED TO PAY \$4800 A MONTH ROYALTY TO GET TO A
12 STARTING POINT, LIKE SOME DATE IN 1981, AND THEN AT THAT
13 POINT THE MAN'S NAME WAS ROOF WHO WAS DOING THE ROOF STUFF,
14 BUT MR ROOF WAS SUPPOSED TO PRESENT A MARKETING AND A
15 MANAGEMENT PLAN TO COMPLY WITH THE WRITTEN SPECIFIC
16 GUIDELINES WITHIN THE AGREEMENT, AND IF THEY COULD NOT AGREE
17 ON THE WRITTEN MANAGEMENT MARKETING PLAN AS TO WHETHER THEY
18 ~~COMPLIED OR NOT, THAT WOULD BE ARBITRARY~~

19 ALL RIGHT NOW, THAT FACT IS NOT WHAT WE HAVE HERE AND
20 THAT CASE CERTAINLY DOES NOT SUPPORT THE IDEA THAT YOU DON'T
21 HAVE TO HAVE AN AGREEMENT, AS THEY SAY, ON MINOR DETAILS
22 WE'RE NOT TALKING ABOUT MINOR DETAILS AND WHAT WE'RE SAYING
23 ARE THE FOUNDATION ARGUMENTS HERE IN MR CORRADO'S GRAPHIC
24 AND IN THE M O U -- BUT MORE IMPORTANTLY THE APERM CASE WAS
25 A CASE -- THERE WAS NO UNCERTAINTY ABOUT WHAT THE MAN WOULD

1 GET PAID \$4800 A MONTH AND THERE WAS NO UNCERTAINTY ABOUT
2 THE WRITTEN GUIDELINES THAT WERE IN THE CONTRACT THE
3 QUESTION WAS IF YOU PRESENTED SOMETHING DIFFERENT HOW
4 WOULD THAT GET RESOLVED? IT WOULD GET RESOLVED BY A THIRD-
5 PARTY ARBITRATION WHICH IS WHAT ARBITRATORS DO

6 AND SO THAT IS A VERY DIFFERENT SITUATION HERE THAN
7 HILTON SITTING DOWN WITH ANYONE IN THE THREE AGREEMENTS IT'S
8 NEGOTIATING AND NOT BEING ABLE TO REACH AN AGREEMENT ON THE
9 JOINT USE OF PARKING OR NOT BEING ABLE TO REACH AN AGREEMENT
10 ON EXECUTIVE COMPENSATION FOR THE OPERATING AGREEMENT OR NOT
11 BEING ABLE TO REACH AN AGREEMENT WITH THE CONVENTION CENTER
12 ON ROOM BLOCK AGREEMENTS I MEAN, IT'S NOT A MATTER OF
13 SOMEBODY SAYING THESE ARE THE GUIDELINES AND IF YOU DON'T --
14 IF YOU CAN'T WORK IT OUT, THE ARBITRATOR IS GOING TO DECIDE
15 THAT, LET IT GO TO ARBITRATION THAT'S NOT WHAT THIS IS
16 AND SO THE APERM CASE, WE SAY GIVES HIM NO RELIEF AND GIVES
17 HIM NO PLACE TO HIDE ON THE ARGUMENT THAT THIS M O U IS AN
18 UNENFORCEABLE AGREEMENT TO AGREE

19 NOW THE COURT ASKED A QUESTION AND I FORGET THE EXACT
20 WORDING OF THE QUESTION, BUT THE ANSWER WAS IN THE MCPETERS
21 CASE, MCPETERS AGAINST YEARGIN, AND THE POINT OF THEIR
22 REFERENCE TO THAT IS---

23 THE COURT I ASKED MR DETWILER -- OR MR DETWILER
24 ASKED HIM, "WELL, WHAT WAS THE AGREEMENT?"

25 MR PAUL THAT'S RIGHT

1 THE COURT AND HE SAID, "MY ANSWER WAS MCPETERS "

2 MR PAUL MCPETERS ALL RIGHT AND I'M HAVING A

3 LITTLE BIT OF TROUBLE FOLLOWING THAT, BUT MCPETERS IS ONE OF

4 THE TWO OR THREE CASES THE PLAINTIFFS ARE USING TO TRY TO

5 CHANNEL OUR ARGUMENT THAT ON A -- ON A BROAD BASE NONE OF THE

6 FOUNDATION DOCUMENTS EVER -- WERE NOT EXECUTED AT THE TIME OF

7 THE M O U , NEVER GOT EXECUTED, THAT THE PLAINTIFFS ARE

8 TRYING TO CHANNEL THIS ENTIRE GROUP OF AGREEMENTS THAT ARE

9 THE FOUNDATION FOR THE BOND ISSUE INTO A DISPUTE ABOUT PRICE

10 WELL THE DISPUTE HERE IS NOT ABOUT PRICE I MEAN

11 THERE IS NO PRICE THAT IS OWED IF THERE'S NO AGREEMENT TO PAY

12 THE PRICE AND SO WE'RE NOT TALKING ABOUT A 7 25 PERCENT,

13 THE RIGHT PERCENTAGE OF SOME NUMBER, OR IS THE 4 25 PERCENT

14 THE RIGHT PERCENTAGE OF SOME NUMBER? THAT'S NOT WHAT THE

15 CASE IS ABOUT THE CASE IS ABOUT IS THERE AN AGREEMENT

16 THAT EVEN GETS YOU TO THE RIGHT TO GET ANY PRICE?

17 AND SO THE IDEA OF TRYING TO TURN THIS INTO A DISPUTE

18 ABOUT PRICE WE SAY--IS ANOTHER OFF-POINT-DIVERSION --I MEAN

19 WE'VE GOT -- THE ENTIRE TRANSACTION IS A BUNCH -- IS SEVERAL

20 INTERDEPENDENT, INTERRELATED AGREEMENTS, AND PRICE IS ONE OF

21 THE THINGS BUT THAT IS NOT WHAT THE DISPUTE IS ABOUT HERE

22 THE DISPUTE IS IS THIS AN ENFORCEABLE AGREEMENT?

23 AND SO THE MCPETERS CASE THAT -- I MEAN THE ONLY THING

24 MCPETERS SAYS IS THE PEOPLE IN SOUTH CAROLINA ARE BUILDING A

25 PULPWOOD PLANT IN MONROEVILLE, ALABAMA AND THEY GOT BEHIND

1 AND SO THEY TELL ALL THE EMPLOYEES, "STAY WITH US WE'VE GOT
2 TO MAKE THE TIME LINE WE'LL MAKE OUR PROFIT IF WE MAKE THE
3 TIME LINE IF WE MAKE THE TIME LINE ON THE PRODUCTION OF THE
4 PULPWOOD PLANT, WE'LL GIVE Y'ALL A SIX-MONTH BONUS "

5 SO GUESS WHAT? THEY MADE THE TIME LINE THEY GOT THE
6 PROFIT THEY DIDN'T PAY MCPETERS THE JURY GAVE MCPETERS
7 \$10,000 HE MADE 21 TO 23,000 A YEAR, DEPENDING ON THE YEAR
8 SO IT WAS DEAD CENTER IN THE RANGE OF EVIDENCE HE GOT 10 ON
9 A \$21,000 TO \$23 000 SALARY, AND THE COURT OF APPEALS
10 AFFIRMED SAYING THAT THIS IS AN ORAL CONTRACT IT'S A
11 DISPUTE ABOUT THE CONTRACT, AND YOU'RE INSIDE THE RANGE OF
12 EVIDENCE

13 WELL, THAT HAS -- I DON'T UNDERSTAND HOW THAT IS AN
14 ANSWER TO ANYTHING MUCH LESS A QUESTION OF WHAT ARE THE
15 TERMS OF THE CONTRACT? AND MR DETWILER WAS SAYING IF THIS
16 IS -- IF THIS IS REALLY A REAL DEAL, THEN LOOK AT THE M O U
17 AND TELL US ALL OF THE ANSWERS TO ALL OF THE QUESTIONS THAT
18 HALF THE LAWYERS IN SOUTH CAROLINA SPENT NEARLY A YEAR TRYING
19 TO NEGOTIATE I MEAN, TELL US THE ANSWERS FROM THE M O U ,
20 AND THERE IS NO ANSWER FROM THE M O U , AND MCPETERS HAS
21 NOTHING TO DO WITH ANSWERING THAT QUESTION AND IT'S A
22 SIMPLE DISPUTE OF EVIDENCE ON AN ORAL CONTRACT CASE WHERE THE
23 VERDICT IS INSIDE THE RANGE OF EVIDENCE, THAT'S ALL IT IS
24 AND SO WE SAY THAT GOES NOWHERE

25 THEN THERE WAS AN ARGUMENT HERE TODAY THAT NONE OF THESE

1 CONTRACTS ARE MATERIAL, THAT IS, THAT THESE ARE ALL
2 TANGENTIAL ALL OF THESE CONTRACTS THAT ARE ON MR CORRADO'S
3 BOARD AND ALL THE ONES THAT WE'VE ALREADY ARGUED ABOUT TODAY,
4 MR DETWILER AND I, ARE NOT MATERIAL THEY'RE TANGENTIAL
5 AGREEMENTS AND I DON'T KNOW WHAT RESPONSE WE CAN MAKE ABOUT
6 THAT OTHER THAN THAT REALLY -- I DON'T BELIEVE ANYONE CAN
7 READ THE M O U AND UNDERSTAND THE EVIDENCE THAT'S BEEN CITED
8 AND SAY WITH CREDIBILITY THAT THESE ARE TANGENTIAL DOCUMENTS
9 THAT DON'T MAKE ANY DIFFERENCE I MEAN THESE DOCUMENTS GO
10 TO THE HEART OF THE TRANSACTION AND ARGUMENTS ABOUT
11 MATERIALITY WE SAY REALLY ARE WITHOUT ANY MERIT AT ALL
12 AND FINALLY THE COURT HAD ASKED, I BELIEVE MR NEWMAN
13 THE QUESTION THE DEFENDANTS ARGUE THAT EVERYTHING LEADS TO
14 THE BOND ISSUE, DO YOU AGREE? AND I NEVER HEARD THE ANSWER
15 TO THAT WE SAY THAT IS RIGHT WE DO ARGUE THAT, AND THAT'S
16 WHAT MR CORRADO'S CHART SHOWS IS A STRAIGHT-UP LINE LEADING
17 TO THE BOND ISSUE THAT'S WHAT THE M O U SAYS IS THE
18 STARTING POINT FOR THE PROJECT, AND THAT'S WHAT NEVER
19 HAPPENED IT DIDN'T HAPPEN NOT ONLY BECAUSE OF ALL OF THE
20 THINGS THAT MR DETWILER TALKED ABOUT IT DIDN'T HAPPEN
21 BECAUSE NONE OF THE UNDERLYING AGREEMENTS WERE EXECUTED AND
22 NEVER GOT EXECUTED THANK YOU
23 THE COURT THANK YOU MR PAUL ALL RIGHT
24 ANYTHING -- HOW MUCH WILL WE HAVE TO DO THIS AFTERNOON BEFORE
25 I COME TO YOU, MR NEWMAN? IS THERE GOING TO BE ANYTHING

1 LEFT FOR THIS AFTERNOON?

2 MR WARD YES, SIR, YOUR HONOR THERE IS THE MOTION TO
3 AMEND

4 THE COURT ALL RIGHT

5 MR PAUL WE'VE GOT A MOTION ON THE SECOND CAUSE WHICH
6 IS INTERFERENCE WITH A PROSPECTIVE CONTRACT RELATION WE
7 HAVE A SUMMARY JUDGMENT MOTION ON THAT

8 THE COURT ALL RIGHT ALL RIGHT MR NEWMAN, DO YOU
9 WANT TO RESPOND VERY BRIEFLY TO ANYTHING THESE GENTLEMEN
10 BROUGHT UP?

11 MR NEWMAN VERY BRIEFLY AND I DISAGREE WITH MR
12 PAUL'S LAST POINT EVERYTHING DOES NOT -- DOES NOT HINGE ON
13 THE BOND ISSUE WHAT HINGES ON THE BOND ISSUE IS AN
14 ACTIVATION OF THE CONDITIONS SUBSEQUENT THE BAIL-OUT
15 CLAUSE, THE ESCAPE CLAUSE, WHATEVER YOU WANT TO CALL IT, THE
16 FEASIBILITY PROVISION -- AND THAT'S HOW ALL THIS BOND STUFF
17 IS SHOE-HORNED IN THIS ARGUMENT IT'S REALLY GOT NOTHING TO
18 DO WITH THE INTENT TO CONTRACT AND INDEFINITENESS OF THE
19 CONTRACT

20 THE CASE WHICH I CITED WHICH TALKS ABOUT WHAT IS A
21 MATERIAL TERM SAYS THAT IT HAS TO DEAL WITH WHETHER OR NOT
22 THE JURY IS GOING TO BE ABLE TO -- WHETHER OR NOT THE JURY IS
23 GOING TO HAVE A REASONABLE BASIS TO AFFORD THE PLAINTIFF --
24 WHETHER OR NOT THEY CAN SIT DOWN WITH A NOTEPAD AND SKETCH
25 OUT SOMETHING MY RESPONSE TO MR DETWILER IN ANSWER TO THAT

1 QUESTION YOU'VE GOT A CONTRACT THE COMPENSATION OF WHICH
2 IS BUILT ON A FLOATING G M P TERM WHICH IS COMMON WITHIN THE
3 TRADE IN WHICH WE'RE OPERATING, AND THE COMPENSATION OF EACH
4 PARTY IS BASED ON A PERCENTAGE OF THAT FLOATING REALITY NOW
5 -- AND JUST BRIEFLY IN RESPONSE TO---

6 THE COURT THE -- AND THAT STANDS FOR THE ESTIMATED
7 PRICE OF THE BUILDING

8 MR NEWMAN CORRECT

9 THE COURT ALL RIGHT I UNDERSTAND -- AND YOUR FEE IS
10 WHAT? 7 25?

11 MR NEWMAN YES, SIR THAT'S CORRECT

12 THE COURT OF THAT FIGURE

13 MR NEWMAN RIGHT

14 THE COURT LET'S JUST ASSUME THAT THAT CAN BE -- COULD
15 BE ESTABLISHED IN FRONT OF A JURY TO SOME DEGREE OF
16 CERTAINTY

17 MR NEWMAN CORRECT

18 THE COURT AND THEY COULD MAKE A -- THEY COULD TAKE A
19 CALCULATOR OR SOMEBODY COULD DO IT LONGHAND ARE YOU SAYING
20 THAT THEY WOULD HAVE TO PAY YOU THAT EVEN IF THE PROJECT --
21 EVEN IF THE M O U ITSELF WAS NOT A BINDING DOCUMENT?

22 MR NEWMAN NO, SIR THE QUESTION OF THE REASONABLE
23 CERTAIN BASIS FOR AFFORDING A REMEDY GOES TO WHETHER OR NOT
24 IT WAS A BINDING DOCUMENT IS WHAT I'M SAYING DOES THAT MAKE
25 SENSE?

1 THE COURT AND IF THERE WAS SO MUCH CLUTTER TO BE
2 UNCLUTTERED FOR THEM, ALL THOSE THINGS ON THEIR CHART OVER
3 THERE, YOU'RE SAYING THAT'S STILL THE CASE

4 MR. NEWMAN SURE THE CLUTTER THAT'S BEEN BEFORE THE
5 COURT TODAY GOES TO THE FEASIBILITY ISSUE ONCE WE GO TO
6 TRIAL ON THIS CASE, ALL THIS STUFF COMES IN AS WELL YOU
7 KNOW, THE BONDS WEREN'T GOING TO CLOSE OR, YOU KNOW, THE --
8 HAVE THE PAR VALUE OF THE BONDS GONE UP TOO MUCH? AND SO
9 IT'S CLEARLY NOT A FEASIBLE ISSUE SO IT DOESN'T GO TO
10 WHETHER OR NOT THE CONTRACT WAS DEFINITE OR NOT TO BE
11 ENFORCED, AND THAT'S THE POINT I WAS TRYING TO---

12 THE COURT YOU'RE SAYING IT'S DEFINITE ENOUGH FOR YOU

13 MR. NEWMAN RIGHT, AND I THINK THAT'S A GOOD POINT

14 THE COURT THEY'RE SAYING IT'S NOT DEFINITE ENOUGH FOR
15 THEM

16 MR. NEWMAN RIGHT

17 THE COURT WELL, THEY'VE GOT A LOT MORE THINGS TO MAKE
18 DEFINITE THAN YOU YOU'VE GOT 7 25 PERCENT OF X WHICH YOU
19 SAY IS DETERMINABLE

20 MR. NEWMAN AND, YOU KNOW, THE CITY---

21 THE COURT AND THEY'VE GOT 7 25 PERCENT OF X BUT
22 WE'VE GOT TO GET ALL A , B , C THROUGH J DONE BEFORE WE CAN
23 BE OBLIGATED TO PAY THAT 7 25 PERCENT

24 MR. NEWMAN WELL, NUMBER ONE IF IT'S NOT DEFINITE
25 ENOUGH TO THEM, THE PROBLEM IS THEY DRAFTED THE AGREEMENT AND

1 -- I MEAN, BUT THE SECOND PROBLEM IS -- WELL, THERE ARE
2 NUMEROUS PROBLEMS THE VARIOUS AGREEMENTS THAT THEY'RE
3 ARGUING MY PEOPLE WEREN'T A PART OF I THINK TURNER MIGHT
4 HAVE BEEN A PART OF ONE OF THEM, BUT THE TESTIMONY IS THAT
5 THE MAJOR ISSUES TO THESE AGREEMENTS WERE SOLVED BUT
6 ANOTHER ISSUE, JUDGE, THAT WE'LL TALK ABOUT---

7 THE COURT SOLVABLE THAT'S MS GROFT?

8 MR NEWMAN I THINK MR LUMPKIN TESTIFIED THAT THERE
9 WAS A MEETING OF THE MINDS THAT'S THE TERM HE USED AND---

10 THE COURT I DON'T CARE -- REALLY CARE WHAT HE'S GOT TO
11 SAY I MEAN, I RESPECT HIS---

12 MR NEWMAN RIGHT

13 THE COURT ---OPINIONS AS A BUSINESSMAN, BUT IF HE CAN
14 MAKE ALL THESE DETERMINATIONS Y'ALL JUST GO TO HIM

15 MR NEWMAN WELL SURE I MEAN---

16 THE COURT WHATEVER HE THINKS ABOUT THE DOCUMENT IS
17 EDUCATIONAL, BUT WHETHER OR NOT HE THINKS IT IS OR ISN'T A
18 ~~CONTRACT OR WHETHER OR NOT THERE'S A---~~ SUCH AND SUCH WAS THE
19 CASE IS NOT BINDING AT ALL ON ME EXCEPT FROM A DETERMINATION
20 OF SOME UNDERLYING FACTS

21 MR NEWMAN RIGHT, AND THAT'S WHAT I -- I WOULD
22 CERTAINLY NOT PRESENT MR LUMPKIN'S CONCLUSIONS AS BINDING,
23 BUT WHAT I WOULD PRESENT THEM AS IS EVIDENCE OF INTENT AND

24 THE COURT ALL RIGHT

25 MR NEWMAN I'LL LEAVE THAT ALONE MR PAUL MENTIONED

1 THAT I RELY ON THE PRESTWICK CASE ACTUALLY, THE ONE THAT I
2 RELY ON THAT'S PARAMOUNT IS THE WORLEY CASE WHICH STATED THAT
3 CONDITIONS PRECEDENT MAY NOT BE IMPLIED WHERE IT MIGHT HAVE
4 BEEN PROVIDED FOR BY THE EXPRESS AGREEMENT CERTAINLY THOSE
5 WERE PROVIDED FOR WITHIN THE CONTRACT YOU'VE GOT THE
6 QUESTION OF FEASIBILITY THAT'S WHY THE QUESTION OF
7 FEASIBILITY IS A CONDITION SUBSEQUENT, NOT A CONDITION
8 PRECEDENT HE'S NOT MADE AN ARGUMENT THAT IT IS A CONDITION
9 PRECEDENT I THINK I SHOULD PROBABLY ADDRESS THE STEVENS &
10 WILKINSON SPECIFIC ISSUE OF JUDGE MANNING'S ORDER WHICH---

11 THE COURT YEAH, AND THEN WE'LL STOP FOR LUNCH THERE

12 MR. NEWMAN YES, SIR THE ORDER HAS BEEN ATTACHED TO
13 THE REPLY MEMORANDUM CORRECT ME IF I'M WRONG

14 THE COURT WELL, SOMEBODY IS GOING TO HAVE TO PULL IT
15 OUT BECAUSE I'VE GOT SO MANY THINGS UP HERE NOW THAT I'VE
16 PULLED APART EVERYTHING IS ATTACHED TO SOMETHING THE
17 MEMOS ARE SHORT, BUT THE ATTACHMENTS ARE FRANKLY TOO LONG TO
18 READ

19 MR. NEWMAN RIGHT

20 THE COURT SO THEY SAY THAT THAT'S JUST A SEPARATE DEAL
21 AND YOU'VE BEEN PAID AND IT MAKES NO DIFFERENCE ON THIS CASE

22 MR. NEWMAN AND THAT'S AN ARGUMENT THAT THEY BROUGHT
23 BEFORE JUDGE MANNING, BUT JUDGE MANNING DECLINED TO GO THEIR
24 WAY SO, NUMBER ONE THIS IS JUST REHASHING SOMETHING THAT'S
25 ALREADY BEEN ESTABLISHED AS THE LAW OF THE CASE

1 THE COURT THEN WHY ARE WE ARGUING THESE MOTIONS IF
2 HE'S ALREADY RULED ON THEM?

3 MR NEWMAN WELL AS TO THE 650 ISSUE, THE JULY 30TH,
4 2003, VOTE BY CITY COUNCIL TO AWARD FUNDS TO STEVENS &
5 WILKINSON DESPITE THE FACT THAT THE BONDS HAD NOT CLOSED IN
6 FACT, I BELIEVE, IF I'M NOT MISTAKEN, WHAT JUDGE MANNING'S
7 ORDER STATES IS THAT THE FACT THAT 697 WAS AWARDED INSTEAD OF
8 650 IS ON ITS FACE EVIDENCE THAT EVEN IF THE AGREEMENT WAS
9 LIMITED TO 650, IT WAS SUBSEQUENTLY MODIFIED BY THE PARTIES
10 SO SUMMARY JUDGMENT WOULD BE INAPPROPRIATE ON THAT ISSUE SO
11 THERE'S A---

12 THE COURT SO THERE'S A SEPARATE CAUSE OF ACTION FOR
13 THE WEEKLY PAYMENT?

14 MR NEWMAN YES, SIR

15 THE COURT SO IF YOU'RE ENTITLED TO A WEEKLY PAYMENT
16 HOW ARE YOU ENTITLED TO 7 25 PERCENT?

17 MR NEWMAN BECAUSE THE WEEKLY PAYMENT, AS IT WAS
18 ENVISIONED BETWEEN THE CITY AND STEVENS & WILKINSON, WOULD
19 HAVE BEEN PULLED OUT FROM WHAT STEVENS & WILKINSON WOULD HAVE
20 GOTTEN AT THE END OF THE DAY

21 THE COURT SO YOU'RE GETTING YOUR CAKE AND EATING IT
22 TOO

23 MR NEWMAN THAT WAS PART OF THE AGREEMENT WHAT
24 STEVENS & WILKINSON HAD DONE WAS THEY HAD DONE EVERYTHING
25 THAT WAS NECESSARY TO ACHIEVE THE G M P THEY WERE NOT

1 WILLING TO DO ANY MORE WORK AT RISK

2 THE COURT HOW MUCH -- HOW MUCH MORE ARE YOU ENTITLED
3 TO?

4 MR NEWMAN I DON'T HAVE THE FIGURE

5 THE COURT \$500,000? A MILLION?

6 MR NEWMAN IT'S -- I THINK IT'S OVER A MILLION
7 DOLLARS I KNOW WE'VE TALKED ABOUT IT BEFORE

8 THE COURT WELL, I'M NOT GOING TO -- I'M NOT GOING TO
9 FIDDLE WITH ALL THAT TODAY

10 MR NEWMAN NO SIR

11 THE COURT IS THAT A MOTION BEFORE ME?

12 MR DETWILER YOUR HONOR, I THINK IT IS PART AND PARCEL
13 OF OUR MOTION FOR SUMMARY JUDGMENT, YES, SIR

14 THE COURT I JUST DON'T REMEMBER READING ANYTHING ABOUT
15 THAT

16 MR DETWILER I THINK JUDGE MANNING -- WELL WHEN WE
17 WROTE OUR ORIGINAL BRIEF, JUDGE MANNING HAD NOT RULED ON THE
18 59(E) MOTION THAT MOTION HAS ONLY RECENTLY BEEN RULED ON
19 AS MR NEWMAN POINTS OUT, JUDGE MANNING SAID A LOT OF THINGS
20 IN THERE, BUT THE ONE THING HE DID SAY IS THIS RULING IS
21 CONFINED TO THE EXISTENCE OF A CONTRACT

22 THE COURT IN JULY OF '03

23 MR DETWILER IN JULY OF '03

24 THE COURT DOESN'T HAVE ANYTHING TO DO WITH THE M O U

25 MR DETWILER DOESN'T HAVE ANYTHING TO DO WITH THE

1 M O U EXCEPT---

2 THE COURT PROVIDED---

3 MR DETWILER ---EXCEPT THAT -- NO I BELIEVE -- LET ME
4 BACK UP I WILL SAY THAT IT DOES HAVE A LOT TO DO WITH THE
5 M O U IN THIS RESPECT IT IS CLEAR AND I DON'T THINK THERE
6 REALLY IS ANY DISPUTE ABOUT THIS, THAT WHATEVER WAS PAID WITH
7 RESPECT TO THE JULY AGREEMENT, LET'S CALL IT -- WHATEVER WAS
8 PAID WITH RESPECT TO THAT AGREEMENT WAS TO BE DEDUCTED FROM
9 AND CREDITED AGAINST WHATEVER THEY MIGHT GET PURSUANT TO WHAT
10 MIGHT COME FROM THE M O U DEAL AND THAT'S CLEAR FROM WHAT
11 WAS ULTIMATELY PROPOSED AND THE CORRESPONDENCE BETWEEN TURNER
12 AND S AND W BECAUSE TURNER HAD TO SIGN OFF ON THAT

13 THE COURT ALL RIGHT

14 MR DETWILER AND SO, YES, THEY ARE INTERRELATED BUT
15 IT'S -- IT WAS A SEPARATE DEAL IN JULY

16 THE COURT OKAY ALL RIGHT ANYTHING ELSE?

17 MR NEWMAN AND I WOULD JUST ADD BRIEFLY TO THAT THAT
18 IT'S ALSO RELEVANT AS A SUBSEQUENT ACT THAT SHOWS THE INTENT
19 OF THE PARTIES WITH REGARD TO WHETHER OR NOT THE CONTRACT WAS
20 BINDING INITIALLY AND THE CASE OF ARMSTRONG VERSUS COLLINS,
21 JUDGE, WHICH WAS A RECENT CASE OUT OF THE COURT OF APPEALS
22 DOES ESTABLISH THAT SUBSEQUENT ACTS ARE ADMISSIBLE TO SHOW
23 EVIDENCE OF INTENT TO ENTER INTO A CONTRACT AND FURTHER
24 ESTABLISHES LITERALLY THAT WHETHER OR NOT -- IF THERE WAS
25 COMPETING EVIDENCE AS TO WHETHER OR NOT THE PARTIES INTENDED

1 TO ENTER INTO A CONTRACT, THAT EVIDENCE MUST BE SUBMITTED TO
2 A JURY AND I'LL LEAVE IT AT THAT

3 THE COURT ALL RIGHT OKAY WHAT TIME DO YOU WANT TO
4 START BACK?

5 MR DETWILER AND YOUR HONOR, WHEN WE COME BACK THE
6 CITY DOES HAVE SOME ADDITIONAL MOTIONS WITH REGARD TO THE
7 OTHER CAUSES OF ACTION QUANTUM MERUIT AND ESTOPPEL HAVE
8 BEEN ASSERTED AGAINST THE CITY WE HAVE NOT ARGUED THOSE
9 YET MR NEWMAN SORT OF TOUCHED ON THAT JUST A MOMENT AGO,
10 BUT WE INTEND TO ARGUE THOSE, IF WE MAY

11 THE COURT ALL RIGHT HOW LONG -- HOW MANY HOURS ARE
12 WE GOING TO NEED TO WORK THIS AFTERNOON? I'M JUST TRYING --
13 AND I'M NOT LOOKING FOR ANYTHING THAT'S ARTIFICIALLY LOW I
14 JUST REALLY WANT TO KNOW

15 MR DETWILER HONESTLY THE TWO MOTIONS WITH THE CITY I
16 BELIEVE ARE FAIRLY BRIEF QUANTUM MERUIT AND---

17 THE COURT I MEAN, WHAT DO YOU MEAN BY THAT MINUTES-
18 WISE?

19 MR DETWILER THIRTY MINUTES?

20 THE COURT OKAY

21 MR DETWILER FOR MY ARGUMENT MAYBE LESS

22 THE COURT ALL RIGHT THAT'S TOTAL

23 MR DETWILER YES, SIR

24 THE COURT OR APIECE

25 MR DETWILER THAT WOULD BE MY ARGUMENT I DON'T KNOW

1 WHAT REPLY THEY MAY HAVE

2 THE COURT OKAY LET'S JUST SAY -- LET'S JUST SAY
3 THAT'S AN HOUR

4 MR DETWILER OKAY

5 THE COURT WHAT ELSE DO WE HAVE? AND, MR PAUL, ARE
6 YOU GOING TO BE TALKING ABOUT THAT?

7 MR PAUL NO, SIR NO, SIR, I'M NOT IN THAT AT ALL
8 MR WARD IS OFF THE HOOK ON THE THIRD -- ON THE CONSPIRACY
9 CLAIM BECAUSE THEY'VE WITHDRAWN THAT, AND THEN I'VE GOT A
10 SUMMARY JUDGMENT MOTION ON THE SECOND CAUSE WHICH IS
11 INTERFERENCE WITH PROSPECTIVE CONTRACT RELATIONS I THINK --
12 I WOULD THINK OPENING WOULD -- I SHOULD BE ABLE TO DO IT IN
13 30 MINUTES

14 THE COURT SO WE'LL BE -- WE'LL BE -- THREE HOURS THIS
15 AFTERNOON WOULD BE PLENTY OF TIME TOTAL?

16 MR DETWILER YES SIR

17 THE COURT ALL RIGHT

18 MR DETWILER I WOULD THINK

19 THE COURT ALL RIGHT JUST -- WE'RE IN COLUMBIA WHICH
20 INVOLVES WALKING AND OPENING CAR DOORS AND SO FORTH LET'S
21 JUST COME BACK AT 2 15 DOES THAT SUIT EVERYBODY?

22 MR DETWILER YES, SIR

23 MR KALISH YES, YOUR HONOR

24 THE COURT OKAY THANK YOU

25 (WHEREUPON, A LUNCH BREAK WAS TAKEN)

1 THE COURT ALL RIGHT KEEP YOUR SEATS ALL RIGHT

2 MR DETWILER, ARE YOU UP AGAIN?

3 MR DETWILER I RECKON SO, YOUR HONOR, IF YOU'LL ALLOW
4 ME

5 THE COURT ALL RIGHT

6 MR DETWILER WELL, NO ACTUALLY BEFORE WE CHANGE
7 GEARS, MR FOSTER WOULD LIKE TO HAVE A WORD WITH THE COURT,
8 IF POSSIBLE

9 THE COURT ALL RIGHT

10 MR FOSTER YOUR HONOR, WHAT I'D LIKE TO DO IS ADDRESS
11 SOME OF THE ISSUES THAT MR HINSON RAISED ABOUT HILTON BUT
12 MORE SPECIFICALLY THIS GARFIELD E-MAIL I'D LIKE TO REALLY
13 HAVE THEM -- AS YOU SAID, THEY DON'T WANT TO TALK ABOUT IT,
14 SO I WENT AHEAD---

15 THE COURT NO I DIDN'T SAY THAT I'M JUST SAYING
16 NOBODY TALKED ABOUT IT TODAY, BUT ANYWAY

17 MR FOSTER WELL, WHAT I'D LIKE TO DO IS HAND UP FOR
18 THE COURT -- SO WE WILL ALL KNOW THE PART THAT HE READ TO
19 YOU WAS NOT THE PART THAT WE RELIED ON IN OUR BRIEF

20 THE COURT RIGHT

21 MR FOSTER AND SO I HAVE HIGHLIGHTED FOR EVERYONE'S
22 BENEFIT EXACTLY WHAT WE'RE TALKING ABOUT IN THE CONTEXT OF
23 THIS E-MAIL AND WE'VE ATTACHED THAT TO OUR BRIEF BUT, YOUR
24 HONOR, I KNOW YOU'VE GOT A LOT OF PAPERWORK SO WHAT WE'RE
25 DOING WITH THIS E-MAIL IS ESSENTIALLY TRYING TO ADVISE THE

1 COURT THAT THE E-MAIL WAS CIRCULATED

2 IF YOU LOOK AT THE VERY BOTTOM, IT STARTS FROM THE
3 SECRETARY AT GARFIELD TRAUB, KATHY DECARLUCCI, AND SHE IS
4 SIMPLY THE -- THE CITY OF COLUMBIA HAS NOW AWARDED THE EDENS
5 & AVANT/GARFIELD TEAM THE RIGHT TO NEGOTIATE AND THIS WAS IN
6 DECEMBER OF '02 AND I THINK IT WAS THIS EXACT DATE,
7 DECEMBER 11TH, '02 SO THE GARFIELD TEAM IS ASKING THE
8 QUESTION IS IT APPROPRIATE OR NECESSARY TO PREPARE THE
9 REGULAR TEAMING AGREEMENT FOR ALL THE OTHER PARTIES? SO
10 THEIR OFFICE IS TALKING ABOUT DO WE WANT TO ENTER INTO THIS
11 TEAMING AGREEMENT?

12 NOW, THE PART OF THE E-MAIL THAT WE HAVE BEEN RELYING
13 ON, I'VE HIGHLIGHTED IT IT'S THE E-MAIL FROM GREG GARFIELD
14 HE WAS VERY INVOLVED IN THIS PROJECT HE SIMPLY WAS NOT A
15 SHAREHOLDER OF THE GARFIELD TRAUB, BUT HE WAS VERY INVOLVED
16 AND HE CONTINUED TO BE INVOLVED AND HE HAS STATED IN THE
17 LAST SENTENCE OF THE FIRST PARAGRAPH "FURTHERMORE, WE'LL
18 WANT THE FLEXIBILITY TO REPLACE HILTON ONLY IF ABSOLUTELY
19 NECESSARY, AND TURNER," ONE OF THE OTHER PLAINTIFFS IN THIS
20 CASE, AGAIN ONLY IF ABSOLUTELY NECESSARY, "SO WE DON'T WANT
21 TO HAVE TO MAKE ANY COMMITMENTS TO THEM AT THIS JUNCTURE "
22 NOW, THAT'S THE SENTENCE THAT WE'VE HIGHLIGHTED IN OUR
23 BRIEFS MR HINSON DID NOT READ THAT SENTENCE TO THE COURT
24 THE IMPORTANCE OF THIS, YOUR HONOR, HAS NOTHING TO DO
25 WITH THE M O U THIS WAS SIX MONTHS BEFORE THE M O U WE

1 RAISED THIS BECAUSE OF THE SECONDARY ARGUMENTS THAT HILTON
2 HAS MADE IN THE COMPLAINT AGAINST THE -- THAT GARFIELD HAS
3 MADE IN THEIR COMPLAINTS AGAINST HILTON GARFIELD IS THE
4 ONLY PLAINTIFF THAT SUED HILTON THE ARCHITECTS DIDN'T SUE
5 US, TURNER DIDN'T SUE US AND THE BASIS OF THE CLAIMS
6 AGAINST HILTON IS THEY HAD AN EXCLUSIVE RELATIONSHIP --
7 GARFIELD HAD AN EXCLUSIVE RELATIONSHIP WITH HILTON WHERE
8 HILTON WASN'T ALLOWED TO TALK TO MR AUGHTRY WE WEREN'T
9 ALLOWED TO SUPPORT ANYTHING WITH MR AUGHTRY

10 SO THEY HAVE THIS -- THE WHOLE BASIS OF THEIR CLAIM
11 AGAINST HILTON IS HILTON WAS EXCLUSIVELY ON OUR TEAM AND
12 WHAT THEY'VE SAID WITH THAT IS, NUMBER ONE, THE M O U IS A
13 BINDING CONTRACT WELL, THERE'S -- THAT'S AN ISSUE THAT THE
14 COURT WILL RULE ON ONE WAY OR THE OTHER NUMBER TWO THEY
15 SAID EVEN IF THE M O U IS NOT A BINDING CONTRACT WE HAD AN
16 ORAL CONTRACT WITH HILTON ON EXCLUSIVITY TERMS AND SO WHAT
17 WE'VE DONE---

18 MR HINSON YOUR HONOR, I'M SORRY I OBJECT TO THIS
19 WE DISCUSSED THIS MATTER AT LENGTH ABOUT A MONTH AGO, AND I
20 DIDN'T MAKE ANY ARGUMENTS AS TO THE HILTON MOTION I MERELY
21 WAS REFERENCING SOME OF THE LAW IN MY REPLY BRIEF REGARDING
22 THE HILTON MOTION I DON'T THINK WE NEED TO GET INTO TODAY
23 THE EXCLUSIVE RELATIONSHIP CLAIMS BETWEEN GARFIELD TRAUB AND
24 HILTON THAT IS -- THAT'S A MATTER THAT WE HAVE PRESENTED TO
25 YOU ALREADY

1 THE COURT OKAY THAT'S OVERRULED GO AHEAD, MR
2 FOSTER

3 MR FOSTER SO, YOUR HONOR, THE PURPOSE OF THE E-MAIL
4 WHICH THIS COURT HAS INVITED US TO ADDRESS IS THAT THERE IS
5 NO ORAL CONTRACT OF EXCLUSIVITY, AND IN OUR MEMOS WE CITED
6 THE PAROL EVIDENCE RULE AND GARFIELD'S RESPONSE TO THAT
7 SAID, "WELL, IF YOU CAN FIND WRITINGS THAT CONFIRM AN ORAL
8 AGREEMENT THEN THE WRITINGS CAN OVERCOME THE PAROL
9 EVIDENCE " THIS WAS THE ONLY WRITING IN THIS CASE THAT
10 MENTIONS EXCLUSIVITY AND IT'S WE DON'T WANT TO BE EXCLUSIVE
11 WITH HILTON

12 SECONDLY, THE ENTIRE BASIS OF THEIR SECOND CAUSE OF
13 ACTION BREACH OF CONTRACT ACCOMPANIED BY FRAUD, WAS THE
14 FRAUDULENT CONDUCT WAS WE DEALT WITH OTHER PEOPLE OTHER THAN
15 GARFIELD, AND WE WERE FRAUDULENT FOR DOING THAT DUE TO
16 EXCLUSIVITY SO THIS E-MAIL ADDRESSES THE ORAL CONTRACT AND
17 BREACH OF CONTRACT ACCOMPANIED BY FRAUD I JUST WANTED TO
18 CLARIFY THAT FOR THE COURT BECAUSE YOU SPECIFICALLY ASKED A
19 QUESTION AND THE PART OF THE E-MAIL THAT WE THINK IS
20 RELEVANT WAS NOT BROUGHT TO THE COURT'S ATTENTION

21 THE COURT ALL RIGHT OKAY ALL RIGHT SO---

22 MR NEWMAN JUDGE, JUST TO NOTE FOR THE RECORD AND TO
23 SECOND MR HINSON'S OBJECTION WITH THE GREATEST RESPECT TO MY
24 FRIEND, MR FOSTER, WE WOULD OBJECT TO THE INCLUSION OF ANY
25 OF HIS ARGUMENTS OR EXHIBITS AS IT PERTAINS TO MOTIONS FOR

1 SUMMARY JUDGMENT AGAINST STEVENS & WILKINSON

2 THE COURT WELL, YOU DON'T HAVE ANY SUIT AGAINST THEM

3 MR NEWMAN CORRECT IN OTHER WORDS, HE'S NOT A MOVANT
4 AGAINST MY PARTY

5 THE COURT RIGHT ALL RIGHT SO, MR DETWILER, WHAT'S
6 THE NEXT MOTION?

7 MR DETWILER ACTUALLY I'M GOING TO, IF THE COURT WILL
8 ALLOW, ASK MR PAUL TO PRESENT HIS MOTION WITH REGARD TO THE
9 TORTIOUS INTERFERENCE WITH A PROSPECTIVE AND CONTRACTUAL
10 RELATIONSHIP

11 THE COURT ALL RIGHT MR PAUL?

12 MR PAUL YES, SIR YOUR HONOR, THIS MOTION IS
13 DIRECTED AT THE SECOND CAUSE OF ACTION WHICH IS INTERFERENCE
14 WITH PROSPECTIVE CONTRACT RELATIONS IT ASSUMES -- BOTH
15 THEIR CLAIM, THE SECOND CAUSE, AND OUR MOTION ASSUME THAT
16 INSIDE OF THE SECOND CAUSE THERE'S NO ALLEGATIONS OF A
17 BINDING CONTRACT OTHERWISE, YOU WOULDN'T HAVE A CLAIM FOR
18 INTERFERENCE WITH PROSPECTIVE CONTRACT RELATIONS, AND THAT
19 DOES MAKE A DIFFERENCE ON SOME POINTS OF ANALYSIS BUT THIS
20 IS A -- THIS IS A CLAIM, AS WE UNDERSTAND IT, ABOUT WHICH THE
21 PLAINTIFFS BASICALLY SAY, "ALL RIGHT IF THERE IS NO
22 CONTRACT, THEN IN THE ALTERNATIVE WE HAD PROSPECTIVE CONTRACT
23 RELATIONS," AND THE QUESTION IS CAN THEY GET TO THE JURY ON
24 THAT KIND OF CLAIM?

25 THE ELEMENTS OF THIS CASE ARE SET OUT IN THE SUPREME

1 COURT, SOUTH CAROLINA'S 1990 DECISION IN CRANDALL AGAINST
2 NAVISTAR---

3 COURT REPORTER I'M SORRY REPEAT THAT

4 MR PAUL CRANDALL, C-R-A-N-D-A-L-L, AGAINST NAVISTAR
5 AND THERE ARE -- THEY'VE BEEN REITERATED ONLY A FEW TIMES
6 ONE OF THE MOST -- ONE OF THE MOST RECENT ONES, UNITED
7 EDUCATIONAL DISTRIBUTORS, THAT WE CITED BUT BASICALLY THE
8 SOUTH CAROLINA SUPREME COURT SAID THERE ARE THREE ELEMENTS TO
9 THIS KIND OF CLAIM ONE IS INTENTIONAL INTERFERENCE WITH A
10 PLAINTIFF'S POTENTIAL CONTRACT RELATIONS TWO, FOR AN
11 IMPROPER PURPOSE AND, THREE, CAUSING INJURY TO THE PLAINTIFF
12 SO THOSE ARE THE THREE ELEMENTS THAT THE COURT SAID ARE
13 NECESSARY TO ALLEGE AND TO PROVE THERE'S BEEN A LITTLE BIT
14 OF GLOSS ON EACH ONE OF THOSE BUT NOT MUCH BECAUSE THERE'S
15 NOT A LOT OF CASE MADE LAW ON THIS FAIRLY NEW TORT IN SOUTH
16 CAROLINA

17 ON THE QUESTION OF POTENTIAL OR PROSPECTIVE CONTRACT,
18 ~~THE CASES ARE SAYING THAT THE PLAINTIFF DOES NOT HAVE TO~~
19 IDENTIFY A SPECIFIC CONTRACT THAT'S THE REASON YOU'RE
20 ALLEGING A PROSPECTIVE CONTRACT SO YOU DON'T HAVE TO IDENTIFY
21 A SPECIFIC CONTRACT, THOUGH I THINK IT'S THE UNITED CASE THAT
22 GOES THROUGH -- IN FACT, MOST OF THESE ARE SITUATIONS WHERE
23 THERE IS A SPECIFICALLY-IDENTIFIED CONTRACT IT'S JUST THEY
24 COULDN'T GET THERE ON THE CONTRACT

25 BUT IN ANY EVENT, YOU DON'T HAVE TO IDENTIFY A SPECIFIC

1 CONTRACT, BUT YOU DO HAVE TO SHOW THAT YOU HAVE A SUFFICIENT
2 INTEREST IN THE CONTRACT BEING NEGOTIATED TO BE ENTITLED TO
3 PROTECTION ON IT AND THE DISTINCTION THE COURT SEEMED TO BE
4 MAKING IS THAT A CONTRACT IS HELD TO BE A SPECIFIC PROPERTY
5 RIGHT, AND IT IS BEING INTERFERED WITH IN A CLAIM FOR
6 TORTIOUS INTERFERENCE

7 A POTENTIAL CONTRACT IS A LESSER RIGHT, BUT YOU STILL
8 MUST HAVE SOME PROTECTABLE INTEREST, AND THAT TRANSLATES INTO
9 - I THINK IT'S THE UNITED CASE - INTO WHAT THE COURT IS
10 SAYING IS A REASONABLE EXPECTATION IN TERMS OF THE IMPROPER
11 PURPOSE THAT YOU'VE GOT TO SHOW, THE CRANDALL CASE, WHICH WAS
12 THE INITIAL SUPREME COURT DECISION THAT GAVE SOUTH CAROLINA
13 THIS CLAIM, STATED THAT THE IMPROPER PURPOSE MUST
14 PREDOMINATE, THAT IS, THAT IF THE ACTING DEFENDANT HAS MORE
15 THAN ONE PURPOSE, THE IMPROPER PURPOSE THAT IS ALLEGED MUST
16 PREDOMINATE ANY OTHER PURPOSE AND THAT'S STATED SPECIFICALLY
17 IN CRANDALL, 395 SOUTHEAST SECOND AT 180

18 AND THEN, THIRD, THE GLOSS ON CAUSATION WHICH IS THE
19 THIRD PRONG, THAT IS, THAT THE DEFENDANT'S ACTION MUST CAUSE
20 INJURY TO THE PLAINTIFF, UNITED EDUCATIONAL TESTING THAT I
21 CITED TO THE COURT HAS SPECIFICALLY HELD THAT IT IS A BUT-FOR
22 CAUSATION TEST, AND THAT CAME UP IN THE MOST DIRECT AND
23 GRAPHIC WAY IT COULD THAT IS, IN UNITED EDUCATIONAL
24 DISTRIBUTING THE DEFENDANT MADE A 12(B)(6) MOTION UNDER SOUTH
25 CAROLINA RULES, AND THE PLAINTIFF HAD GIVEN -- HAD BEEN GIVEN

1 TWO CHANCES TO AMEND THE COMPLAINT WHEN IT CAME BEFORE THE
2 COURT FOR A THIRD AMENDMENT, THE PLAINTIFF STILL HAD NOT
3 ALLEGED -- NOT -- APPARENTLY NOT BEEN ABLE TO ALLEGE BUT-FOR
4 CAUSATION, AND THE TRIAL COURT DISMISSED AND THE COURT OF
5 APPEALS -- THE SUPREME COURT AFFIRMED

6 SO IT IS CLEAR NOW THAT THE CAUSATION IS A BUT-FOR
7 CAUSATION WHICH YOU MUST SHOW THAT IS, YOU'VE GOT TO SHOW
8 INTENTIONAL INTERFERENCE WITH A POTENTIAL CONTRACT, DONE FOR
9 AN IMPROPER PURPOSE, AND YOU MUST SHOW BUT-FOR CAUSATION, AND
10 THOSE ARE THREE INDEPENDENT ELEMENTS AND WE ARE APPROACHING
11 THOSE THREE INDEPENDENTLY IN OUR MOTION HERE

12 THE COURT ALL RIGHT

13 MR PAUL NOW, THE -- ON THE POINT OF POTENTIAL
14 CONTRACT, WE SAY THAT THE PLAINTIFFS HERE CANNOT SHOW A
15 REASONABLE EXPECTATION FOR THE CONTRACT AND THERE ARE A
16 COUPLE OF REASONS FOR THAT THE FIRST REASON IS THAT THE
17 CONTRACT ON WHICH THE -- OR THE POTENTIAL CONTRACT ON WHICH
18 THE PLAINTIFFS ARE RELYING AND PROFOUNDING IS ONE THAT WAS
19 NEVER APPROVED BY THE LEGISLATIVE BODY, THAT IS, BY THE CITY
20 COUNCIL OF COLUMBIA

21 WE HAVE LOOKED -- THERE'S NO SOUTH CAROLINA CASE ON THIS
22 EITHER WAY WE'VE ACTUALLY NOT FOUND A CASE THAT DIRECTLY
23 ADDRESSES THIS ANYWAY THERE MAY BE ONE, BUT CERTAINLY WE'VE
24 NOT FOUND ONE IN CAROLINA, SOUTH CAROLINA, TO THIS POINT
25 EITHER WAY BUT OUR CONTENTION IS THAT IF YOU'RE -- IF

1 YOU'RE DEALING WITH THE GOVERNMENT, YOU CANNOT MEET THE
2 ELEMENT OF REASONABLE EXPECTATION WHICH IS THE FIRST PRONG IN
3 A PROSPECTIVE -- INTERFERENCE WITH PROSPECTIVE CONTRACT IF
4 THE PROSPECTIVE RELATION YOU'RE DEALING WITH IS A RELATION
5 WITH A GOVERNMENT, LEGISLATIVE BODY, BECAUSE NOBODY CAN HAVE
6 A REASONABLE EXPECTATION IN WHAT ACTION A LEGISLATIVE BODY
7 WILL TAKE AND THAT'S WHERE THE -- THAT'S WHERE THE
8 PLAINTIFFS ARGUE, AND IT'S UNFORTUNATE THERE'S NO LAW EITHER
9 WAY ON IT, AT LEAST NONE THAT WE CAN FIND EITHER WAY
10 BUT -- BUT WHEN YOU -- WHEN YOU THINK ABOUT IT, IF AN
11 ENTITY PRIVATE ENTITY, DEALING WITH A GOVERNMENTAL BODY CAN
12 HAVE NEGOTIATIONS WITH THE STAFF PEOPLE THAT ARE WORKING
13 UNDER THE DIRECTION OF A LEGISLATIVE BODY OR THE GOVERNMENT
14 AND ALONG THE WAY DEALING WITH WHOEVER THEY'RE DEALING WITH
15 WITHOUT A GOVERNMENT LEGISLATIVE ACTION, THAT IS, WITHOUT A
16 RESOLUTION OF A STATUTE OR AN ORDINANCE AND IF PEOPLE CAN
17 DEAL WITH STAFF AND SOMEHOW DEVELOP AN EXPECTATION, THEN ANY
18 OTHER PERSON THAT IS TRYING TO TAKE OPPOSING ACTION WITH THE
19 GOVERNMENT, TOO, IS GOING TO BE RUNNING IN DANGER OF
20 INTERFERING WITH SOME KIND OF CLAIM OF PROSPECTIVE CONTRACT
21 RELATIONS AND THIS GOES BACK PARTLY TO THE NOERR-PENNINGTON
22 ARGUMENT THAT WE'VE ALREADY MADE, BUT IT INVOLVES AN OVERLAY
23 OF THE NEW TORT IN SOUTH CAROLINA OF INTERFERENCE WITH
24 PROSPECTIVE CONTRACT RELATIONS IN DEALING WITH GOVERNMENT
25 ENTITIES, AND AS FAR AS WE KNOW THERE'S NO CASE IN SOUTH

1 CAROLINA THAT DEALS WITH THIS

2 BUT WE'RE SAYING THAT IN THE FIRST PRONG OF OUR ARGUMENT
3 ON NO REASONABLE EXPECTATION ABSENT A LEGISLATIVE ORDINANCE
4 OR A STATUTE OR BY WHATEVER MEANS THE GOVERNMENT OPERATES, IF
5 THE GOVERNMENT HAS NOT EXERCISED ITS LEGISLATIVE AUTHORITY TO
6 AUTHORIZE THE CONDUCT OF THE PEOPLE THAT YOU'RE DEALING WITH
7 IN TERMS OF THE CONTRACT THAT YOU'RE CLAIMING YOU'VE GOT AN
8 EXPECTATION IN---

9 THE COURT WELL THEY'RE SAYING THAT THE FEBRUARY 11
10 VOTE IN ESSENCE DID CREATE IT WITH ENOUGH CERTAINTY

11 MR PAUL WE ARE CERTAINLY SAYING THAT AUGHTRY IS
12 CERTAINLY SAYING THAT BECAUSE THAT IS A NONPROFIT
13 CORPORATION, AND TO THAT POINT THE CITY HAS GOT SOME OF THIS
14 IN THEIR BRIEF ALSO ON THE ESTOPPEL ISSUE I THINK THAT THE
15 COURT WILL HEAR LATER, BUT THE MAYOR OR THE CITY MANAGER OR
16 THE INDIVIDUAL COUNCIL PERSONS ACTING INDIVIDUALLY OR SITTING
17 AROUND TALKING AT THE COFFEE SHOP OR EVEN VOTING FOR THE
18 NONPROFIT BOARD WE SAY ARE NOT THE BODY POLITIC OF THE CITY
19 OF COLUMBIA THEY'RE NOT ANSWERABLE IN THEIR PRIVATE LIVES
20 AND THEY'RE NOT ANSWERABLE AS A BOARD OF THE NONPROFIT TO THE
21 VOTERS, AND THEY'RE NOT SUBJECT TO THE PUBLIC HEARING
22 REQUIREMENTS AND THEY'RE NOT SUBJECT TO OPEN RECORDS LAWS AND
23 OTHER THINGS

24 AND SO, YES, SIR, THE ANSWER IS THAT WE SAY THE ACTIONS
25 THAT THE CITY COUNCIL MEMBERS TOOK ACTING AS THE BOARD OF THE

1 NONPROFIT IS NOT AN AUTHORIZATION AND CANNOT GIVE RISE TO A
2 REASONABLE EXPECTATION IN TERMS OF WHAT IS GOING ON HERE
3 BECAUSE WHAT IS GOING ON HERE IN THE M O U IS WHAT WE'VE
4 ALREADY TALKED ABOUT TODAY WHERE THE CITY OF COLUMBIA
5 ULTIMATELY HAS TO GET ON THE HOOK FOR THE DEBT SERVICE AND
6 GET ON THE HOOK FOR THE CREDIT ENHANCEMENT AND GET ON THE
7 HOOK FOR THE BONDS AND THE BOND ISSUE HAS TO HAPPEN

8 AND SO WHAT WE'RE SAYING IS QUITE SIMPLY IF -- IF YOU'RE
9 DEALING WITH A GOVERNMENT, THEN -- AND THE GOVERNMENT THAT
10 YOU'RE DEALING WITH IS THE LEGISLATURE AND NOT SOME OTHER
11 PART OF THE GOVERNMENT, THEN YOU CAN'T HAVE A REASONABLE
12 EXPECTATION ARISING OUT OF YOUR DEALINGS IF THE GOVERNMENT---

13 THE COURT IF YOU'RE DEALING---

14 MR PAUL IF YOU'VE GOT---

15 THE COURT YOU CAN'T HAVE A REASONABLE EXPECTATION OF
16 ANYTHING IF SOMEBODY IS DEALING WITH THE GOVERNMENT IS
17 THAT---

18 MR PAUL WELL, NOT IN THAT---

19 THE COURT THAT COULD BE -- THAT COULD BE TAKEN MORE
20 THAN ONE WAY BUT I UNDERSTAND WHAT YOU'RE SAYING

21 MR PAUL IT COMES UP FREQUENTLY WHEN I WAS TRYING TO
22 THINK OF SOME WAYS IT COMES UP, IT COMES UP FAIRLY OFTEN IN
23 ZONING SITUATIONS WHERE YOU'LL HAVE SOMEBODY THAT BUYS A
24 PIECE OF LAND SUBJECT TO ZONING

25 THE COURT RIGHT

1 MR PAUL AND A GUY GOES AROUND AND TALKS TO EVERY
2 ZONING -- EVERY COMMISSIONER, EVERY COUNTY COMMISSIONER
3 YEAH, YEAH, THAT'S FINE THAT'S FINE THAT'S FINE AND SO
4 WHILE HE'S ON A CONTRACT SUBJECT TO ZONING, WHILE YOU'RE
5 WORKING YOUR WAY THROUGH THE ZONING PROCESS YOU'RE OUT THERE
6 SPENDING A FEW HUNDRED THOUSAND DOLLARS ON DUE DILIGENCE, YOU
7 KNOW, BORING AND TESTING AND DOING ALL THAT STUFF THAT YOU'VE
8 GOT TO DO, BUT YOU DON'T HAVE YOUR ZONING YET AND THEN YOU
9 GET READY TO GO TO THE ZONING HEARING AND 200 PEOPLE SHOW UP
10 AND THEY'RE -- YOU KNOW THEY'RE YELLING AND SCREAMING AND
11 RAISING CAIN, AND ULTIMATELY YOU -- YOU KNOW, YOU SAT DOWN
12 AND TALKED TO THE COMMISSIONER AT THE COFFEE SHOP, BUT WHEN
13 THEY ARE LOOKING AT 200 VOTERS IN THE FACE, THEY GO -- THEY
14 GO THE OTHER WAY

15 THE COURT THAT'S WHAT I ASKED MR NEWMAN AWHILE AGO,
16 OBVIOUSLY BEFORE LUNCH, WAS YOU KNOW, YOU WANT TO SAY THAT
17 THOSE FIVE PEOPLE VOTING AS HOTEL BOARD MEMBERS VOTED FOUR TO
18 ONE THIS WAY -- IF THEY HAD DIFFERENT -- WEARING THEIR ---
19 DIFFERENT HATS AT THE CITY COUNCIL MEETING AND HEARING THINGS
20 FROM A DIFFERENT PERSPECTIVE AND FROM DIFFERENT CORNERS OF
21 THE CITY, THEY COULD WELL CHANGE THEIR VOTES AND IT WOULD BE
22 FOUR TO ONE THE OTHER WAY

23 MR PAUL THAT'S RIGHT

24 THE COURT AND HIS ANSWER TO THAT WAS THAT WOULD STILL
25 -- WE'D STILL BE ENTITLED TO PURSUE OUR CLAIM BECAUSE WE'VE

1 PRESENTED A FEASIBLE DEAL FOR A HOTEL THAT'S WHAT YOU SAID
2 ISN'T THAT RIGHT?

3 MR NEWMAN YES, SIR

4 THE COURT OKAY

5 MR PAUL AND IN THIS SITUATION -- THAT'S THE REASON I
6 MADE THE POINT AT THE BEGINNING AS I UNDERSTAND THE
7 PLAINTIFFS' SECOND CAUSE THAT I'M ARGUING HERE IT ASSUMES
8 THERE IS NO CONTRACT AND IT ASSUMES -- AND OUR MOTION ASSUMES
9 THAT ASSUMPTION THAT IS, THEY HAVE NO CONTRACT THAT'S WHY
10 THEY'RE SUING FOR---

11 THE COURT PROSPECTIVE---

12 MR PAUL ---INTERFERENCE WITH PROSPECTIVE AND SO
13 THIS -- THEIR CLAIM AND OUR MOTION IS IN THE CONTEXT OF NO
14 CONTRACT BUT A PRIVATE PARTY DEALING WITH A GOVERNMENT
15 LEGISLATURE AND THEN CLAIMING THAT THEY HAD AN EXPECTATION,
16 EVEN THOUGH THE GOVERNMENT HAD NOT ACTED, AND I THINK IT
17 COMES UP -- I SEE IT COME UP FREQUENTLY IN A ZONING CASE, AS
18 I JUST MENTIONED AND IT COMES UP -- IT WILL COME UP
19 PERIODICALLY WHERE PEOPLE ARE GETTING IN FRONT OF GOVERNMENT
20 ACTION IN ANTICIPATION OF IT, BUT THE GOVERNMENT ACTION
21 DOESN'T OCCUR

22 NOW, ALL OF THE PEOPLE THAT SHOW UP AT THE ZONING
23 HEARING THAT ARE VOICING OPPOSITION AND EVEN COMPETITORS THAT
24 WANT TO USE THE REAL ESTATE FOR THEIR OWN PURPOSE ARE NOT
25 GOING TO BE LIABLE BECAUSE THEY ARE OPPOSING THAT ZONING

1 HEARING AND -- FOR WHATEVER REASON AS LONG AS IT'S NOT FOR
2 SOME IMPROPER PURPOSE SO WE'RE SAYING THAT HERE THAT THERE
3 CANNOT BE A REASONABLE EXPECTATION BECAUSE THEY'RE DEALING
4 WITH A GOVERNMENT ENTITY AND IT REQUIRED FUTURE GOVERNMENT
5 ACTION

6 THE COURT WHAT ARE THE CASES IN YOUR MEMO -- I SEE THE
7 UNITED CASE WHAT ARE THE ONES THAT DEAL WITH GOVERNMENT
8 ANGLE?

9 MR PAUL WELL, AS I WAS TRYING TO BE FRANK AND SAY WE
10 CANNOT FIND ANY CASES DEALING WITH THE ARGUMENT THAT I AM
11 MAKING -- I CAN'T FIND A SOUTH CAROLINA CASE ON THIS POINT
12 AND I CAN'T -- WE HAVE NOT BEEN ABLE TO FIND A CASE ANYWHERE
13 ON THIS POINT BECAUSE I DON'T BELIEVE IT'S FREQUENT THAT
14 PEOPLE DEAL WITH A GOVERNMENT LEGISLATIVE BODY AND THEN SUE
15 SOMEBODY ELSE BECAUSE THE GOVERNMENT LEGISLATIVE BODY DIDN'T
16 DO WHAT THEY WANTED I DON'T THINK THAT'S A FREQUENT
17 OCCURRENCE, BUT WE HAVE NOT BEEN ABLE TO FIND ANY CASES AND
18 THAT'S WHAT I WAS TRYING TO BE FRANK TO SAY

19 BUT THAT DOESN'T MEAN THAT WE ARE NOT INSIDE OF THE
20 PRINCIPLE THAT YOU'VE GOT TO HAVE A REASONABLE EXPECTATION
21 WE JUST SAY YOU CAN'T HAVE ONE IF YOUR EXPECTATION ARISES OUT
22 OF FUTURE GOVERNMENT LEGISLATIVE ACTION BECAUSE NOBODY OWNS
23 THE LEGISLATURE, AND THE LEGISLATURE SHOULD DO WHAT IT THINKS
24 IS IN THE BEST INTEREST OF THE PEOPLE AT THE TIME IT VOTES
25 AND NOBODY KNOWS WHAT THAT'S GOING TO BE UNTIL THE VOTE

1 JUST LIKE THE HEALTH CARE SITUATION WITH CONGRESS RIGHT NOW
2 NOBODY KNOWS WHAT'S GOING TO HAPPEN, AND ANYBODY RELYING ON
3 WHAT THEY THINK IS GOING TO HAPPEN MAY VERY WELL GET HOOKED

4 SO THE SECOND PRONG OF OUR ARGUMENT ON THIS POINT, THAT
5 IS NO REASONABLE EXPECTATION, GOES TO THE STATUS OF THE FIVE
6 AGREEMENTS THAT WE'VE ALREADY TALKED ABOUT THAT WERE NOT EVER
7 SIGNED AND HAD NOT BEEN SIGNED THROUGHOUT THE LIFE OF WHAT
8 THE PLAINTIFFS SAY IS REASONABLE EXPECTATION THAT IS, AS
9 THE PLAINTIFFS HAVE CONCEDED, THE AGREEMENTS THAT WE WERE
10 TALKING ABOUT THAT SHOW ON MR CORRADO'S CHART AND THAT SHOW
11 IN THE M O U ARE NOT AGREEMENTS THAT THE PLAINTIFFS ARE
12 PARTIES TO EXCEPT FOR THE DEVELOPMENT MANAGEMENT AGREEMENT,
13 BUT THE REST OF THE AGREEMENTS ARE NOT AGREEMENTS THE
14 PLAINTIFFS ARE PARTIES TO

15 THE PLAINTIFFS SEEM TO THINK THAT'S A POINT IN THEIR
16 FAVOR WE THINK THE REVERSE IS TRUE THAT IS, THE
17 PLAINTIFFS COULD NOT MAKE THOSE AGREEMENTS IF THEY WANTED TO
18 BECAUSE THEY'RE NOT PARTIES TO IT, AND THERE'S NOTHING THEY
19 CAN DO IT'S PUSHING A STRING FROM THEIR STANDPOINT
20 THEY'RE ON THE SIDELINES HOPING SOMETHING WILL HAPPEN THAT
21 WILL HELP THEM, BUT THEY HAVE NO CONTROL AND NO ABILITY TO
22 MAKE THOSE AGREEMENTS

23 AND SO OUR SECOND POINT UNDER THIS FIRST ELEMENT, NO
24 REASONABLE EXPECTATION, IS THAT UNDER THE EVIDENCE IN THE
25 CASE, UNDER THE UNDISPUTED EVIDENCE IN THE CASE, THE

1 PLAINTIFFS HERE CANNOT HAVE A REASONABLE EXPECTATION ARISING
2 OUT OF A SITUATION WHERE THE CONTRACT OR THE PROSPECTIVE
3 CONTRACT THEY ARE CONTENDING THEY REASONABLY EXPECTED TO
4 OCCUR IS ONE IN WHICH THERE'S GOT TO BE AT LEAST FIVE OR SIX
5 OTHER CONTRACTS NEGOTIATED AND EXECUTED BY PEOPLE OTHER THAN
6 THEMSELVES THAT HAD NOT HAPPENED AT THE TIME THAT THEY ARE
7 SAYING OUR INTERFERENCE OCCURRED, AND SO THAT'S OUR SECOND
8 POINT ON THE FIRST ELEMENT

9 NOW THE PLAINTIFFS -- THE ONLY CASE THE PLAINTIFFS HAVE
10 CITED IN THEIR RESPONSE BRIEF IN OPPOSITION TO MY -- TO THE
11 ARGUMENT I JUST MADE ABOUT THE GOVERNMENT AND NOT BEING ABLE
12 TO RELY ON FUTURE LEGISLATIVE ACTION IS A CASE, COUNTY OF
13 CHARLESTON AGAINST NATIONAL ADVERTISING THAT IS A CASE
14 THAT'S NOTHING LIKE OURS IT'S A CASE WHERE THE ZONING
15 ADMINISTRATOR OF THE COUNTY OF CHARLESTON WAS ASKED TO
16 INTERPRET A SIGN ORDINANCE FOR THE COUNTY OF CHARLESTON, AND
17 THE QUESTION WAS THE SIGN ORDINANCE SAID YOU CAN'T PUT ONE
18 SIGN WITHIN SO MANY FEET OF ANOTHER SIGN THE SIGN WAS IN
19 MOUNT PLEASANT, SOUTH CAROLINA, APPARENTLY INCORPORATED IN
20 THE COUNTY OF CHARLESTON THE ZONING ADMINISTRATOR'S RULING
21 WAS THAT THE COUNTY ZONING ORDINANCE DOESN'T APPLY TO THE
22 INCORPORATED MUNICIPALITIES IN THE COUNTY THEREFORE, THE
23 ZONING ORDINANCE DOES NOT PRECLUDE WHERE YOU PUT THE SIGN
24 BECAUSE OF BUILDING PERMITS SO THEY ISSUED A BUILDING
25 PERMIT

1 THE PEOPLE SPENT \$36 000 ON A SIGN THEN THE COUNTY
2 ATTORNEY BROUGHT A COMPLAINT TO TEAR THE SIGN DOWN, AND THE
3 DEFENSE WAS ESTOPPEL AND SOUTH CAROLINA COURT RULED, YES,
4 THIS IS ESTOPPEL, AND THE RULING IS THAT THE ZONING
5 ADMINISTRATOR UNDER THE ORDINANCE OF THE COUNTY OF CHARLESTON
6 HAS THE SPECIFIC AUTHORITY TO INTERPRET THE ZONING ORDINANCE
7 THE ZONING ADMINISTRATOR, BECAUSE THAT'S WHO THIS GUY WAS, HE
8 INTERPRETED IT HE HAD THE AUTHORITY TO DO IT HE ISSUED
9 THE BUILDING PERMIT HE HAD THE AUTHORITY TO DO IT PEOPLE
10 RELIED ON IT AND THEY SPENT MONEY, AND SO THE COUNTY WAS
11 ESTOPPED

12 WELL, THAT IS A VERY DIFFERENT SITUATION THAN WE'VE GOT
13 FIRST OF ALL, IT'S NOT A LEGISLATIVE BODY AT ALL SECOND,
14 IT'S AN INDIVIDUAL ACTING WITH SPECIFIC DELEGATED AUTHORITY,
15 NOT FOR LEGISLATIVE, BECAUSE YOU CANNOT DELEGATE LEGISLATIVE
16 AUTHORITY, BUT HE'S ACTING WITH DELEGATED QUASI
17 ADMINISTRATIVE AUTHORITY NOW, THAT'S THE ONLY CASE THEY'VE
18 CITED, AND WE SAY THAT CASE HAS NOTHING TO DO WITH THE FACTS
19 THAT WE'RE TALKING ABOUT HERE

20 THE SECOND ELEMENT OF THE NEW CLAIM FOR INTERFERENCE OF
21 PROSPECTIVE BUSINESS RELATIONS IS THAT THE PLAINTIFFS MUST
22 SHOW THAT THE DEFENDANT IS ACTING FOR AN IMPROPER PURPOSE,
23 AND AS I SAY, THE LAWS ON THAT IS THAT -- BY THE CRANDALL
24 CASE SPECIFICALLY, WHICH WAS THE FIRST CASE, IS THAT THE
25 IMPROPER PURPOSE MUST BE SHOWN TO BE THE PREDOMINANT PURPOSE

1 NOW, AS APPLIED TO AUGHTRY THE ONLY PURPOSE THAT HAS
2 BEEN OFFERED BY THE PLAINTIFFS HERE IS A COMPETITIVE PURPOSE,
3 THAT IS, THAT AUGHTRY WANTED TO COMPETE AND THE UNITED
4 EDUCATION CASE SPECIFICALLY SAYS THAT GENERALLY NO FINDING OF
5 IMPROPER PURPOSE IS PRESENT WHERE NO EVIDENCE -- WHERE
6 THERE'S NO EVIDENCE TO SUGGEST ANY MOTIVE OTHER THAN THE
7 DEFENDANT'S PURSUIT OF ITS OWN CONTRACTUAL RELATIONSHIP, YOU
8 KNOW, WITH THE OTHER PARTY BECAUSE ABSENT A CONTRACT WHICH
9 IS WHERE WE ARE IN THIS SECOND CAUSE OF ACTION, ABSENT A
10 CONTRACT, PEOPLE HAVE THE RIGHT TO COMPETE

11 THE COURT WHAT WOULD BE AN EXAMPLE OF A PROPER
12 PURPOSE?

13 MR PAUL WELL, THAT'S WHAT I'M SAYING THE
14 COMPETITION -- DID YOU SAY IMPROPER OR PROPER?

15 THE COURT I'M SORRY WHAT WOULD BE AN EXAMPLE OF AN
16 IMPROPER PURPOSE?

17 MR PAUL I THINK AN IMPROPER PURPOSE WOULD BE IF WE --
18 IF AUGHTRY'S POSITION WAS THE INDIVIDUALS WHO CONSTITUTE THE
19 PLAINTIFFS ARE OF A RACIAL MAKE-UP THAT SHOULD BE ALLOWED TO,
20 YOU KNOW, HAVE A DEVELOPMENT HEARING IN THE CITY OF THE
21 COLUMBIA OR SOME OTHER DISCRIMINATORY ALLEGATION OR SOME
22 OTHER DISCRIMINATORY PURPOSE _ BUT, FOR SURE, OPEN
23 COMPETITION NOT ONLY IS WHAT THE COUNTRY IS ABOUT BUT THE
24 UNITED EDUCATION CASE SPECIFICALLY SAYS THAT COMPETITION IS
25 OKAY AND COMPETITION IN THE CONTEXT OF A SITUATION WHERE

1 NOBODY HAS GOT A CONTRACT, WHICH IS WHERE WE ARE IN THIS
2 CAUSE, AND WHERE PEOPLE ARE JUST COMPETING TO GET A CONTRACT,
3 THERE'S NOTHING WRONG WITH COMPETITION

4 AND SO -- AND THAT'S THE ALLEGATION HERE IS AUGHTRY WAS
5 COMPETING WITH THEM THAT IS THEIR ALLEGATION, AND WE SAY
6 THAT UNDER THAT ALLEGATION THAT, ONE, UNDER THE CASE LAW
7 THERE'S NOTHING IMPROPER ABOUT IT, AND FOR SURE THERE IS NO
8 EVIDENCE THAT THERE'S ANY IMPROPER PURPOSE THAT PREDOMINATES
9 ANY OTHER PURPOSE THAT IS, THE ONLY PURPOSE THEY'VE EVER
10 SAID IS COMPETITION AND THAT'S OKAY THAT'S NOT ONLY NOT
11 IMPROPER, IT'S PROPER SO WE SAY THAT ON THE SECOND ELEMENT
12 OF THE CAUSE OF ACTION THE ALLEGATIONS ACTUALLY SHOW A PROPER
13 PURPOSE THERE IS NO EVIDENCE OF AN IMPROPER PURPOSE SO
14 THEY CAN'T MAKE OUT A CASE UNDER THE SECOND ELEMENT OF
15 IMPROPER PURPOSE

16 NOW, THIRD AND FINALLY, THE THIRD ELEMENT IS THE ELEMENT
17 OF CAUSATION, THAT IS, YOU'VE GOT TO HAVE INTENTIONAL
18 INTERFERENCE WITH A POTENTIAL CONTRACT RELATION YOU'VE GOT
19 TO HAVE AN IMPROPER PURPOSE, AND YOU'VE GOT TO CAUSE THE
20 INJURY THAT IS COMPLAINED OF AND IT'S A BUT-FOR TEST NOW,
21 HERE -- AND AS I SAID, THE UNITED EDUCATION DISTRIBUTORS CASE
22 IT WAS ONE THAT WAS -- IT WAS DISMISSED ON THE PLEADINGS
23 BECAUSE THE PLAINTIFF EITHER DID NOT OR COULD NOT ALLEGE BUT-
24 FOR CAUSATION

25 SO HERE WHAT WE'VE GOT IS A CITY COUNCIL THAT NEVER

1 PASSED THE RESOLUTIONS NECESSARY TO LET THE BOND ISSUE GO
2 FORWARD THE CITY COUNCIL NEVER TOOK ANY OF THE ACTIONS TO
3 GUARANTEE CITY ENHANCEMENT OR CITY LIABILITY FOR THE FIRST
4 40, THEN 50, THEN 70 PERCENT OF THE BOND DEBT THEY NEVER
5 GUARANTEED THE DEBT SERVICE THEY NEVER ISSUED THE DIRECT
6 ALLEGATION BONDS THEY NEVER TOOK ANY RESOLUTIONS NEVER
7 ENACTED ANY RESOLUTIONS TO ALLOW THE BOND ISSUE TO GO
8 FORWARD

9 NOW, ON A BUT-FOR TEST THERE IS NO EVIDENCE HERE OF BUT-
10 FOR CAUSATION WHERE IT CAN BE SHOWN THAT BUT FOR SOME ACTION
11 OF AUGHTRY THE CITY COUNCIL DID OR DID NOT DO WHATEVER
12 ACTIONS WERE DONE TO RESULT IN NO BOND RESOLUTION BEING
13 PASSED IF THE COURT RECALLS, WE'VE GOT -- AND THE EVIDENCE
14 HERE RELATES TO THE EVIDENCE ALREADY BEFORE THE COURT IN THE
15 NOERR-PENNINGTON ARGUMENT, BUT IF THE COURT RECALLS, THIS IS
16 A SITUATION WHERE THERE WAS MASSIVE PUBLIC PROTEST AND
17 OPPOSITION

18 WE HAVE AFFIDAVITS ~~FROM RUSTY DEPASS SAYING THAT HE AS A~~
19 CONSERVATIVE AND A LADY NAMED CATHY (SIC) WAITES AS A LIBERAL
20 FORMED A CONSERVATIVE/LIBERAL COALITION, HAD TELEPHONE BANKS
21 CALLING THESE ACCOUNTS OF PEOPLE HAD LETTER-WRITING
22 CAMPAIGNS, WENT TO EVERYBODY, CAMPAIGNED AS HARD AS THEY
23 COULD TO KILL THIS DEAL, HAD NO RELATIONSHIP WITH AUGHTRY
24 WHATSOEVER, DIDN'T EVEN KNOW WHO AUGHTRY WAS EXCEPT WHAT THEY
25 READ ABOUT IN THE PAPER

1 WE PUT ABOUT 30 ARTICLES IN EVIDENCE WHERE PEOPLE HAD
2 WRITTEN IN TO THE PAPER AS LETTERS TO THE EDITOR AND
3 EDITORIALS BY THE PAPERS HERE IN COLUMBIA WHERE THE PAPERS
4 HERE WERE TAKING VERY, VERY ADVERSE POSITIONS TO THE IDEA OF
5 A PUBLICLY-FINANCED HOTEL YOU'VE GOT THE CHANGES IN THE
6 UNDERWRITING GUIDELINES THAT I WAS TALKING ABOUT THIS MORNING
7 WHERE THE DEBT SERVICE COVERAGE RATIO WENT FROM TWO TO TWO
8 AND A HALF YOU'VE GOT THE CHANGES IN THE COST THAT MR
9 DETWILER WAS TALKING ABOUT WHERE IT WENT UP TO 80 MILLION OR
10 82 MILLION OR WHATEVER IT IS THAT MR DETWILER WAS SHOWING

11 YOU'VE GOT A PLETHORA OF FACTS THAT ARE HAPPENING ALL AT
12 ONCE AND ARE COMING TOGETHER AT A CRITICAL PERIOD OF TIME
13 NOW, OUT OF ALL THOSE FACTS THERE IS -- THERE IS NO EVIDENCE
14 OF ANY CAUSATION BY AUGHTRY THAT IS, THEY'VE GOT TO ALLEGE
15 THAT HE CAUSED THE INJURY THERE'S NO EVIDENCE THAT ANYTHING
16 AUGHTRY DID HAD ANY CAUSAL EFFECT ON ANYTHING THE LEGISLATURE
17 HERE IN COLUMBIA DID OR DID NOT DO BUT CERTAINLY GIVEN ALL
18 OF THE OTHER EVIDENCE IN THE RECORD OF ALL OF THE OPPOSITION
19 AND ALL OF THE ECONOMIC DETERIORATION, BOTH IN THE MARKET AND
20 THE ECONOMIC INCREASE IN COST, THERE IS ABSOLUTELY NO BUT-FOR
21 CAUSATION AS IS SPECIFICALLY REQUIRED BY UNITED EDUCATION
22 DISTRIBUTORS

23 SO WE SAY THAT ON NONE OF THE THREE ELEMENTS THESE
24 ALL -- AND THESE ARE ALL SEPARATE AND INDEPENDENT ARGUMENTS
25 AND SEPARATE AND INDEPENDENT ELEMENTS, BUT ON NONE OF THEM

1 CAN THE PLAINTIFFS GET THROUGH THE GATE THEY CAN'T SHOW
2 REASONABLE RELIANCE THEY CAN'T SHOW AN IMPROPER PURPOSE
3 THAT PREDOMINATES ALL OTHER PURPOSES AND FOR SURE THEY CAN'T
4 SHOW BUT-FOR CAUSATION SO THAT'S OUR ARGUMENT

5 THE COURT ALL RIGHT MR NEWMAN WHAT WAS THE
6 PROSPECTIVE RELATIONSHIP THAT THEY WERE INTERFERING WITH?

7 MR NEWMAN THE CAUSE OF ACTION WITH REGARD TO -- WITH
8 RESPECT TO THE FACTUAL RELATIONS IS PART OF THE ALTERNATIVE
9 OF THE TORTIOUS INTERFERENCE ARGUMENT THE TORTIOUS
10 INTERFERENCE ARGUMENT WAS BASED UPON THE ALLEGATION THAT THE
11 M O U CONSTITUTED A CONTRACT THE PROSPECTIVE CONTRACTUAL
12 RELATIONS IS THAT THE M O -- REALLY IT'S ADOPTING IN THE
13 ALTERNATIVE THEIR ARGUMENT AGAINST THE FIRST ONE THAT THE
14 M O U WAS ONLY A PROSPECTIVE CONTRACTUAL RELATIONSHIP AND,
15 THEREFORE, THE BUSINESS RELATIONSHIP ENVISIONED UNDER THE
16 M O U GAVE RISE TO THE CAUSE OF ACTION

17 THE COURT ALL RIGHT MR PAUL ARGUES THAT WHEN YOU'RE
18 DEALING WITH FUTURE LEGISLATIVE ACTION NOTHING CAN BE CERTAIN
19 ENOUGH TO FIT WITHIN THAT FIRST ELEMENT

20 MR NEWMAN YES, YOUR HONOR

21 THE COURT IT'S CONSIDERED A REASONABLE EXPECTATION

22 MR NEWMAN RIGHT, AND I'VE GOT A COUPLE OF POINTS
23 ABOUT THAT, THE FIRST OF WHICH IS THE POINT ABOUT THE LAW MR
24 PAUL WAS RIGHT THE ONLY SUPREME COURT CASE CONTAINING ANY
25 SUBSTANCE WITH REGARD TO THIS CAUSE OF ACTION IS THE CRANDALL

1 CORP CASE THE UNITED DISTRIBUTORS CASE CAME OUT OF THE
2 COURT OF APPEALS, AND THERE THE COURT STRUGGLED TO IDENTIFY
3 EXACTLY WHAT PRINCIPLES APPLIED TO CRANDALL CORP THE COURT
4 OF APPEALS, OF COURSE, BEING A COURT OF REVIEW AND SO WE'RE
5 LEFT WITH A FAIRLY VAGUE PRECEDENT SET BY OUR SUPREME COURT
6 SO, FIRST AND MORE FOREMOST, I'D SAY THAT THIS ARGUMENT
7 WITH REGARD TO GOVERNMENTAL ENTITIES AND PROSPECTIVE
8 CONTRACTUAL RELATIONS HAS NOT BEEN ADDRESSED BY OUR SUPREME
9 COURT AND HAS NOT BEEN ESTABLISHED AS A RULE SO IT WOULD BE
10 IMPROPER IN THIS SETTING FOR US TO INJECT A NEW STANDARD THAT
11 OUR SUPREME COURT HAS NOT RECOGNIZED YET
12 THE SECOND ARGUMENT I MADE JUDGE, IS SORT OF A COMMON
13 SENSE ARGUMENT YOU KNOW, MR PAUL SAYS THAT YOU CAN'T RELY
14 ON A GOVERNMENTAL ENTITY TO DO X OR Y THE SAME IS TRUE
15 WITH A PRIVATE ENTITY IF YOU AND I ARE IN NEGOTIATIONS WITH
16 REGARD TO A CONTRACT THERE'S NOTHING TO STOP YOU FROM
17 PULLING OUT AT THE LAST MINUTE AND THE FACT THAT WE'RE
18 DEALING WITH THE LEGISLATURE HERE ACTUALLY MAY MITIGATE THAT
19 RISK BECAUSE THE LEGISLATURE IS AT LEAST UNDER THREAT FROM
20 POLITICAL PUNISHMENT, AND A PRIVATE ENTITY IS UNDER NO THREAT
21 WHATSOEVER, CERTAINLY NOT IF THE CONTRACT HAS NOT BEEN
22 FORMED SO I DON'T UNDERSTAND THE EMPHASIS THAT HE'S PLACING
23 ON A PUBLIC BODY VERSUS A PRIVATE BODY
24 THE COURT THAT GETS BACK TO THE QUESTION -- IT MAY NOT
25 BE THE EXACT POINT I WAS LOOKING FOR EARLIER IF THE CITY

1 VOTED AT MR AUGHTRY'S BEHEST NOT TO GO THROUGH WITH YOUR
2 DEAL, YOU'RE JUST SAYING THAT WOULDN'T BE OPERATING IN GOOD
3 FAITH

4 MR NEWMAN CORRECT

5 THE COURT AND THEY WOULD HAVE THE DUTY -- WELL, I SEE
6 WHAT YOU'RE SAYING YOU'RE SAYING THAT MR AUGHTRY DOESN'T
7 HAVE THE RIGHT TO ASK A GOVERNMENTAL ENTITY NOT TO OPERATE IN
8 GOOD FAITH TO SECURE SOME BENEFIT FOR HIMSELF IF THERE'S A --
9 IF THERE IS A REASONABLE EXPECTATION THAT THE CITY'S GOING TO
10 DO BUSINESS WITH YOU

11 MR NEWMAN CORRECT

12 THE COURT THAT'S WHAT YOU SAY

13 MR NEWMAN CORRECT AND, AGAIN, AS MR PAUL ALLUDED
14 TO WHEN WE STARTED TALKING ABOUT WHAT RIGHTS MR AUGHTRY MAY
15 OR MAY NOT HAVE, WE'RE DELVING INTO THAT NOERR-PENNINGTON
16 AREA WHICH HAS ALREADY BEEN EXTENSIVELY BRIEFED AND WHICH
17 HE'S REFERRED TO AND WHICH I WOULD ADOPT AS WELL IF WE'RE
18 GOING TO THAT

19 NOW WITH REGARD TO WHAT'S FORESEEABLE, I BELIEVE IT'S
20 IMPORTANT TO NOTE THAT A CONTRACTUAL -- A POTENTIAL
21 CONTRACTUAL RELATIONSHIP IS NOT NECESSARILY REQUIRED TO GIVE
22 RISE TO THIS CAUSE OF ACTION, BUT A POTENTIAL QUASI
23 CONTRACTUAL RELATIONSHIP CAN ALSO GIVE RISE TO THIS CAUSE OF
24 ACTION AND WE'VE, OF COURSE PLED BOTH QUANTUM MERUIT AND
25 ESTOPPEL IN THIS CASE, BOTH WHICH CONSTITUTE QUASI

1 CONTRACTUAL RIGHTS AND DON'T REQUIRE THE EXISTENCE OF AN
2 ACTUAL CONTRACT IN ORDER TO GIVE RISE TO THE TORTIOUS
3 INTERFERENCE WITH RESPECT TO CONTRACTUAL RELATIONS AND IN
4 THIS CASE WE OUT -- I DON'T WANT TO BEAT A DEAD HORSE BUT WE
5 OUTLINED IN OUR BRIEF IN OPPOSITION TO MR PAUL'S MOTION THE
6 VARIOUS REPRESENTATIONS OF THE CITY THAT WE RELIED UPON IN
7 PROCEEDING WITH THE M O U PROJECT IF I COULD WALK THROUGH
8 A FEW MORE POINTS, JUDGE

9 THE COURT WELL, MR PAUL SAID THERE'S NO EVIDENCE THAT
10 AUGHTRY DID ANYTHING TO CAUSE THE CONTRACT NOT TO ENSUE

11 MR NEWMAN MR PAUL -- ARE YOU REFERRING TO HIS BUT-
12 FOR ARGUMENT?

13 THE COURT RIGHT

14 MR NEWMAN THE BUT-FOR ARGUMENT AND THE IMPROPER
15 PURPOSE ARGUMENT BOTH GIVE ME A LITTLE BIT OF CONCERN THE
16 REASON WHY IS THEY WERE NOT BRIEFED BY MR PAUL OR HIS
17 ASSOCIATES WHEN WE SET UP THIS AD HOC SCHEDULING ISSUE---

18 THE COURT I THINK THEY DID STOP AT NUMBER ONE IN THEIR
19 -- THE REASONABLE EXPECTATION IN THEIR MEMO

20 MR NEWMAN YES, SIR SO I'M CAUGHT A LITTLE BIT OFF
21 KILTER BY THESE ARGUMENTS, BUT I'LL DO MY BEST TO PRESENT TO
22 YOUR HONOR WHAT MY RESPECTIVE ARGUMENTS IN OPPOSITION WOULD
23 BE WITH REGARD TO THE BUT-FOR CAUSATION, THERE ARE E-MAILS
24 FROM BO AUGHTRY TO HIS VARIOUS ASSOCIATES HERE IN COLUMBIA
25 IDENTIFYING COUNCILMAN -- COUNCILWOMAN TAMEIKA ISAAC DEVINE

1 AS, QUOTE, THE SWING VOTE IN THIS WHOLE PROCESS MR AUGHTRY
2 HIRED A COUNTY COUNCILMAN HERE IN TOWN TO LOBBY ON HIS
3 BEHALF

4 THE COURT WHO IS THAT?

5 MR NEWMAN DAMON JETER MR JETER WAS CHILDHOOD
6 FRIENDS WITH MS ISAAC DEVINE, AND MR JETER ALLEGES THAT HE
7 HAD NO PERSONAL CONTACT WITH HER---

8 THE COURT HE'S A COUNCIL MEMBER?

9 MR NEWMAN YES, SIR, HE'S WITH COUNTY COUNCIL

10 THE COURT COUNTY COUNCIL

11 MR NEWMAN YES, SIR, AND WE WERE REMARKING OVER LUNCH
12 THAT THIS MAY BE THE LARGEST CITY IN SOUTH CAROLINA BUT STILL
13 OPERATING MUCH LIKE A SMALL TOWN SO WE ALLEGE THAT MR
14 JETER AND MS DEVINE CERTAINLY HAD PERSONAL CONTACT

15 THE COURT CERTAINLY YOU COULD DEPOSE MR JETER

16 MR NEWMAN HE HAS BEEN DEPOSED

17 THE COURT WHAT'S HE SAY?

18 MR NEWMAN WELL, MR JETER -- HIS MEMORY WAS FAILING
19 HIM ON SEVERAL KEY POINTS HE EXPLAINED TO US THAT HE WAS
20 BEING PAID \$2,000 A MONTH TO ACT SIMPLY AS A SOUNDING BOARD
21 TO MR AUGHTRY WE DON'T THINK THAT'S A VERY CREDIBLE
22 ARGUMENT WE LOOK FORWARD TO BRINGING THAT BEFORE THE JURY
23 BUT WHAT'S MORE IMPORTANT -- WHAT IS MORE NOTABLE ARE TWO
24 THINGS NUMBER ONE MR JETER ADMITTED TO BEING CHILDHOOD
25 FRIENDS WITH MS ISAAC DEVINE AND, NUMBER TWO IN EARLY APRIL

1 OF 2004 - I DON'T REMEMBER THE EXACT DATE, I WANT TO SAY IT
2 WAS THE 3RD OR 4TH - AN E-MAIL WAS ADDRESSED TO STEVE GANTT,
3 THE ASSISTANT CITY MANAGER, WHO YOU'VE ALREADY HEARD ABOUT
4 FROM BO AUGHTRY MR AUGHTRY IDENTIFIED THAT HE HAD SEVERAL
5 PEOPLE WORKING FOR HIM ON THIS PROJECT WHO ARE IN PERSONAL
6 CONTACT WITH MEMBERS OF BOTH COUNCIL OR PEOPLE INVOLVED IN
7 THE PROCUREMENT PROCESS

8 THE COURT AND WHEN WAS THAT?

9 MR NEWMAN THIS WAS IN EARLY APRIL OF 2004

10 THE COURT AFTER THE MARCH 17 VOTE?

11 MR NEWMAN CORRECT

12 THE COURT MARCH 17 REQUEST FOR SECOND R F P ?

13 MR NEWMAN THIS IS ABOUT TWO WEEKS AFTER THE FACT, AND
14 AT ANY RATE, MR AUGHTRY HAD ASKED MR GANTT IF THAT WAS OKAY
15 AND MR GANTT IN HIS RESPONSE SAID, NO, THAT WOULD BE AGAINST
16 THE LAW YOU'RE NOT SUPPOSED TO BE HAVING PERSONAL CONTACT
17 WITH MEMBERS OF CITY COUNCIL SO OBVIOUSLY WHAT WE'RE
18 ALLEGING HAS BEEN GOING ON HERE IS UNDER-THE-TABLE DEALING
19 BETWEEN MR AUGHTRY AND THE FOLKS INVOLVED WITH THE CITY THAT
20 STRETCH BACK TO AT LEAST -- AT LEAST DECEMBER OF 2003 IF NOT
21 BEYOND

22 THE E-MAILS FROM MR AUGHTRY THE NUMBER IS AROUND SEVEN
23 OR EIGHT, IN WHICH HE'S IDENTIFYING THIS DEAL IS AN AWFUL
24 SITUATION WHICH HE NEEDS TO CONVINCE MEMBERS OF CITY COUNCIL,
25 INCLUDING MAYOR COBLE, THAT THEY NEED TO CHANGE THEIR MIND

1 AND GO WITH HIM

2 THE COURT SO WHAT YOU'RE SAYING IS THAT IF THERE'S NO
3 CONTRACT, THE CITY WOULD BE RELIEVED BUT MR AUGHTRY OR THE
4 AUGHTRY DEFENDANTS WOULD NOT BE UNDER THIS THEORY

5 MR NEWMAN WELL, ACTUALLY, NO THE CITY WOULD STAY --
6 THE CITY STILL COULD -- THEIR BREACH OF -- OUR BREACH OF
7 CONTRACT CLAIM AGAINST THEM MAY EVAPORATE, BUT OUR CLAIMS FOR
8 QUANTUM MERUIT AND ESTOPPEL MAY STILL LIVE ON AND THOSE
9 CLAIMS WOULD BE SUFFICIENT

10 THE COURT TALKING ABOUT JUST INsofar AS THE CONTRACT
11 ACTIONS ARE CONCERNED?

12 MR NEWMAN YES, SIR YES, SIR AND I THINK THAT THAT
13 APPLIES TO THE IMPROPER PURPOSE AS WELL AGAIN, THIS WASN'T
14 SIMPLY AN ATTEMPT TO COMPETE IT WAS AN ATTEMPT TO PROCURE
15 THE BREACH OF A RELATIONSHIP BETWEEN DIFFERENT PARTIES, AND
16 IN -- IN SO DOING---

17 THE COURT WELL, YOU CAN'T SAY THERE'S AN UNLAWFUL
18 PURPOSE BECAUSE OF THE VERY DEFINITION OF THAT ELEMENT OF THE
19 TORT

20 MR NEWMAN WELL, THE---

21 THE COURT IF THAT WERE THE CASE, THEN ELEMENT NUMBER
22 TWO NEED NEVER BE ADDRESSED

23 MR NEWMAN RIGHT WELL -- AND THEN THE UNLAWFUL
24 PURPOSE ACTUALLY WOULD BE FINE IN THE FACT THAT MR AUGHTRY
25 WAS POTENTIALLY VIOLATING THE LAW BY HAVING PERSONAL CONTACT

1 WITH MEMBERS OF THE CITY, CITY COUNCIL, AND HIS AGENTS HAD
2 PERSONAL CONTACT WITH MEMBERS OF THE CITY AND THE CITY
3 COUNCIL I BELIEVE MS JUMPER'S AFFIDAVIT WHICH MR HINSON
4 HAS ALREADY ALLUDED TO ESTABLISHES THAT MR AUGHTRY WAS
5 CALLING IN TO MR GANTT'S OFFICE ON A REGULAR BASIS

6 THE COURT DO I HAVE THAT---

7 MR NEWMAN YOU DO

8 THE COURT ---AFFIDAVIT? I MAY HAVE MISSED THAT IS
9 IT IN THE THICKER STACK WITH THE RUBBER BAND AROUND IT? I
10 DON'T THINK SO

11 MR HINSON YOUR HONOR, IT WAS AN EXHIBIT---

12 THE COURT GIVE ME THE LETTER

13 MR HINSON ---TO OUR CONSPIRACY BRIEF

14 THE COURT OKAY WELL, THEN I DON'T HAVE THAT I
15 DON'T HAVE THAT ONE UP HERE EXHIBIT TO A CONSPIRACY BRIEF?
16 OKAY GO AHEAD MR NEWMAN

17 MR NEWMAN YES, SIR

18 THE COURT YOU'RE SAYING THERE IS EVIDENCE THAT MR
19 AUGHTRY DID DO THINGS THAT CAUSED THE CONTRACT NOT TO ENSUE

20 MR NEWMAN CORRECT CORRECT, OR AT LEAST THE BUSINESS
21 WITH RESPECT TO THE CONTRACTUAL RELATIONSHIP AND THOSE ARE
22 MY -- HAVING BEEN CAUGHT A LITTLE OFF GUARD HERE, THAT'S WHAT
23 I WOULD LIKE TO ADVANCE IF YOUR HONOR WOULD CONSIDER THE
24 SUBSTANCE OF MR PAUL'S ARGUMENT AT POINTS TWO AND THREE I
25 WOULD APPRECIATE THE OPPORTUNITY TO BE ABLE TO BRIEF THEM

1 THOROUGHLY CONSIDERING TO COPIOUS AMOUNTS OF MATERIALS THAT
2 ARE HERE

3 JUDGE, ONE THING THAT I DO THINK IS IMPORTANT TO NOTE IS
4 THAT THE VARIOUS COURTS HAVE CONSIDERED THIS CAUSE OF ACTION
5 INCLUDING THE UNITED EDUCATIONAL DISTRIBUTORS AND HAVE
6 RECOGNIZED THAT A PROSPECTIVE CONTRACTUAL RELATION IS BY
7 DEFINITION NONSUSCEPTIBLE OF PRECISE EXACT IDENTIFICATION AS
8 IS AN EXISTING CONTRACT QUOTE ANYTHING THAT IS
9 PROSPECTIVE IN NATURE IS NECESSARILY UNCERTAIN

10 THIS REALLY UNDERCUTS THE ARGUMENTS THAT THE AUGHTRY
11 DEFENDANTS ATTEMPT TO INCORPORATE INTO THEIR MOTION WITH
12 REGARD TO THE VARIOUS AGREEMENTS THAT HAVE NOT YET BEEN
13 SIGNED, THAT BEING THE UNCERTAINTY WHICH MAY - AND WE
14 CERTAINLY DON'T CONCEDE THAT - BUT THE UNCERTAINTY WHICH,
15 IF YOU TAKE MR AUGHTRY'S ARGUMENT, THAT FACE VALUE MAY EXIST
16 DOES NOT RENDER THIS CAUSE OF ACTION VOID AND, AGAIN, AS WE
17 CITED ONE OF THE WITNESSES IN OUR BRIEF, WE STATED THAT IT
18 WAS SIMPLY A MATTER OF GETTING THE DOCUMENTS FINALLY
19 FINALIZED SO WE COULD GO AHEAD AND CLOSE IT SO IF ANY
20 UNCERTAINTY DID EXIST AND EVEN IF IT WAS -- EVEN IF IT WAS
21 RELEVANT TO YOUR CONSIDERATION IT WAS MITIGATED BY THE
22 ACTIONS OF THE PARTIES LEADING UP TO THE DAY IN WHICH, AS I
23 SAID, THE FINAL ISSUES OF THE SECOND R F P WERE JUDGE, I
24 HAVE A COPY OF THE AFFIDAVIT OF---

25 THE COURT I'VE GOT IT IT'S EXHIBIT 9'

1 MR. NEWMAN OKAY YES, SIR AND JUST -- AGAIN, I
2 WON'T BELABOR THE COURT'S TIME BY REFERRING TO EVERY LITTLE
3 THING IN IT, BUT IT DOES SET FORTH THE CONTACT BETWEEN MR
4 GANTT AND MR. AUGHTRY THAT WAS TAKING PLACE NOT ONLY DURING
5 THE SECOND R F P PROCESS BUT WHILE THE M O U WAS STILL
6 UNDERGOING ITS DEVELOPMENT BY THE CITY, BY THE MEMBERS OF THE
7 PROJECT TEAM IF YOU HAVE ANY OTHER SPECIFIC QUESTIONS, I'D
8 BE HAPPY TO ANSWER THEM

9 THE COURT SO YOU'RE SAYING THAT -- TELL ME WHAT THE
10 UNLAWFUL PURPOSE WAS IN THIS CASE YOU SAY IT WENT BEYOND
11 COMPETITION?

12 MR. NEWMAN YES, SIR

13 THE COURT AND THAT'S BECAUSE OF THE NATURE OF THE
14 CONTACT OR THE SUBSTANCE OF THE CONTACT?

15 MR. NEWMAN I THINK---

16 THE COURT I THINK YOU SAID SOMETHING ABOUT THAT IN
17 THIS CASE THAT THE PURPOSE WAS UNLAWFUL BECAUSE OF THE WAY
18 MR. AUGHTRY WENT ABOUT IT?

19 MR. NEWMAN I THINK THAT IT'S A MIXTURE OF THE PURPOSE
20 AND THE DESIGN, DESIGN BEING TO INTENTIONALLY INTERFERE WITH
21 A BUSINESS RELATIONSHIP BETWEEN TWO FOLKS, NOT JUST IN
22 COMPETITION IT'S NOT AS IF WE HAD TWO HOT DOG VENDORS
23 THROWING HOT DOGS TO PEOPLE WALKING DOWN THE STREET

24 THE COURT SO WHAT DID MR. AUGHTRY DO?

25 MR. NEWMAN WELL, THE ALLEGATIONS ARE THAT MR. AUGHTRY

1 ENGAGED IN UNLAWFUL CONTACT WITH MEMBERS OF CITY COUNCIL,
2 STAFF MEMBERS OF THE CITY

3 THE COURT AND THAT'S BORNE OUT BY THE JUMPER AFFIDAVIT
4 AND WHAT ELSE?

5 MR. NEWMAN BY THE JUMPER AFFIDAVIT THE DEPOSITION OF
6 DAMON JETER, THE E-MAILS THAT PASSED BETWEEN---

7 THE COURT AND MR. JETER SAYS HE DOESN'T REMEMBER -- IS
8 THERE ANYTHING WHERE ANYBODY SAYS THIS IS WHAT MR. AUGHTRY
9 DID? BECAUSE MS. JUMPER SAID SHE JUST PUT CALLS THROUGH
10 MR. JETER SAYS HE DOESN'T REMEMBER AND SO WHAT ELSE DO YOU
11 HAVE?

12 MR. NEWMAN AND I HATE TO QUOTE MR. JETER AGAIN, I
13 HAVEN'T HAD THE OPPORTUNITY TO REVIEW HIS DEPOSITION RECENTLY
14 BECAUSE I WAS NOT AWARE THAT THIS WAS GOING TO BE ONE OF THE
15 BASES OF MR. AUGHTRY'S MOTION HOWEVER -- AND ALSO THE
16 PERSONAL E-MAILS FROM MR. AUGHTRY TO MEMBERS OF CITY COUNCIL
17 AND THE CITY STAFF TO MANDATE THE CESSATION OF PUBLIC FUNDING
18 ON THE PROJECT AND ADMITTED THAT HIS AGENTS WERE HAVING
19 PERSONAL CONTACT WITH THE CITY IN VIOLATION OF THE LAW

20 THE COURT AND HOW IS THAT A VIOLATION OF THE LAW?

21 MR. NEWMAN AS PART OF THE PROCUREMENT PROCESS,
22 EVERYTHING IS SUPPOSED TO BE DONE PUBLICLY, AND THAT MEANS
23 ANY KIND OF COMMUNICATIONS WITH THE CITY NEEDED TO BE IN
24 WRITING AND THE VOTE -- THE VOICE CONTACT, THE ONE-ON-ONE
25 CONTACT, IS SPECIFICALLY PROHIBITED

1 THE COURT ALL RIGHT

2 MR NEWMAN ALL RIGHT

3 THE COURT OKAY MR HINSON, ANY -- DO YOU HAVE THIS
4 CAUSE OF ACTION TOO?

5 MR HINSON YES, YOUR HONOR, AND I WOULD ADOPT MR
6 NEWMAN'S ARGUMENTS I WOULD, HOWEVER, ADD THAT ONE -- A LOT
7 OF WHAT MR PAUL ADDRESSES IS IN THE CONTEXT AND SPHERE OF
8 THE NOERR-PENNINGTON ARGUMENTS AS FAR AS GOVERNMENTAL ACTION
9 WOULD INCORPORATE THIS INTO THE ARGUMENTS MADE BY MR VAIL
10 APPROXIMATELY A MONTH AGO IN FRONT OF YOUR HONOR AND WOULD
11 I DO WANT TO POINT OUT THE DIFFERENCE BETWEEN THE CITY ACTING
12 IN A ZONING -- IN ITS ZONING CAPACITY AND THE CITY ACTING IN
13 A MERCHANT CAPACITY FOR THE CONSTRUCTION OF A HOTEL -- AND
14 THIS IS THE MERCHANT EXCEPTION THAT MR VAIL TALKED ABOUT
15 BOTH IN HIS BRIEF AND HIS ORAL ARGUMENT

16 A ZONING -- THE ACTION OF ZONING LAND IS LIMITED TO THE
17 GOVERNMENTAL SPHERE THE PRIVATE ACTORS DON'T DO THAT, BUT
18 THE ACTION OF BUILDING A HOTEL IS SOMETHING THAT CORPORATIONS
19 DO, INDIVIDUALS DO, AND WHEN THE CITY TAKES STEPS - AGAIN,
20 IT'S CONTRACTUAL NEGOTIATIONS FOR THE CONSTRUCTION OF A HOTEL
21 - THEY'RE NOT ACTING SO MUCH AS A GOVERNMENT BUT AS A
22 MERCHANT IN THAT SITUATION AND IT TAKES A WHOLE DIFFERENT
23 MEANING

24 THE COURT BUT THEY STILL HAVE TO GO THROUGH THE
25 LEGISLATIVE HOOPS TO GET THE -- TO GET THE DEAL FINALLY DONE

1 **MR HINSON** CERTAINLY, YOUR HONOR AND I WOULD -- I
2 WOULD I GUESS REFERENCE BACK TO WHAT MR NEWMAN SAID THE
3 SAME IS SAID FOR A BUSINESS I MEAN, IF YOU'RE IN
4 CONTRACTUAL NEGOTIATIONS WITH A BUSINESS, BE IT FOR THE
5 CONSTRUCTION OF YOUR, YOU KNOW, YOUR STORE FRONT, YOUR HOME,
6 A HOTEL, YOU KNOW, THE BUSINESS CAN PULL OUT AND SAY, "NO,
7 I'VE CHANGED MY MIND I DON'T WANT TO GO THROUGH WITH THIS
8 DEAL " AND WHAT WE HAVE HERE IS THE CITY IN THAT CAPACITY
9 AND YOU HAVE AUGHTRY INTERFERING WITH THE NEGOTIATIONS FOR
10 THE CONSTRUCTION OF THIS HOTEL AND, AGAIN OF COURSE, THIS
11 IS ARGUING IN THE ALTERNATIVE FROM OUR EARLIER ARGUMENTS
12 REGARDING THE EXISTENCE OF A CONTRACT

13 **THE COURT** OKAY HOW ABOUT TURNER? DO Y'ALL HAVE THIS
14 CAUSE OF ACTION, TOO?

15 **MR KALISH** WE DO NOT, YOUR HONOR

16 **THE COURT** OKAY ALL RIGHT MR PAUL, ARE YOU---

17 **MR PAUL** ONE GOOD THING IS TURNER IS NOT SUING US

18 **THE COURT** OKAY HARD TO KEEP UP WITH MIGHT AS WELL
19 THROW A DART AT IT TO SEE IF IT WILL STICK MR PAUL, HOW
20 ABOUT THE - I'LL JUST WORK BACKWARDS - MR AUGHTRY'S -- YOU
21 SAID THERE'S NO EVIDENCE THAT MR AUGHTRY OR AUGHTRY DID
22 ANYTHING THAT CAUSED THE CONTRACT NOT TO ENSUE HOW ABOUT
23 RESPOND TO WHAT THEY'VE SAID?

24 **MR PAUL** ALL RIGHT, SIR YES, SIR WHAT I MEANT TO
25 SAY IS THAT THERE'S NO EVIDENCE -- EVERYTHING AUGHTRY DID IS

1 IN THE RECORD THAT IS, HE WROTE LETTERS TO THE NEWSPAPER,
2 THEY'RE IN THE RECORD HE WROTE LETTERS TO CITY COUNCIL
3 MEMBERS ASKING TO HAVE MEETINGS TO COME TO CITY COUNCIL AND
4 MAKE PUBLIC PRESENTATIONS HE MET WITH CITY COUNCIL MEMBERS,
5 AND HE'S BEEN DEPOSED BY ALL OF THEM AND THERE IS -- AS FAR
6 AS WE KNOW -- I MEAN, I'M QUITE POSITIVE ABOUT THIS THERE
7 IS NO EVIDENCE OF ANYTHING IMPROPER THAT AUGHTRY HAS DONE IN
8 ANY OF HIS CONTACTS EVERY WRITING HAS BEEN PRODUCED AND IS
9 IN EVIDENCE AND IT'S BEFORE THE COURT

10 THE COURT HOW ABOUT WHAT -- I THINK MR NEWMAN OR
11 MAYBE IT WAS MR HINSON SAID THAT HE HAD TOLD MR GANTT THAT
12 HE WAS SPEAKING WITH CITY COUNCIL MEMBERS AND WANTED TO KNOW
13 IF THAT WAS OKAY AND GANTT TOLD HIM NO

14 MR PAUL THE -- I THINK THE CONTEXT OF THAT IS THAT I
15 THINK AUGHTRY SENT GANTT AN E-MAIL SAYING THIS IS -- FIRST OF
16 ALL, THIS IS AFTER MARCH 17 I CANNOT REMEMBER WHETHER IT IS
17 BEFORE OR AFTER APRIL 2ND WHEN THE SECOND R F P WAS ISSUED
18 IT'S CLEARLY AFTER MARCH 17 AND SO -- AND IT RELATES TO --
19 THAT E-MAIL RELATES TO THE SECOND R F P

20 NOW, THE CAUSE THAT IS BEFORE THE COURT -- I'M GOING TO
21 TRY TO ANSWER THIS AS DIRECTLY AS I CAN, BUT I DO WANT TO BE
22 SURE ABOUT THIS THE CAUSE THAT IS BEFORE THE COURT IS A
23 CLAIM OF INTERFERING WITH A PROSPECTIVE CONTRACT RELATION
24 THAT IS THE M O U THIS M O U NOT THE SECOND BID BUT THE
25 M O U AND THE M O U , AS MR HINSON CONCEDED AT THE LAST

1 HEARING, WAS DEAD AS A DOORNAIL AS OF MARCH 17 WHEN THE CITY
2 VOTED---

3 THE COURT SO YOU'RE SAYING ALL THAT WAS AFTER THAT
4 DATE

5 MR PAUL YES SIR YEAH THERE'S NO QUESTION IT WAS
6 AFTER THAT I MEAN, I DON'T EVEN -- I COULD NOT REMEMBER
7 WHETHER IT WAS BEFORE OR AFTER APRIL 2ND THERE'S NO
8 QUESTION IT WAS AFTER MARCH 17 AND SO THAT GOES TO THIS
9 AMENDMENT THAT MR WARD WILL BE DEALING WITH, THE PROPOSED
10 AMENDMENT TO THE COMPLAINT BUT---

11 THE COURT HOW ABOUT HIRING MR JETER?

12 MR PAUL HIRING MR JETER? MR JETER HAS BEEN
13 DEPOSED THERE'S NOTHING WRONG WITH HIRING MR JETER MR
14 JETER HAS BEEN DEPOSED MR AUGHTRY HAS BEEN DEPOSED

15 THE COURT WHAT DID MR JETER DO?

16 MR PAUL MR JETER WAS -- THE TESTIMONY IS MR JETER
17 WAS HIRED TO REPORT TO AUGHTRY ON WHAT WAS GOING ON IN TOWN
18 THAT IS, JETER AUGHTRY'S TESTIMONY IS, WAS HIS SORT-OF-EARS
19 IN TOWN AUGHTRY LIVES IN GREENVILLE, AND SO JETER IS THE
20 PERSON THAT KNOWS COLUMBIA AND HE WAS TO REPORT TO AUGHTRY
21 AND HE MADE AN INTRODUCTION TO A COUPLE OF COUNCIL PEOPLE AND
22 THAT'S IT AND THERE'S NO -- JETER WAS DEPOSED UP ONE SIDE AND
23 DOWN THE OTHER AUGHTRY WAS DEPOSED, AND NOTHING HAS COME OF
24 IT THERE'S NOT ONE IOTA OF ANY IMPROPER CONDUCT BY JETER
25 HE SAYS I KNOW SO-AND-SO AND I INTRODUCED HIM TO BO

1 AUGHTRY THAT'S IT

2 THE COURT WHEN WAS THAT?

3 MR PAUL THOSE WERE IN THE FALL OF 2003 SEPTEMBER,
4 OCTOBER, NOVEMBER OF 2003

5 THE COURT AND THAT'S NOT ENOUGH TO CREATE AN INFERENCE
6 OF AN UNLAWFUL PURPOSE FOR A BUT-FOR

7 MR PAUL I DON'T BELIEVE SO

8 THE COURT TO FULFILL THE BUT-FOR BOX?

9 MR PAUL WE WOULD SAY NO BECAUSE WE'RE IN THE CONTEXT
10 OF NO CONTRACT FOR THIS CAUSE OF ACTION NO CONTRACT THESE
11 PEOPLE FOR THIS CAUSE HERE ARE CONCEDING THEY HAD NO
12 CONTRACT, THEY'RE DEALING WITH THE CITY THEY HAVE NO LOCK
13 ON THE CITY THEY'RE DEALING WITH THE CITY UNDER THIS CAUSE
14 OF ACTION, AND THERE'S NOTHING WRONG WITH AUGHTRY TRYING TO
15 DEAL WITH THE CITY

16 SO THERE'S NOTHING -- WE SAY THERE'S ABSOLUTELY NOTHING
17 WRONG WITH THAT, AND THERE'S NOTHING -- THERE'S NO IMPROPER
18 PURPOSE, BUT THERE'S ALSO NO EVIDENCE THAT WHATEVER AUGHTRY
19 DID RESULTED IN ANYTHING MUCH LESS RESULTED IN SOMETHING
20 THAT WAS NOT CAUSED BY ALL OF THE OTHER OPPOSITION TO A
21 PUBLIC HOTEL IN THE CITY OF COLUMBIA AND THE DETERIORATING
22 FINANCIAL CIRCUMSTANCE AND THE INCREASE IN COSTS I MEAN
23 THERE'S -- UNDER EVIDENCE BEFORE THE COURT THERE HAS BEEN NO
24 SHOWING THAT AUGHTRY ON BUT-FOR CAUSATION IS THE CAUSE OF THE
25 CITY PASSING THE MARCH 17 RESOLUTION

1 THE COURT DO YOU -- WHAT DO YOU MAKE OF THE DONNA
2 JUMPER AFFIDAVIT?

3 MR PAUL THE DONNA JUMPER AFFIDAVIT WE -- WE DON'T
4 KNOW WHAT TO MAKE OF IT IT CAME A LITTLE LATE IN THE DAY
5 FOR US AND SO -- IN TERMS OF WE HAVE NOT DEPOSED THE LADY
6 YET BUT I DON'T SEE ANYTHING ILLEGAL HERE SHE SAYS THAT
7 SHE TOOK CALLS FROM AUGHTRY TO GANTT AND THAT THEY HAD
8 CONVERSATIONS SHE DOESN'T EVEN MAKE AN ATTEMPT TO SAY WHAT
9 THEY WERE, AND AS I SAY, IF IT'S A CALL AFTER MARCH 17 WE SAY
10 IT'S IRRELEVANT IF IT'S A CALL BEFORE MARCH 17, CERTAINLY
11 FOR THIS MOTION HERE AND THIS CAUSE HERE WE SAY THERE'S
12 NOTHING WRONG WITH IT BECAUSE THEY CONCEDE THERE'S NO
13 CONTRACT

14 THE COURT IN PARAGRAPH 6 SHE SAYS, "AFTER THE CITY
15 ISSUED A NEW REQUEST FOR PROPOSALS ON APRIL 2ND 2004, MR
16 AUGHTRY CONTINUED TO CALL MR GANTT REGARDING THE PROJECT,
17 DESPITE THE FACT THAT THE RULE SPECIFICALLY STATED BIDDERS
18 SHOULD NOT CONTACT THE CITY THROUGH DIRECT PHONE CALLS AND
19 PERSONAL CONTACT BUT THAT ALL QUESTIONS WERE TO BE SENT IN
20 WRITING " IS MR -- FOR WHATEVER IT'S WORTH, EVEN THOUGH
21 IT'S AFTER MARCH 17TH, DOES MR AUGHTRY DENY THAT OR DOES HE
22 AGREE THAT HE DID THAT?

23 MR PAUL I HONESTLY DON'T KNOW THE ANSWER TO THAT
24 QUESTION BECAUSE I DON'T THINK -- I DON'T REMEMBER WHETHER
25 ANYBODY WAS THAT SPECIFIC WITH BO AUGHTRY IN HIS DEPOSITION

1 SO I DON'T KNOW THAT -- I HONESTLY CANNOT REMEMBER THE ANSWER
2 TO THAT QUESTION AND I'M NOT SURE IF THERE IS AN ANSWER TO
3 THAT QUESTION

4 THE COURT DO Y'ALL HAVE A CAUSE OF ACTION BASED ON ANY
5 NEW RELATIONSHIP AFTER MARCH 17?

6 MR HINSON YOUR HONOR, THAT IS THE AMENDMENT TO OUR
7 PLEADINGS THAT JOHN VAIL REFERENCED TOWARDS THE END OF NOERR-
8 PENNINGTON ORAL---

9 THE COURT RIGHT

10 MR HINSON ---ARGUMENTS AND WE DO HAVE A MOTION WE'D
11 LIKE TO PRESENT TO YOU TODAY TO AMEND THE PLEADINGS

12 MR PAUL THAT I THINK -- I THINK THIS AFFIDAVIT
13 APPARENTLY RELATES TO IT, TO THE MOTION TO AMEND, AND IT
14 APPARENTLY RELATED TO THE CONSPIRACY CLAIM THAT THEY DROPPED

15 THE COURT OKAY

16 MR PAUL I THINK IT WAS FILED IN OPPOSITION TO THE
17 CONSPIRACY CLAIM THAT'S BEEN DROPPED IT MAY NOW HAVE SOME
18 RELATION TO THIS MOTION TO AMEND, BUT WE SAY IT HAS NO
19 RELATION TO THE SECOND CAUSE OF ACTION THAT THEY'RE SUING ON
20 BECAUSE THEIR OWN ALLEGATIONS SAY THAT THIS M O U IS THE
21 PROSPECTIVE CONTRACT AND IT COULD HAVE NOTHING TO DO WITH
22 THIS

23 THE COURT OKAY ALL RIGHT ANYTHING ELSE, MR PAUL?

24 MR PAUL I THINK -- I APPRECIATE THE COURT'S
25 QUESTIONS I THINK -- I THINK THE EVIDENCE -- I DON'T THINK

1 I HAVE HEARD ANYTHING THAT SAYS FROM MR HINSON OR MR
2 NEWMAN, THAT THERE'S ANY EVIDENCE OF AN UNLAWFUL PURPOSE IN
3 THE CONTEXT OF THIS CAUSE OF ACTION WHERE THEY CONCEDE
4 THERE'S NO CONTRACT BECAUSE WE SAY, AS THE UNITED EDUCATION
5 CASE SAYS, THERE IS NOTHING WRONG WITH COMPETITION IN THE
6 CONTEXT OF NO CONTRACT WITH THE CITY

7 SO I DON'T THINK THERE'S ONE IOTA OF EVIDENCE ABOUT
8 UNLAWFUL PURPOSE AND I DON'T THINK THE -- I THINK THERE'S NO
9 WAY TO GET INTO SOME OF WHAT MR NEWMAN WAS TALKING ABOUT
10 WITHOUT SOUNDING LIKE WE'RE CREATING FACT ISSUES, AND I DON'T
11 WANT TO DRAG YOU INTO THAT I'M PERFECTLY CONTENT TO STAND
12 ON THE RECORD

13 THE COURT WILL HAVE THE WRITTEN -- THE WRITINGS BETWEEN
14 AUGHTRY AND THE CITY COUNCIL THE COURT'S GOT THE E-MAILS
15 THE COURT'S GOT THE DEPOSITION IT'S CLEAN AS A WHISTLE IF
16 YOU LOOK AT IT THERE'S NOTHING THERE THERE'S ABSOLUTELY
17 NOTHING THERE, AND I WOULD -- WE WOULD ASK THE COURT TO LOOK
18 AT IT BECAUSE MR NEWMAN CAN STAND HERE ALL DAY LONG AND TALK
19 ABOUT DAMON JETER BEING SOMEBODY'S FRIEND IN A TOWN WHERE
20 EVERYBODY IS SOMEBODY'S FRIEND AND THEY HAPPENED TO BE ON
21 CITY COUNCIL BUT THAT DOESN'T MEAN ANYTHING

22 AND HE CAN TALK ABOUT AUGHTRY HIRING DAMON JETER TO KEEP
23 HIM INFORMED ABOUT WHAT'S GOING ON HERE THAT DOESN'T SHOW
24 ANYTHING AND SO WHEN YOU -- WHEN THE COURT LOOKS AT THE
25 REAL EVIDENCE AND GETS AWAY FROM ALLEGATIONS ABOUT, YOU KNOW,

1 WHAT WOULD HOPE TO BE SHOWN AND WHAT MIGHT BE SHOWN AND WHAT
2 THEY WOULD LIKE TO TELL THE JURY, THERE'S NOTHING THERE SO WE
3 SAY

4 THE COURT ALL RIGHT ALL RIGHT ON MY -- YES, SIR?

5 MR NEWMAN YOUR HONOR, AGAIN JUST TO -- IF IT PLEASE
6 THE COURT I WOULD APPRECIATE THE OPPORTUNITY TO BRIEF THOSE
7 TWO ISSUES THAT WERE NOT PREVIOUSLY BRIEFED

8 THE COURT WELL, HE DIDN'T BRIEF THEM EITHER SO

9 MR NEWMAN WELL

10 THE COURT ARE YOU TALKING ABOUT THE SECOND AND THE
11 THIRD ELEMENTS?

12 MR NEWMAN YES SIR THE PROBLEM IS IS THEY WEREN'T
13 STATED WITHIN THE GROUNDS FOR THE MOTION THEREFORE WE WERE
14 NOT ON NOTICE THAT THEY WOULD BEING ARGUING UNDER THE---

15 THE COURT ALL RIGHT HOW MUCH TIME WILL YOU NEED AND
16 HOW MANY PAGES WILL YOU NEED WITH NO ATTACHMENTS? YOU CAN
17 REFER TO OTHER ATTACHMENTS

18 MR NEWMAN YES, SIR FRIDAY

19 THE COURT ALL RIGHT

20 MR NEWMAN FIVE DAYS

21 THE COURT OKAY HOW MANY PAGES WILL YOU NEED?

22 MR NEWMAN TEN PAGES?

23 THE COURT ALL RIGHT

24 MR NEWMAN AND WE'LL LIMIT IT TO THOSE TWO ISSUES

25 THE COURT ANYTHING AFTER TEN PAGES I JUST QUIT

1 READING

2 MR NEWMAN YES YOUR HONOR

3 THE COURT ALL RIGHT NEXT ON MY LIST I HAVE -- WELL,
4 I HAD THE GARFIELD VERSUS AUGHTRY MOTION FOR SUMMARY JUDGMENT
5 AS TO INTERFERENCE WITH A CONTRACT WE JUST FINISHED
6 INTERFERENCE WITH PROSPECTIVE

7 MR PAUL YEAH, AND WE HAD ARGUED THE OTHER BEFORE
8 LUNCH

9 THE COURT WE ARGUED ONE AND TWO BEFORE LUNCH

10 MR PAUL YES, SIR

11 THE COURT AND THAT WAS ESSENTIALLY THE SAME GROUNDS AS
12 MR DETWILER, THE FACT THAT THERE WAS NO CONTRACT AND YOU
13 ADDED A COUPLE OF OTHER THINGS RIGHT?

14 MR PAUL YES, SIR

15 THE COURT YOU ADDED THE FAILURE OF THE CONDITIONS
16 PRECEDENT RIGHT?

17 MR PAUL YES, SIR

18 THE COURT OKAY CONSPIRACY IS WITHDRAWN EXCEPT FOR
19 THE ATTACHMENTS TO THAT MEMO IS THAT RIGHT?

20 MR HINSON YES, YOUR HONOR, AND I WOULD OFFER --
21 THERE'S -- THERE IS SOME LAW IN THE MEMO I THINK THAT HAS --
22 IN THE MEMO WE FILED THAT HAS IMPORT TO THE OTHER ISSUES FOR
23 -- FROM LOOKING AT THE MEMO RIGHT NOW, WE TALKED ABOUT CIVIL
24 -- THIS IS AN EXACT QUOTE "CIVIL CONSPIRACY IS AN ACT WHICH
25 IS BY ITS VERY NATURE COVERT AND CLANDESTINE AND USUALLY NOT

1 SUSCEPTIBLE OF PROOF BY DIRECT EVIDENCE," AND I THINK THAT
2 KIND OF TOUCHES ON WHAT WE WERE TALKING ABOUT HERE WITH THIS
3 WHAT IS THE EVIDENCE THAT MR. AUGHTRY BEHAVED IN AN IMPROPER
4 MANNER? AND SIMILAR TO CONSPIRACY, YOU'RE NOT GOING TO GET A
5 DEPOSITION WHERE MR. AUGHTRY ADMITS, PRETTY UNLIKELY, TO SAY,
6 OH, YEAH, I CHEATED IN THIS PROCESS I---

7 THE COURT WELL, YOU'VE STILL GOT TO GET IT FROM
8 SOMEWHERE YOU CAN'T JUST SAY, WELL, IT'S PROOF THAT HE
9 CHEATED BECAUSE HE SAYS HE DIDN'T

10 MR. HINSON CERTAINLY CERTAINLY NOT YOUR HONOR BUT
11 THERE IS OTHER EVIDENCE THAT MR. NEWMAN TALKED ABOUT THAT I
12 THINK THE EVIDENCE OR AN INFERENCE CAN BE CREATED, AND AT
13 THIS STAGE WE'RE ENTITLED TO EVERY REASONABLE INFERENCE FROM
14 THE EVIDENCE I JUST WAS POINTING OUT THAT THERE ARE SOME
15 PARTS OF THIS BRIEF I WOULD SAY THAT ARE STILL RELEVANT TO
16 THE UNDERLYING ISSUES ON THE OTHER CLAIM

17 THE COURT THEY MIGHT NOT CREATE A FULL-BOARD
18 CONSPIRACY CAUSE OF ACTION, BUT THEY'RE STILL RELEVANT

19 MR. HINSON YES YOUR HONOR

20 THE COURT ON THE OTHER POINTS OKAY ALL RIGHT
21 SOMEBODY MENTIONED SOMETHING BEFORE LUNCH ABOUT ESTOPPEL I
22 DON'T SEE THAT ON MY LIST

23 MR. DETWILER YOUR HONOR, THERE ARE TWO CAUSES OF --
24 TWO ADDITIONAL CAUSES OF ACTION ASSERTED AGAINST THE CITY
25 ONE IS FOR ESTOPPEL OR CONTRACT BY ESTOPPEL AND THE OTHER ONE

1 IS QUANTUM MERUIT AND I'M PREPARED TO ARGUE THOSE

2 THE COURT OKAY THOSE -- OKAY THAT GOES BACK UP TO
3 THE TOP UNDER HEADING A THEN MOTION FOR SUMMARY JUDGMENT ON
4 ALL CAUSES OF ACTION

5 MR DETWILER YES, SIR

6 THE COURT NOW, WHO'S ASSERTED QUANTUM MERUIT?

7 MR DETWILER I THINK ALL THREE PLAINTIFFS HAVE
8 ASSERTED QUANTUM MERUIT, AND I THINK NOW WITH THE AMENDMENT
9 TO THE GARFIELD TRAUB COMPLAINT ALL THREE HAVE ASSERTED
10 ESTOPPEL IS THAT CORRECT?

11 THE COURT IS THAT -- IS THAT WHAT I -- IS THAT WHAT
12 Y'ALL PRESENTED TO ME TODAY?

13 MR KALISH YOUR HONOR, WE HAVE NOT ASSERTED ESTOPPEL
14 WE PLAN TO AMEND TO ASSERT ESTOPPEL

15 MR DETWILER WE'D LIKE TO ARGUE OUR MOTION FOR SUMMARY
16 JUDGMENT OF A PROSPECTIVE---

17 THE COURT CAUSE OF ACTION?

18 MR DETWILER ---CAUSE OF ACTION

19 THE COURT ALL RIGHT WELL, I THINK -- SHE HANDED ME A
20 -- WHAT WAS STYLED A CONSENT ORDER WHAT WAS THAT?

21 MR HINSON THAT WAS FROM GARFIELD TRAUB AND GARY
22 REALTY, YOUR HONOR IT WAS---

23 THE COURT TO DO WHAT?

24 MR HINSON IT WAS TO AMEND THE PLEADINGS TO -- TO
25 AMEND OUR PLEADINGS TO INCORPORATE AN ESTOPPEL CAUSE OF

1 ACTION

2 THE COURT WHICH GRAHAM ALREADY HAS

3 MR HINSON WHICH GRAHAM ALREADY HAS YES, YOUR HONOR

4 THE COURT HOW ABOUT TURNER?

5 MR KALISH WE HAVE NOT MOVED, BUT WE PLAN TO MOVE TO
6 AMEND TO ASSERT A---

7 THE COURT ALL RIGHT AND SO IT'S A -- IT'S A DOUBLE
8 PROSPECTIVE ARGUMENT

9 MR DETWILER WELL AS YOU POINTED OUT, THAT IS A
10 CONSENT ORDER WE HAVE NOT OBJECTED TO THEIR MOTION TO
11 AMEND

12 THE COURT ALL RIGHT SO PROCEDURALLY YOU'RE GOING TO
13 BE ARGUING NEXT FOR SUMMARY JUDGMENT ON WHICH CAUSE OF
14 ACTION? THE QUANTUM -- LET'S JUST GO WITH QUANTUM MERUIT
15 FIRST SINCE THAT'S THE FIRST THING I THOUGHT OF TO SAY

16 MR DETWILER ALL RIGHT WE'LL DO IT EITHER WAY YOU
17 WANT TO DO IT, YOUR HONOR YOUR HONOR, QUANTUM MERUIT HAS
18 THREE ESSENTIAL ELEMENTS ONE IS A BENEFIT CONFERRED
19 ANOTHER ONE IS THE BENEFIT REALIZED BY THE DEFENDANT, AND
20 THAT BENEFIT MUST BE MEASURED BASED UPON THE VALUE TO THE
21 DEFENDANT, NOT WHAT IT MIGHT HAVE COST THE PLAINTIFF TO
22 CONFER THE BENEFIT, BUT THE VALUE ACTUALLY RECEIVED AND, OF
23 COURSE, THEN A RETENTION OF THAT BENEFIT IN A MANNER THAT
24 WOULD BE IMPROPER FOR THE DEFENDANT TO RETAIN WITHOUT PAYING
25 FOR IT AND IT IS OUR POSITION, YOUR HONOR, THAT THERE'S NO

1 EVIDENCE IN THE RECORD WHATSOEVER THAT THERE HAS BEEN ANY
2 BENEFIT CONFERRED UPON THE CITY IN THIS MATTER

3 NOW, THE BENEFITS THAT ARE RELIED UPON BY THE PLAINTIFFS
4 ARE SEVERAL, AND I'D LIKE TO JUST ADDRESS EACH ONE IN TURN
5 ONE IS -- INVOLVES A RENDERING BY AN ARTIST, AND THAT IS
6 ADDRESSED IN OUR REPLY BRIEF PREDOMINANTLY AND WHEN WE -- THE
7 RENDERING WE'RE TALKING ABOUT IS A SKETCH OF THE 300-ROOM
8 HILTON HOTEL PROPOSED BY THE PLAINTIFFS THEY SAY THAT THAT
9 RENDERING WAS A BENEFIT CONFERRED UPON THE CITY, THAT THAT
10 RENDERING WAS USED BY THE CITY AND, THEREFORE, WE HAVE TO PAY
11 FOR IT

12 WELL, LET ME JUST START BY SAYING THAT WE PAID FOR THE
13 RENDERING THERE IS A -- IN I THINK IT'S EXHIBIT N AND O
14 TO OUR REPLY BRIEF THERE IS A -- SOME CORRESPONDENCE AND AN
15 INVOICE, IF I RECALL, THAT -- FOR \$4,000 WHICH THE CITY PAID
16 TO THE ARTIST FOR THE RENDERING THAT THEY NOW SAY THEY
17 CONFERRED UPON US AND WE ALSO PAID \$400 TO AN ASSOCIATE OF
18 STEVENS & WILKINSON FOR COORDINATING GETTING THE RENDERING,
19 AND THE CITY PAID FOR THOSE OUTSIDE OF ANY OTHER RELATIONSHIP
20 OR CONTRACT OR ANYTHING THAT ANYBODY HAD WITH EACH OTHER, AND
21 THAT WAS A RENDERING THAT THEY'RE NOW SAYING WAS A BENEFIT
22 THEY CONFERRED UPON US, THE CITY

23 THEIR POINT IN ALL THAT NOW IS THAT THE HOTEL THAT WAS
24 BUILT THE TWO-THIRD SIZE, REDUCED-SIZE HOTEL THAT WAS
25 ACTUALLY BUILT, KIND OF LOOKS LIKE THE RENDERING

1 THE COURT LIKE THE WATERCOLOR PICTURE

2 MR DETWILER RIGHT IT KIND OF LOOKS LIKE A WATER-
3 COLOR PICTURE THAT'S THE BENEFIT THE SECOND THING THAT --
4 AND I -- THIS REALLY WASN'T TO THEIR GREAT CREDIT THIS WAS
5 NOT IN THEIR BRIEF, BUT IT IS SOMETHING THAT WAS MENTIONED IN
6 SOME DEPOSITIONS, IN PARTICULAR CHARLES GARY'S DEPOSITION AND
7 HE'S A CO-PLAINTIFF WITH GARFIELD TRAUB, AND THAT IS CHARLES
8 GARY ACTUALLY SAID THAT WE EDUCATED THE CITY ABOUT HOW TO DO
9 A DEAL AND, THEREFORE, THAT'S A BENEFIT FOR WHICH WE ARE---

10 THE COURT KIND OF MAKES PRACTICAL SENSE IN OTHER
11 WORDS, YOU USED THEM AS A TEST RUN TO LEARN HOW TO TALK THE
12 TALK AND WALK THE WALK

13 MR DETWILER IT WOULD -- IT WOULD MAKE PRACTICAL SENSE
14 MAYBE IF YOU STRETCH IT IF IT CAME FROM ANYBODY ELSE, BUT
15 THIS IS A MAN WHO WAS IN THIS DEAL BECAUSE HE DIDN'T KNOW
16 ANYTHING ABOUT THE HOTEL BUSINESS BUT WANTED TO LEARN IT

17 THE COURT WHO IS THAT?

18 MR DETWILER CHARLES GARY, THE PLAINTIFF IN THE
19 GARFIELD TRAUB COMPLAINT THE THIRD THING THAT THEY INDICATE
20 THAT WERE BENEFITS CONFERRED UPON THE CITY ARE THE DRAWINGS
21 AND PLANS THAT S AND W PREPARED NOW, THERE'S NO EVIDENCE
22 IN THE RECORD THAT THESE DRAWINGS AND PLANS WERE USED BY THE
23 CITY

24 NOW, LET'S KEEP IN MIND THAT THE ULTIMATE -- THAT THE
25 HOTEL THAT WAS ULTIMATELY BUILT IS OWNED BY THE AUGHTRY

1 DEFENDANTS, NOT BY THE CITY THE CITY DIDN'T BUILD THIS
2 HOTEL THE CITY DOESN'T OWN THIS HOTEL THE CITY DIDN'T DO
3 THE BOND FINANCING THE CITY DIDN'T DO ANY OF THAT THE
4 CITY, AS IT TURNS OUT, IS NOT A PLAYER IN THE HILTON HOTEL
5 EXCEPT THAT IT DID, YOU KNOW, MAKE SOME CONTRIBUTION UP FRONT
6 TO THE DEVELOPMENT OF THE HOTEL

7 SO THOSE PLANS COULD NOT HAVE BEEN USED BY THE CITY
8 THE CITY COULD NOT HAVE USED -- GOTTEN ANY BENEFIT FROM THOSE
9 PLANS AND DRAWINGS THERE IS NO EVIDENCE THAT THEY WERE
10 EVEN -- THAT THEY WERE EVER USED BY THE CITY, AND THERE WAS
11 NO EVIDENCE THAT THE CITY EVER EVEN SENT THEM TO AUGHTRY
12 NOW, LET ME---

13 THE COURT WHERE DID IT GO? JUST THEY WERE BETWEEN THE
14 PLAINTIFFS?

15 MR DETWILER THE PLAINTIFFS DID IT FOR THEIR 300-ROOM
16 HOTEL AUGHTRY BUILT A 200-ROOM HOTEL AND---

17 THE COURT DID THE CITY EVER GET THE COPIES?

18 --- MR DETWILER -- THE CITY DID HAVE COPIES, YES, SIR BUT
19 THERE'S NO EVIDENCE THAT THEY EVER SENT THEM TO AUGHTRY, AND
20 THERE'S CERTAINLY NO EVIDENCE AND THERE CAN'T BE ANY
21 EVIDENCE---

22 THE COURT SO THEY HAD NO VALUE TO YOU

23 MR DETWILER THEY HAVE NO VALUE TO THE CITY, AND
24 THERE'S NO EVIDENCE THAT THEY CONFERRED ANY VALUE UPON
25 AUGHTRY NOW, I WILL CALL THE COURT'S ATTENTION TO THEIR

1 BRIEF, THE PLAINTIFF'S BRIEF, WHERE THEY -- AND THIS IS THE
2 LEAP THEY MAKE IN THIS REGARD THEY SAY THAT THERE'S AN
3 E-MAIL FROM STEVE GANTT SENDING TO BO AUGHTRY A COPY OF THE
4 RENDERING THAT WE TALKED ABOUT A MOMENT AGO, THE ARTIST'S
5 SKETCH, AND, THEREFORE, THAT PROVES THAT AUGHTRY GOT ALL THE
6 DRAWINGS AND PLANS THAT THEY PREPARED

7 THE COURT WHAT DID THE E-MAIL SAY THAT -- BY WHICH
8 THEY SENT -- ALONG WITH WHICH THEY SENT THE DRAWING?

9 MR DETWILER HERE'S THE RENDERING OR I SENT THE
10 RENDERING AS YOU REQUESTED IT JUST REFERS TO THE RENDERING,
11 AS I RECALL

12 THE COURT AND YOU SAY THAT HAD ALREADY BEEN PAID FOR

13 MR DETWILER AND THAT'S WHAT WE PAID FOR WE BOUGHT
14 IT AND WE PAID FOR IT

15 THE COURT YOU BOUGHT IT FOR \$400?

16 MR DETWILER NO, 4,000

17 THE COURT OH, I THOUGHT I READ 400

18 MR DETWILER IT WAS 4,000 PLUS WE PAID ONE OF THE
19 MEMBERS OF THE TEAM ANOTHER 400 JUST TO ARRANGE IT FOR US
20 SO THAT WAS BOUGHT AND PAID FOR BY THE CITY THIS IS AGAIN
21 THE RENDERING

22 THE COURT SO THEY MAINTAIN THAT BECAUSE YOU SENT THAT
23 TO MR AUGHTRY YOU MUST HAVE SENT OTHER THINGS

24 MR DETWILER THAT'S THE LEAP, AS I READ THEIR BRIEF
25 ONCE AGAIN, THERE'S NO EVIDENCE THAT THERE'S ANY VALUE OF ANY

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C James, Jr , Circuit Court Judge

Case No 2005-CP-40-1014
(Consolidated Under Case No 2007-CP-40-1252)

Stevens and Wilkinson of South Carolina, Inc , Gary
Realty Company, Inc , Garfield Traub Development, LLC,
and Turner Construction Company, Plaintiffs,

Of Whom
Gary Realty Company, Inc , and Garfield Traub
Development, LLC are Appellants,

vs

Paul C "Bo" Aughtry III Windsor/Aughtry Co , Inc
Vista Hotel Partners LLC, Hilton Hotels Corporation and
the City of Columbia Defendants,

Of Whom
The City of Columbia is Respondent

RECORD ON APPEAL

Kenneth M Suggs
Francis M Hinson, IV
JANET, JENER & SUGGS, LLC
Post Office Box 927
Columbia South Carolina 29202
Tel (803) 726-0050
Attorneys for Appellants

D Reece Williams, III
Richard C Detwiler
Kathleen McDaniel
CALLISON TIGHE
& ROBINSON, LLC
1812 Lincoln Street, Suite 200
Columbia, South Carolina 29202
Tel (803) 404-6900
Attorneys for Respondent

INDEX

ORDERS

Order Consolidating Cases for Discovery filed May 24 2007	5-13
Order Consolidating Cases for Trial, signed July 9, 2009	14-16

JUDGMENTS

Circuit Court's Grant of Summary Judgment to the City of Columbia, filed Nov 19, 2009	17-37
Circuit Court's Grant of Summary Judgment to Hilton Hotels Corporation, filed Nov 23, 2009	38-55
Circuit Court's Grant of Summary Judgment to Aughtry Parties, filed Dec 1, 2009	56-76

PLEADINGS

Gary Realty Company Inc and Garfield Traub Development, LLC's Amended Complaint filed July 29, 2005	77-83
Gary Realty and Garfield Traub Development, LLC's Memorandum in Opposition to Defendant Hilton's Motion for Summary Judgment, filed July 2, 2009	84-92
Joint Memorandum of Stevens & Wilkinson, Gary Realty, and Garfield Traub Development LLC in Opposition to the City of Columbia and Aughtry's Motions for Summary Judgment, filed August 4, 2009	93-126

TRANSCRIPTS

Transcript of July 9 2009 Hearing on Defendants' Motions for Summary Judgment	127-310
Transcript of Aug 17 2009 Hearing on Defendants' Motions for Summary Judgment	311-577
Deposition Transcript of William Corrado, dated Dec 22, 2008, pp 1-3, 41-42, 99	578-583
Deposition of Shawn Epps dated April 28, 2006, pp 1-2, 9-10	584-587

Deposition Transcript of John Lumpkin, dated Aug 19, 2008, pp 1-4, 40 52 53, 60-61, 67 68, 74, 83-84, 86 158, 287-88	588-605
Deposition Transcript of Robert Lyles dated Aug 21 2008 pp 1 5, 16, 82	606-612
Deposition Transcript of Greg Garfield, dated Aug 22, 2008, pp 1-5, 285- 86 290	613-620
Deposition Transcript of Raymond Garfield, dated Oct 21, 2008, pp 1-5 28-29	621-627
Deposition Transcript of Charles Gary dated Sept 3 2008, pp 1-5, 23, 25 26, 30-31	628-637
Deposition Transcript of Jeff Sachs, dated Feb 5, 2009, pp 1-4, 96-98 145	638 645
Deposition Transcript of Tony Traub, dated Dec 4, 2008, pp 1-5, 79	646 651
Deposition Transcript of City s 30(b)(6) witness, Steven Gantt, dated Dec 9, 2008, pp 1 4, 50-51	652-657

EXHIBITS AND OTHER MATERIAL PRESENTED TO THE CIRCUIT COURT

Affidavit of Joel Gottlieb dated Aug 11, 2009	658-662
Affidavit of Greg Garfield, dated June 24, 2009	663-666
Affidavit of Raymond Garfield dated June 24, 2009	667-690
Affidavit of Erika Salley, dated Aug 6, 2009	691-694
Affidavit of Eric Anthony Traub, dated June 26, 2009	695-698
Plaintiffs' Responses to Defendant Hilton Hotels Corp 's Second Request for Admissions, dated Oct 29, 2007	699-700
City's Request for Qualifications dated Jan 15, 2001	701-704
Memorandum of Understanding, dated April 17, 2003	705-728
City's Request for Proposals dated April 2 2004	728-737
PKF Study, dated Oct 2003	738-887

City Council Work Session Minutes, dated Dec 11 2002	888-889
Notes of Development Team/City Meeting held on July 10, 2003	890-893
City of Columbia Convention Center Hotel Corporation Board of Directors Meeting Minutes, dated Feb 11, 2004	894-895
Columbia Convention Center Hotel Corporation Meeting Minutes, dated Feb 11, 2004	896-898
Handwritten Columbia Convention Center Hotel Corporation Meeting Minutes, dated Feb 11, 2004	899-903
Columbia City Council Meeting Minutes, dated Mar 17, 2004	904-906
Columbia City Council Meeting Minutes, dated Mar 24, 2004	907-910
Ambac Assurance Corporation Commitment for Financial Guaranty Insurance, dated Feb 17, 2004	911-913
Ambac Commitment Letter dated Feb 17 2004	914-915
Citigroup Financial Model, dated Sept 24, 2003	916-926
Citigroup Financial Model, dated Mar 15, 2004	927-941
Citigroup Presentation, dated Feb 11, 2004	942-946
Pictures of Aughttry Hotel	947-949
Rendering of Project Team's Proposed Hotel	950
Articles of Incorporation and Bylaws for Columbia Convention Center Hotel Corporation	951-966
Excerpt of Draft Development Management Agreement	967-970
Excerpt of Agreement between Design/Builder and Architect/Engineer for Design/Build Project	971-980
Letter of Intent between Aughttry and City	981-984
Letter from Jack Plaxco to Shawn Epps, dated July 8 2003	985
Email from Bo Aughttry to Gantt, dated April 5, 2004	986-987

Letter from Elliott Franks to Steve Gantt dated Feb 25 2004	988
Letter from John Lumpkin to Bill Corrado, dated Feb 26, 2004	989
Email Chain between Joel Gottlieb and Kathleen Wu, dated Nov 12 2003	990-994
Email Chain among Kathleen Wu and Others, dated Jan 6, 2004	995-996

1 OF THAT STUFF TO THE CITY

2 THE COURT WELL WHAT DOES -- HOW DO YOU -- STEVENS &
3 WILKINSON'S QUANTUM MERUIT CLAIM, HOW DOES THAT FALL IN WITH
4 THE 697 THAT'S BEEN PAID? ARE YOU SAYING -- ARE YOU SAYING
5 THAT THAT IS THE SATISFACTION OF THEIR QUANTUM MERUIT CLAIM,
6 TOO?

7 MR DETWILER NO, SIR I WOULD SAY -- AND I'M GLAD YOU
8 BROUGHT THAT UP BECAUSE I DO WANT TO ADDRESS THAT I DO HAVE
9 -- AND I'VE GIVEN COUNSEL COPIES OF THESE I'D LIKE TO HAND
10 UP, IF THE COURT WOULD PLEASE, DOCUMENTS THAT JUST RELATE TO
11 THAT \$650,000 TRANSACTION BECAUSE I DON'T KNOW THAT IT'S BEEN
12 CLEARLY LAID OUT THE DOCUMENTS SPEAK FOR THEMSELVES AND

13 LET ME JUST EXPLAIN FACTUALLY WHAT HAPPENED ON THE
14 \$650 000 THESE TABS YOUR HONOR, ARE -- GIVEN TO YOU ARE
15 THE DOCUMENTS THEY'RE ALL IN CHRONOLOGICAL ORDER THE
16 FIRST ONE IS A LETTER FROM JOHN LUMPKIN TO STEVE GANTT,
17 JUNE 26, 2003, BEFORE THE COUNCIL TOOK ANY VOTE ABOUT THIS
18 HE BEGINS BY SAYING, "AS YOU KNOW UNDER THE TERMS OF THE
19 M O U , MEMBERS OF THE DEVELOPMENT TEAM AGREE TO BE
20 EFFECTIVELY AT RISK UP TO THE DATE OF THE BOND CLOSING "

21 NOW, HE GOES ON TO EXPLAIN THAT WITH REGARD TO S AND W
22 THEY DIDN'T INTEND TO DO ANY MORE WORK UNTIL THE BONDS
23 CLOSED, AND THEN THEY WOULD PICK BACK UP WITH ALL THE THINGS
24 THAT THEY HAD TO DO WHICH INCLUDE CONSTRUCTION MANAGEMENT,
25 AND SO FORTH BUT THEY ALSO HAD TO DO MORE COMPLETE

1 DRAWINGS, BUT THAT WOULDN'T BE DONE UNTIL THE BONDS ACTUALLY
2 CLOSED

3 NOW THEY'RE TALKING ABOUT WANTING TO EXPEDITE THIS WHILE
4 THEY'RE WAITING FOR THESE OTHER ISSUES AND I MENTIONED THIS
5 EARLIER THIS MORNING WHILE THEY'RE WAITING FOR THESE OTHER
6 ISSUES REGARDING FINANCING AND SO FORTH TO PLAY OUT, IT NOW
7 LOOKS LIKE THE BOND IS GOING TO BE CLOSED IN OCTOBER SO
8 THEY'RE LOOKING TO KEEP S AND W UP AND RUNNING BEYOND WHAT
9 THEY INTENDED TO DO BEFORE THE BONDS CLOSED AND THE DEAL WAS
10 EFFECTIVELY DONE AND HE'S PROPOSING OR HE'S TALKING ABOUT
11 PAYMENT OF FEES FOR THIS 90-DAY PERIOD THIS IS AN ESTIMATE
12 OF A 90-DAY PERIOD NOW -- AND ATTACHED TO THAT IS AN
13 ESTIMATE OF THOSE FEES \$450,000 PLUS \$60,000 PER WEEK, AGAIN
14 FOR THAT ESTIMATED TIME PERIOD

15 THE NEXT TAB TWO IS A REVISED ESTIMATE OF THOSE FEES
16 WHICH IS \$450 000 TO S AND E (SIC) AND THEN 200,000 FOR
17 CONSULTANTS AND THEN AN ESTIMATE OF FEES BEYOND THE
18 OCTOBER 13TH, 2003---

19 THE COURT WHICH IS THE 650 PLUS THE 75

20 MR DETWILER THAT'S THE 650 PLUS THE 75 THE NEXT TAB
21 IS MINUTES FROM THE CITY COUNCIL MEETING AND THE VERY LAST
22 THING ON THE SECOND PAGE OF THAT TAB, YOUR HONOR, IS THE
23 ACTION THAT WAS APPROVED, AND THE ACTION THAT WAS APPROVED
24 WAS \$650,000 FOR INTERIM ARCHITECTURAL FEES NO MENTION OF
25 \$75,000 A WEEK OR ANYTHING ELSE AND THIS IS WHAT I

1 SUBMITTED TO YOU EARLIER WAS AN OFFER AND A COUNTEROFFER IN
2 EFFECT BY THE -- BY THE CITY COUNCIL SAYING OKAY, WE'LL PAY
3 YOU THE 650

4 THE NEXT IS A MEMO FROM BOBBY LYLES NOW THIS IS FAST-
5 FORWARDING TO DECEMBER 5TH OF '03 MEMO OF BOBBY LYLES TO
6 SHAWN EPPS WHO WORKED FOR THE CITY AT THE TIME AND -- AND I
7 PUT THIS IN HERE BECAUSE IT'S IMPORTANT THAT -- FOR THE COURT
8 TO UNDERSTAND THAT HE USED THE WORD ADVANCE THIS WAS
9 INTENDED TO BE AN ADVANCE ON WHATEVER FEES THEY MIGHT
10 ULTIMATELY GET PURSUANT TO THE M O U , AND THAT BECOMES
11 IMPORTANT AS YOU---

12 THE COURT HAVE THEY ALREADY BEEN PAID THE 697?

13 MR DETWILER THEY WERE GETTING -- THE NEXT -- THE NEXT
14 ONE THAT YOU SEE IS LEADING UP TO THAT 697 NO, SIR, THE 697
15 HAD NOT BEEN PAID, BUT IT GETS PAID THAT MONTH THE INVOICE
16 HAD NOT BEEN SUBMITTED AT THAT POINT

17 SO THEN THERE IS A -- THERE'S ANOTHER CORRESPONDENCE
18 FROM BOBBY LYLES TO MARK ALICE OF TURNER CONSTRUCTION NOW,
19 KEEP IN MIND THAT S AND W 'S CONTRACT -- THE WAY THIS THING
20 IS SET UP, S AND W 'S DEAL REALLY FALLS UNDER THE PURVIEW OF
21 TURNER'S OVERALL DESIGN/BUILD OR TURNER'S OVERALL CONTRACT
22 WITH THE CITY AND SO BOBBY LYLES IS ASKING TURNER FOR
23 PERMISSION TO GET THIS ADDITIONAL MONEY, EXCEPT AT THIS POINT
24 HE'S TALKING ABOUT IT BEING \$700,000

25 AGAIN, THE NEXT TAB IS BOBBY LYLES WRITING MARK ALICE

1 AGAIN ON DECEMBER 17TH AND THIS IS IMPORTANT HE'S NOW
2 TALKING ABOUT 705,000 AND HE NEEDS FOR TURNER TO AGREE TO A
3 COUPLE OF THINGS THAT THE CITY OF COLUMBIA WILL BE
4 REIMBURSED DIRECTLY AT BOND CLOSING FOR THIS ADVANCE AND THAT
5 IT IS PERMISSIBLE THAT THE ADVANCED FUNDS BE PAID DIRECTLY TO
6 STEVENS & WILKINSON, NOT THROUGH TURNER, AND THAT'S
7 ULTIMATELY WHAT HAPPENED, YOUR HONOR

8 THEY SUBMITTED THE BILL WHICH IS AT TAB SEVEN FOR
9 697,000 AND, YOU KNOW, HONESTLY IT IS UNCLEAR WHY IT'S MORE
10 THAN THE 650 EXCEPT THAT I WILL POINT OUT THAT THE PERIOD --
11 THE BONDS DID NOT CLOSE IN OCTOBER AS EVERYBODY HAD EXPECTED
12 WHEN THEY ORIGINALLY WENT INTO THIS AND WE'RE NOW EXTENDING
13 THIS OUT -- THEY NOW SUBMITTED A BILL THROUGH DECEMBER 15TH
14 THE COURT ALL RIGHT

15 MR DETWILER AND IT GOT PAID AND THEN ON PAGE,
16 EXCUSE ME, THE NINTH TAB ONCE AGAIN MARK ALICE -- AT THIS
17 POINT MARK ALICE IS WRITING BACK IN RESPONSE TO THIS
18 CORRESPONDENCE AT THIS POINT HE'S WRITING JOHN LUMPKIN THE
19 POINT MAN FOR THE TEAM, AND HE SAYS, "OKAY THIS IS OKAY
20 WITH US THEY CAN HAVE THE MONEY WE WON'T TAKE ANY PART OF
21 IT AS LONG AS EVERYBODY UNDERSTANDS SEVERAL THINGS, AND ONE
22 OF THEM IS THAT IF FOR SOME REASON THE BONDS DON'T CLOSE, WE
23 DON'T HAVE TO PAY THE MONEY BACK " AND SO, ONCE AGAIN, IN
24 DECEMBER OF '03 TURNER IS CLEARLY CONTEMPLATING THAT
25 EVERYTHING IS DEPENDENT ON THE BOND CLOSING ALL MONEY FLOWS

1 FROM THE BOND CLOSING NO BOND CLOSING, NO MONEY

2 DECEMBER 18, JOHN LUMPKIN IS WRITING TO STEVE GANTT AND
3 HE IS SAYING ESSENTIALLY THE SAME THING TO THE CITY THAT
4 THE CITY OF COLUMBIA MAY ADVANCE THESE FUNDS DIRECTLY TO
5 STEVENS & WILKINSON THE FUNDS WILL BE CREDITED AGAINST THE
6 DESIGN FEE, AND THE CITY WILL BE REIMBURSED SUCH AMOUNT AT
7 CLOSING, AT THE BOND CLOSING AND IT ALSO IN THE FINAL
8 PARAGRAPH SAYS THAT IN THE EVENT THAT THE BONDS FAIL TO
9 CLOSE, THERE WILL BE NO OBLIGATION FROM THE DESIGN TEAM OR
10 ANYBODY TO PAY THE CITY BACK SO, IN OTHER WORDS, IT WAS A
11 NON-REFUNDABLE ADVANCE IS WHAT THAT AMOUNTED TO

12 THE COURT ALL RIGHT WELL, GETTING BACK TO YOUR
13 QUANTUM MERUIT ARGUMENT, IF THEY WERE -- IF THEY WERE TO
14 RECEIVE A VERDICT ON THEIR QUANTUM MERUIT ARGUMENT WOULD
15 THIS 697 BE LOPPED OFF THE TOP OR AM I NOT -- IN OTHER WORDS
16 WHAT---

17 MR DETWILER I THINK IT -- I THINK IT WOULD HAVE TO
18 BE I THINK IT WOULD HAVE TO BE, YOUR HONOR YOU KNOW, IT'S
19 REALLY INCONCEIVABLE TO ME TO LOP \$697,000 OFF OF NOTHING
20 THOUGH BECAUSE THERE'S NO EVIDENCE -- AND WHEN I -- AND I'M
21 NOT -- THIS IS NO EXAGGERATION THERE IS NO EVIDENCE OF ANY
22 VALUE CONVEYED -- MEASURABLE VALUE CONVEYED TO THE CITY OF
23 COLUMBIA BY THESE FOLKS

24 NOW, THAT IS NOT TO SAY THEY DIDN'T WORK HARD THAT IS
25 NOT TO SAY THAT THEY -- YOU KNOW, THEY DID -- YOU ASKED THE

1 QUESTION AWHILE AGO DID THESE FOLKS, YOU KNOW, WORK FOR A
2 YEAR TRYING TO MAKE THIS DEAL WORK? THEY COULDN'T MAKE IT
3 WORK THEY WERE EXPECTING A GREAT REWARD AT THE END OF THE
4 DAY WHICH THEY DIDN'T GET, AND I'M DISAPPOINTED FOR THEM THAT
5 THEY DIDN'T GET IT, BUT THAT DOES NOT MEAN THAT THEY
6 CONFERRED ANY BENEFIT WHATSOEVER TO THE CITY THEY DIDN'T

7 AND WE'VE ASKED AND WE'VE ASKED AND WE'VE ASKED TELL
8 US WHAT YOUR DAMAGES ARE, AND THEY HAVE YET TO TELL US WHAT
9 MEASURABLE DAMAGES THERE MIGHT BE THROUGH ANYTHING THAT THEY
10 DID IN TERMS OF CONFERRING ANY BENEFIT AND THAT IS WITH
11 RESPECT TO ALL OF THE DEFENDANTS

12 THERE'S ONE MORE THING THAT THEY SAY -- AND I'LL BE
13 HONEST WITH YOU, I DON'T QUITE GET IT BUT I WANT TO ADDRESS
14 IT AS BEST I CAN THEY SAY THAT THE ROOM BLOCK AGREEMENT WAS
15 A BENEFIT CONFERRED UPON THE CITY NOW, THIS -- KEEP IN MIND
16 THIS IS THE ROOM BLOCK AGREEMENT THAT WAS NEVER FULLY
17 NEGOTIATED WE TALKED ABOUT IT AD NAUSEAM THIS MORNING
18 NEVER EXECUTED BY ANYBODY BUT THEY'RE SAYING THAT THAT WAS
19 A BENEFIT CONFERRED UPON THE CITY

20 NOW, THIS IS THE ROOM BLOCK AGREEMENT AGAIN THAT WAS
21 UNDER NEGOTIATIONS ALL THE WAY TO THE END AND, AGAIN NO --
22 NO EVIDENCE OF A BENEFIT CONFERRED, BUT THERE'S ALSO NO
23 EVIDENCE THAT WHAT WAS ENTERED INTO ULTIMATELY BETWEEN THE
24 CITY AND BO AUGHTRY HAS ANY RESEMBLANCE TO WHATEVER IT IS
25 THAT WAS STILL UNDER NEGOTIATION BACK WHEN WE WERE TALKING

1 WITH THEM ABOUT DOING A PUBLICLY-FINANCED DEAL SO, I MEAN,
2 I JUST DON'T SEE HOW YOU GET ANYWHERE WITH THAT ARGUMENT
3 THERE'S NO TRACTION THERE

4 YOUR HONOR, I'M PREPARED TO TALK ABOUT ESTOPPEL BUT IF
5 YOU WANT TO ADDRESS ONE ISSUE AT A TIME, I'LL SIT DOWN AND
6 LET THESE FOLKS SPEAK

7 THE COURT ALL RIGHT MR NEWMAN?

8 MR NEWMAN YES, SIR JUDGE, I THINK WE'RE GOING TO DO
9 THIS PIECEMEAL FIRST OF ALL, WITH REGARD TO THE JULY 30TH
10 VOTE, YOU JUST GOT THE 12 NEW EXHIBITS AND I THINK WE JUST
11 SHOULD REALLY LEAVE THIS FOR ANOTHER TIME OR CONSIDERING
12 JUDGE MANNING'S ORDER AND THE 59(E) ORDER ON THIS EXACT SAME
13 ISSUE WE JUST NOT TAKE IT UP

14 THE COURT WELL, MR DETWILER, DOES YOUR SECOND
15 SUPPLEMENTAL PACKET OR EXHIBIT PACKET HAVE ANYTHING TO DO
16 WITH THE QUANTUM MERUIT OR DID YOU START TALKING ABOUT THAT
17 BECAUSE I ASKED YOU ABOUT IT?

18 MR DETWILER I TALKED ABOUT IT BECAUSE YOU ASKED ABOUT
19 IT, BUT I HAD INTENDED TO TALK ABOUT IT FOR SEVERAL REASONS
20 ONE IS IT IS SOMETHING THAT THEY I THINK RELY UPON WITH
21 REGARD TO THEIR ESTOPPEL ARGUMENT, AND ALSO BEFORE YOU TODAY
22 IS A MOTION FOR SUMMARY JUDGMENT ON EVERYTHING AND WE THINK
23 THAT JUDGE MANNING'S ORDER SETS THAT UP PERFECTLY FOR YOU TO
24 ANSWER THE QUESTIONS THAT HE DID NOT ANSWER AND THAT IS WAS
25 THERE ANY BREACH OF ANY CONTRACT THAT WAS FORMED?

1 THE COURT ALL RIGHT

2 MR DETWILER AND I MISSPOKE EARLIER THIS MORNING YOU
3 DO HAVE A COPY OF THAT ORDER ATTACHED TO OUR REPLY BRIEF,
4 YOUR HONOR

5 THE COURT ALL RIGHT ALL RIGHT SO, MR NEWMAN, ARE
6 YOU GOING TO

7 MR NEWMAN I'M SORRY

8 MR DETWILER I'M SORRY

9 THE COURT Y'ALL GO AHEAD THAT'S FINE

10 MR NEWMAN OKAY

11 THE COURT I'VE SIGNED THIS ORDER ALLOWING THE
12 COMPLAINT TO BE AMENDED I THINK THERE'S JUST ONE BECAUSE
13 THIS IS GARY REALTY VERSUS THE CITY OF COLUMBIA?

14 MR HINSON THANK YOU, YOUR HONOR

15 MR NEWMAN JUDGE, I'LL JUST SPEAK BRIEFLY ON THAT
16 JUDGE, FIRST OF ALL, WE'VE BRIEFED THE ISSUES WITH REGARD TO
17 THE JULY 30TH VOTE BEFORE JUDGE MANNING WE ADDRESSED THEM
18 TO THE EXTENT IT'S NECESSARY IF THERE WAS AN ISSUE THAT --
19 AT ANY RATE, IT'S BEEN DEALT WITH

20 THE COURT LET'S JUST TALK ABOUT THE QUANTUM MERUIT

21 MR NEWMAN THERE WE GO LET'S JUST KEEP IT SIMPLE

22 THE COURT WHAT ARE YOUR -- WHAT ARE THE -- WHAT ARE
23 THE BENEFITS CONFERRED?

24 MR NEWMAN OKAY AND, AGAIN I'LL DO MY BEST TO KEEP
25 IT SIMPLE SINCE IT'S GETTING LATE IN THE AFTERNOON

1 THE COURT NO DON'T WORRY ABOUT THAT DON'T STOP
2 BECAUSE IT'S GETTING LATE

3 MR. NEWMAN IT MAY BE FOR MY BENEFIT RATHER THAN YOURS
4 BUT THE FIRST THING THAT IS NECESSARY TO EMPHASIZE FROM THE
5 ARCHITECTS' PERSPECTIVE IS THAT THE ARCHITECTURAL WORK WAS
6 NOT FOCUSED SIMPLY UPON THE BUILDING IT WAS ALSO FOCUSED ON
7 SITE PREPARATION A LOT OF THAT WENT INTO THIS WORK ON THE
8 FRONT END OF THE DEAL AND MR. DETWILER SAID THAT HE'S ASKED
9 AND ASKED AND HE HAS, AND THE MOST RECENT TIME HE ASKED WAS
10 ON JULY 8TH OF THIS YEAR HE ASKED MR. DEAN MOORE, WHO WAS
11 ONE OF OUR ARCHITECTS WHO WAS KIND OF ON THE GROUND RATHER
12 THAN NEGOTIATING WITH THE PARTIES, AND I BELIEVE WE -- I KNOW
13 WE GOT THIS -- THE DEPOSITION WAS TAKEN AFTER THE CITY FILED
14 THIS MEMO

15 BUT AT ANY RATE, ONE OF THE QUESTIONS FROM MR. DETWILER
16 TO MR. MOORE WAS, "I ASKED YOU A QUESTION AWHILE AGO
17 'BEFORE I TURN OR PASS THE BATON -- AND I DID WANT TO FOLLOW
18 UP ' WE WERE TALKING ABOUT WHAT WORK PRODUCT OF S AND W ,"
19 BEING MY FOLKS, "IF ANY, THE CITY ACTUALLY USED IN ANY
20 FASHION FOR ANY PURPOSE IS THERE ANY SUCH WORK PRODUCT THAT
21 S AND W PRODUCED WHICH THE CITY USED FOR ANY PURPOSE?"
22 ANSWER "TO MY KNOWLEDGE, THEY HAD USED SOME OF THE SITE
23 DEMOLITION AND SITE LAYOUT AND GARAGE LAYOUT WORK, BUT AS FAR
24 AS BUILDINGS I DON'T KNOW THAT BECAUSE I'VE NEVER FOLLOWED UP
25 TO SEE WHAT THE BUILDING LOOKS LIKE " , SO IF YOU'RE LOOKING

1 FOR EVIDENCE, THERE YOU HAVE IT SITE DEMOLITION AND SITE
2 LAYOUT AND GARAGE LAYOUT WORK

3 THE COURT HOW MUCH WAS THAT WORTH? WHAT WAS THE VALUE
4 TO THE DEFENDANT?

5 MR. NEWMAN WELL, NOW, WE HAVEN'T HAD TESTIMONY ON THAT
6 FACT YET, BUT THE FACT IS ONCE THE SITE -- ONE OF THE ISSUES
7 EARLY ON WAS WHERE EXACTLY WAS THE HOTEL GOING TO GO?
8 THERE ARE THREE OR FOUR DIFFERENT SPOTS AROUND THE CITY ALL
9 WITHIN ABOUT A THREE OR FOUR-BLOCK RADIUS WHERE IT COULD
10 POSSIBLY WIND UP

11 THE COURT SO THIS EARLY SITE WORK -- AND I HATE TO GO
12 BACK TO THIS THING THEY JUST HANDED UP THE EARLY SITE WORK
13 REFERENCED ON TAB SEVEN OF THE SECOND SET OF EXHIBITS,
14 \$34,000, THAT DOESN'T HAVE ANYTHING TO DO WITH WHAT YOU'RE
15 TALKING ABOUT?

16 MR. NEWMAN IT MAY, BUT WE'D HAVE TO HAVE THE SPECIFIC
17 TESTIMONY FROM MY FOLKS AND SOME OF THE SUBCONTRACTORS TO
18 IDENTIFY EXACTLY WHAT MR. MOORE WAS TALKING ABOUT IN
19 COMPARING IT TO WHAT WAS COMPENSATED IN THAT OR WHAT
20 ALLEGEDLY WAS COMPENSATED IN REFERENCE---

21 THE COURT BECAUSE THERE'S NO WAY FOR ME TO LOOK AT
22 THIS AND TELL WHETHER THAT EARLY SITE WORK FIGURE WAS BUILT
23 INTO ANY OF WHAT WAS ACTUALLY PAID

24 MR. NEWMAN CORRECT

25 THE COURT ALL RIGHT SO YOU'RE SAYING EARLY SITE WORK

1 WAS A BENEFIT

2 MR NEWMAN SITE DEMOLITION, SITE LAYOUT, AND GARAGE
3 WORK AS WELL AND---

4 THE COURT THAT'S ACTUAL PHYSICAL WORK DONE ON THE
5 GROUND

6 MR NEWMAN CORRECT, THAT, ACCORDING TO MR MOORE, THE
7 CITY USED SO -- AND ALSO WHEN YOU GO TO THIS -- THE ISSUE
8 OVER THE RENDERING THAT HAS BEEN ADDRESSED NUMEROUS TIMES,
9 MR GANTT GAVE A 30(B)(6) DEPOSITION SPEAKING ON BEHALF OF
10 THE CITY, AND HE WAS ASKED ABOUT THE ARTISTIC RENDERING AND
11 THE FINAL RESULT THE HOTEL IS OVER ON LINCOLN STREET OR
12 WHEREVER IT IS RIGHT NOW, AND HE TESTIFIED HIMSELF THAT THE
13 HOTEL LOOKS MUCH LIKE THE RENDERING THAT THE STEVENS &
14 WILKINSON FOLKS PUT TOGETHER

15 MR DETWILER SAID IT WAS OTHER PEOPLE IT WAS T V S
16 ACTUALLY WHO WAS A SUBCONTRACTOR OF STEVENS & WILKINSON THAT
17 WAS HIRED TO DO THE ARTISTIC RENDERING I'VE SEEN THE
18 INVOICE I HAVE NOT SEEN A CHECK

19 THE COURT I THOUGHT THEY SAID THEY PAID YOU FOR THAT

20 MR NEWMAN WELL, THAT'S WHAT THEY SAID I'M NOT SURE
21 THAT THAT'S---

22 THE COURT SO YOU WANT \$4400

23 MR NEWMAN WELL, I'D LOVE THE \$4400 WHAT I'D LIKE IS
24 COMPENSATION FOR THE REST OF THE ARCHITECTURAL RENDERINGS
25 THAT WERE PROVIDED TO THE CITY THAT CONSTITUTED, ACCORDING TO

1 MR LYLES' DEPOSITION, A FULL SET OF CONSTRUCTION DOCUMENTS

2 THE COURT WAIT A MINUTE NOW ALL RIGHT YOU SAID THE
3 HOTEL LOOKS LIKE THE PICTURE

4 MR NEWMAN CORRECT

5 THE COURT DOES THE INTERIOR OF THE -- DOES THE HOTEL
6 AS CONSTRUCTED LOOK LIKE YOUR PLANS?

7 MR NEWMAN ACCORDING TO MR GARY, WHO HAS TESTIFIED ON
8 THE ISSUE, THEY LOOK SIMILAR NOW, IS THAT ENOUGH TO PROVE
9 IT? THAT WILL BE UP TO THE JURY

10 THE COURT ALL RIGHT SO WHO IS THE ARCHITECT ON THE
11 ONE THAT WAS ACTUALLY BUILT?

12 MR FOSTER THE ONE THAT WAS ACTUALLY BUILT, MR
13 AUGHTRY HIRED A GROUP OUT OF TENNESSEE

14 THE COURT WHAT WAS THE NAME OF IT?

15 MR NEWMAN I DON'T REMEMBER THE NAME OF IT

16 THE COURT I ASSUME THEY PUT TOGETHER SOME PLANS, AND I
17 ASSUME THOSE -- I ASSUME THEY PAID FOR THEM I ASSUME IF MR
18 AUGHTRY WANTED TO BASICALLY STEAL YOUR PLANS AND USE THOSE

19 YOU WOULD NOT HAVE PAID ANOTHER ARCHITECT

20 MR NEWMAN WELL, I DON'T BELIEVE THAT THEY -- I DON'T
21 BELIEVE THAT IT'S IN THE RECORD AS TO WHAT EXACTLY THEY
22 PRODUCED AND WHAT EXACTLY THEY DID NOT WHAT WE KNOW IS THAT
23 IN THAT E-MAIL FROM MR GANTT TO MR AUGHTRY THE ARTISTIC
24 RENDERING WAS NOT BEING SENT TO MR AUGHTRY IT WAS BEING
25 SENT TO HIS ARCHITECTS SOMEWHERE IN TENNESSEE

1 UNDER THE TERMS OF THE M O U THE CITY, A NON-BINDING
2 M O U ACCORDING TO SEVERAL PARTIES IN THIS CASE, THE CITY
3 WAS TO RETAIN ALL OF THE ARCHITECTURAL DRAWINGS THAT STEVENS
4 & WILKINSON PRODUCED AND THEY---

5 THE COURT HAVE YOU -- HAVE YOU -- HAVE YOU ASKED THE
6 QUESTION WHAT DID YOU DO WITH THOSE, MR GANTT, OR WHOEVER
7 ELSE WITH THE CITY?

8 MR NEWMAN JUDGE, I DON'T KNOW OF ANYWHERE IN THE
9 RECORD WHERE I COULD POINT TO THAT, BUT AS MR HINSON WAS
10 ALLUDING TO EARLIER TODAY, THAT EVIDENCE IS STRONG THAT THE
11 CITY WAS IN POSSESSION OF THESE PLANS THEY WANTED THIS
12 STUFF CREATED THEY -- THERE'S EVIDENCE THAT THEY WERE
13 GIVING THINGS CREATED BY STEVENS & WILKINSON TO MR AUGHTRY'S
14 ARCHITECTS I THINK---

15 THE COURT WHAT'S THE EVIDENCE THAT THEY WERE DOING
16 THAT?

17 MR NEWMAN THE E-MAIL WITH REGARD TO THE ARTISTIC
18 RENDERING NOW, MR ---

19 THE COURT BUT AN ARTISTIC RENDERING IS NOT A PLAN

20 MR NEWMAN THAT'S CORRECT

21 THE COURT IT'S A PICTURE SAYING, "BUILD SOMETHING THAT
22 LOOKS LIKE THIS "

23 MR NEWMAN THAT'S CORRECT

24 THE COURT SO HOW DO YOU GET FROM THAT POINT, WHICH IS
25 POINT A , TO POINT B THAT THEY MUST HAVE GIVEN THE PLANS

1 ALSO?

2 MR NEWMAN WELL, I THINK THAT THE -- NUMBER ONE, I
3 THINK AGAIN THE SIMILARITY OF THE HOTEL AND THE ACCESS TO THE
4 MATERIALS CONSTITUTE ENOUGH OF AN INFERENCE TO GET US PAST
5 THE MERE SCINTILLA---

6 THE COURT WELL, THEN WHY DIDN'T YOU ASK THEM WHAT
7 DID YOU -- DID YOU GIVE -- DID YOU EVER GIVE THESE PLANS TO
8 MR AUGHTRY?

9 MR NEWMAN AND I DON'T KNOW -- HONESTLY, I COULDN'T
10 SPEAK AS TO WHY I DON'T HAVE THAT INFORMATION IN FRONT OF
11 ME, AND IF, IN FACT, THERE'S A MOTION FOR SUMMARY JUDGMENT,
12 PERHAPS IT'S SOMETHING FOR FURTHER DISCOVERY

13 THE COURT MAYBE MR PAUL AND MR DETWILER WOULDN'T
14 MIND ME ASKING THEM NOW DID MR -- MAYBE I ALREADY DID ASK,
15 I DON'T KNOW DID YOU GIVE -- DID Y'ALL GIVE THE PLANS TO
16 MR AUGHTRY?

17 MR DETWILER IT'S MY UNDERSTANDING WE DID NOT, AND
18 THERE'S NO EVIDENCE TO THE CONTRARY

19 THE COURT DID YOU GET THE PLANS, MR PAUL?

20 MR PAUL YOUR HONOR, I KNOW WE GOT THE RENDERING AND I
21 CAN'T SAY ONE WAY OR THE OTHER I'LL HAVE TO CHECK I DON'T
22 THINK THERE'S ANY EVIDENCE THAT THEY EVER GOT THE PLANS THE
23 EVIDENCE IS THAT AUGHTRY HAS ARCHITECTS IN MEMPHIS THAT DO
24 THE PLANS FOR ALL OF HIS HOTELS AUGHTRY'S GOT A NUMBER OF
25 HOTELS, AND THE ARCHITECTS IN MEMPHIS DO HIS HOTELS AND THEY

1 DID THE PLANS FOR THIS HOTEL AND HE PAID THEM FOR IT

2 THE COURT AND, MR NEWMAN, LET'S JUST ASSUME THEIR
3 RESPONSE UNDER OATH AT SOME POINT FROM THESE WITNESSES WOULD
4 BE I DON'T KNOW WHAT YOU'RE TALKING ABOUT WE GOT A WATER-
5 COLOR AND THAT'S ALL WE GOT WOULD YOU SAY THAT'S STILL
6 ENOUGH OF A CIRCUMSTANTIAL INFERENCE THAT THEY MUST HAVE
7 GOTTEN THE PLANS, TOO?

8 MR NEWMAN I THINK SO, TO GET TO THE JURY ON THIS
9 ISSUE

10 THE COURT AND THE JURY WOULD BE LEFT ON A CREDIBILITY
11 ISSUE WANTING TO KNOW OR HAVING TO DECIDE HE SAYS THEY MUST
12 HAVE GOTTEN THEM BECAUSE HE GOT THE WATERCOLOR PICTURE
13 THEY'RE SAYING THEY DIDN'T GET THEM WE BELIEVE THEY GOT
14 THEM, AND WE ALSO BELIEVE NOT ONLY DID THEY GET THEM BUT THEY
15 USED THEM

16 MR NEWMAN RIGHT AND ONE THING---

17 THE COURT NOW, WHAT BENEFIT WAS THAT TO THE CITY?

18 MR NEWMAN WELL, IT -- AND I WANTED TO ADD ONE MORE
19 THING THAT WHAT YOU SAID TO MR HINSON REMINDED OF AND THAT
20 IS THAT MR RAY GARFIELD'S AFFIDAVIT WHICH WAS SUBMITTED TO
21 YOU STATES THAT IN HIS EXPERIENCE IN THIS BUSINESS AUGHTRY
22 COULD NOT HAVE PRODUCED THE HOTEL HE DID SO QUICKLY WITHOUT
23 UTILIZING THE ARCHITECTURAL RENDERINGS PRODUCED BY OUR
24 PROJECT TEAM

25 THE COURT HOW WAS THAT A BENEFIT TO THE CITY?

1 MR. NEWMAN WELL, IT'S A BENEFIT TO THE CITY BECAUSE,
2 NUMBER ONE, THE NOTION THAT THE CITY WASN'T BENEFITTING FROM
3 THE HOTEL SEEMS TO SMACK OF - I DON'T KNOW WHAT YOU WOULD
4 CALL IT - A LACK OF COMMON SENSE IN THAT THE CITY WAS -- WAS
5 PROVIDING PUBLIC SUBSIDIES TO THIS HOTEL AND PROVIDING PUBLIC
6 SUBSIDIES TO MR. AUGHTRY NOW, EXACTLY HOW YOU'D WORK THAT
7 OUT AS FAR AS A DOLLAR FIGURE IS CONCERNED, THAT WOULD BE
8 LEFT UP TO SOMETHING WE WOULD PROVE TO THE LADIES AND
9 GENTLEMEN SITTING IN THE BOX RIGHT THERE

10 BUT CERTAINLY THE HOTEL GOT A BILL, AND IT'S BUILDING
11 THE SITE THAT WAS -- THE PRE-SITE DEMOLITION WORK AND OTHER
12 SITE WORK WAS PREPARED BY MY FOLKS AND BUILT, ACCORDING TO
13 SEVERAL OF THE WITNESSES, STRANGELY SIMILARLY TO THE ONE THAT
14 WAS DESIGNED BY STEVENS & WILKINSON

15 THE COURT ACCORDING TO THE PICTURE

16 MR. NEWMAN ACCORDING TO THE PICTURE AND MR. GARFIELD'S
17 AFFIDAVIT THAT SAYS IN THIS LINE OF BUSINESS I'VE NEVER SEEN
18 ANYTHING GO UP SO FAST WITHOUT A SUBSTANTIAL AMOUNT OF WORK

19 THE COURT HAVE Y'ALL MADE A -- DID Y'ALL EVER MAKE A
20 REQUEST TO INSPECT THE PREMISES TO CHECK OUT THE AIR SHAFTS,
21 THE ELEVATOR SHAFTS, ALL THE NOOKS AND CRANNIES OF THE HOTEL
22 TO SEE IF IT LOOKED LIKE YOURS?

23 MR. NEWMAN WE NEVER SPECIFICALLY MADE A REQUEST UNDER
24 RULE WHATEVER IT WOULD BE, 30 OR 31, FOR AN INSPECTION OF THE
25 PREMISES BUT SEVERAL WITNESSES HAVE TESTIFIED THAT THEY HAVE

1 VISITED THE HOTEL I DON'T KNOW IF YOUR HONOR HAS BEEN
2 THERE, BUT THERE'S A RESTAURANT THERE AS WELL AS A LOT OF
3 FOLKS IN TOWN GO THERE TO EAT, NOT JUST TO STAY SO JUST GO
4 AND HAVE A STEAK AT RUTH'S CHRIS, AND IT WILL GIVE YOU A GOOD
5 LOOK AT WHAT'S BEEN BUILT SO THAT'S OUR EVIDENCE THAT WE'RE
6 PUTTING BEFORE YOUR HONOR WE THINK IT SURVIVES THE MERE
7 SCINTILLA STANDARD, AND MR KALISH IS GOING TO SPEAK ON
8 BEHALF OF TURNER CONSTRUCTION AND MORE SPECIFICALLY AS TO THE
9 HOTEL BLOCK ROOM AGREEMENT

10 THE COURT ALL RIGHT

11 MR HINSON YOUR HONOR, CAN I FOLLOW UP REAL QUICKLY ON
12 MR NEWMAN'S ARGUMENTS?

13 THE COURT WELL, YOU'RE NOT THE ARCHITECT THOUGH,
14 RIGHT?

15 MR HINSON NO, YOUR HONOR

16 THE COURT OKAY

17 MR HINSON I JUST WANTED TO ADDRESS THE ISSUE OF WHAT
18 BENEFIT THE CITY WOULD HAVE GOTTEN IN REGARD TO THE PLANS,
19 AND I THINK ANY BENEFIT TO -- I MEAN, MY CLIENT WAS THE
20 DEVELOPER OF THIS SO, I MEAN, THEY WERE WORKING TO
21 COORDINATE THIS SO ANY WORK I THINK CAN BE ATTRIBUTED TO MY
22 CLIENT

23 THE COURT BUT THEY WOULDN'T HAVE PAID TWICE

24 MR HINSON NO NO, YOUR HONOR THE BENEFIT TO THE
25 CITY, IF THEY'RE ABLE -- IF MR AUGHTRY AND THE AUGHTRY

1 PARTIES ARE ABLE TO TAKE ADVANTAGE OF THE WORK THAT MY TEAM
2 DID, THAT WOULD IN ESSENCE LOWER MR AUGHTRY'S COSTS AND
3 CONSEQUENTLY -- CONSEQUENTLY LOWER WHATEVER SUBSIDY HE MAY
4 REQUIRE FROM THE CITY I MEAN, AS IT WAS, HE REQUIRED---

5 THE COURT I UNDERSTAND WHAT BOTH OF Y'ALL ARE SAYING,
6 BUT DON'T YOU HAVE TO DO MORE THAN SAY THIS MUST BE THE CASE
7 SO WE SURVIVE THE MERE SCINTILLA? IN OTHER WORDS,
8 SOMETHING'S GOT TO BE THERE OR IT WOULDN'T HAVE GONE UP SO
9 FAST IT LOOKS LIKE THE PICTURE WE HAD PEOPLE THAT ATE IN
10 THE RESTAURANT THAT SAYS, "OH, THIS LOOKS THE SAME " DON'T
11 YOU HAVE TO HAVE SOMETHING---

12 MR HINSON WELL---

13 THE COURT ---OTHER THAN A BUNCH OF PEOPLE WHO YOU'RE
14 SAYING ARE STONEWALLING YOU?

15 MR HINSON WELL, YOUR HONOR, I DO THINK WE HAVE A MERE
16 SCINTILLA OF EVIDENCE AND, AGAIN, MR GARFIELD SUBMITTED AS
17 -- IS OFFERED AS AN EXPERT IN THIS CASE ON HOTEL DEVELOPMENT,
18 AND HIS TESTIMONY WOULD BE, YOU KNOW, MR AUGHTRY SAYING HE

19 CAN BUILD THIS IN X NUMBER OF MONTHS, I'VE NEVER SEEN IT

20 THE COURT ALL RIGHT

21 MR HINSON TO MAKE THAT STATEMENT, HE MUST KNOW---

22 THE COURT YOU'RE TALKING ABOUT FROM TURNING THE FIRST
23 SHOVEL OR STARTING FROM GETTING ALL RIGHT HERE'S WHERE
24 YOU -- YOU'RE AWARDED THE PROPOSAL YOU START HERE AND YOU
25 GET TO THE END OR YOU START TALKING ABOUT DIGGING THE FIRST

1 HOLE WITH A BACKHOE?

2 MR HINSON I BELIEVE MR AUGHTRY'S STATEMENT IS
3 SOMETHING TO THE EFFECT OF IF GIVEN THE GREEN LIGHT, I
4 COULD HAVE THE DOORS OPEN WITHIN 18 MONTHS, SOMETHING TO THAT
5 EFFECT AND MR ---

6 THE COURT AND YOU'RE SAYING THAT HE MUST HAVE HAD
7 ALREADY ARCHITECTS' PLANS BECAUSE IT WOULD TAKE MONTHS TO GET
8 THOSE DONE

9 MR HINSON MY UNDERSTANDING FROM MR GARFIELD IS THAT
10 IT WOULD TAKE CLOSE TO A YEAR TO CREATE THESE TYPE OF PLANS
11 FROM SCRATCH AND THAT OBVIOUSLY MR AUGHTRY MUST HAVE HAD
12 SOME INTENTION OR KNOWLEDGE THAT HE WAS GOING TO GET PLANS---

13 THE COURT SO WHY DIDN'T Y'ALL USE THE -- EXCUSE ME
14 WHY DIDN'T Y'ALL DEPOSE THE TENNESSEE ARCHITECT?

15 MR HINSON WELL, YOUR HONOR, WE HAVE ASKED AND
16 RECEIVED A COPY OF THE PLANS AND THEY HAVE BEEN SUBMITTED
17 UNDER A CONFIDENTIALITY ORDER MEANING I CAN'T SHOW THEM -- A
18 CONFIDENTIALITY AGREEMENT I SHOULD SAY, TOO, THAT I CAN'T
19 SHOW THEM TO MY CLIENT AND IF WE---

20 THE COURT WHO CAN YOU SHOW THEM TO?

21 MR HINSON WELL, THAT WOULD BE THE NEXT QUESTION IF
22 WE HAVE TO GAIN PERMISSION FROM THE DEFENSE TO SHOW THEM TO
23 SOMEONE, I THINK WE WOULD LOOK AT THIS POINT TO SHOW---

24 THE COURT I ASSUME YOU'D LOOK AT THEM JUST LIKE I
25 WOULD YOU WOULDN'T KNOW WHAT TO MAKE OF THEM

1 MR HINSON THAT'S MIGHT AS WELL---

2 THE COURT SO YOU GOT PERMISSION -- YOU GOT THE -- WHO
3 SPONSORED THE CONFIDENTIALITY AGREEMENT? SOME LAWYER FOR THE
4 ARCHITECT---

5 MR HINSON WELL, THE CONFIDENTIALITY AGREEMENT---

6 THE COURT ---OR MR AUGHTRY?

7 MR HINSON ---WAS BETWEEN PARTIES THERE WAS A BUNCH
8 OF DOCUMENTS IN THIS CASE---

9 THE COURT WHO COULD HE SHOW THEM TO?

10 MR WARD YOUR HONOR, HE WOULD BE ENTITLED TO SHOW THEM
11 TO HIS CONSULTANT WHO WOULD PRESUMABLY TRY TO DETERMINE
12 WHETHER OR NOT WORK COMMENCED ON THOSE PLANS PRIOR TO THE
13 AWARD OF THE SECOND R F P OR THAT THEY WERE CLEARLY BASED ON
14 THE WORK PRODUCT OF HIS CLIENT

15 THE COURT HAVE YOU DONE THAT?

16 MR HINSON WE HAVE NOT DONE THAT YET, YOUR HONOR I
17 WAS GOING TO SAY IF WE WERE ALLOWED TO CONTINUE IN THIS CASE
18 I DO BELIEVE THAT WOULD BE OUR NEXT STEP

19 THE COURT WHEN DID YOU GIVE THEM TO HIM? WHEN DID YOU
20 GET THEM?

21 MR WARD SEVERAL MONTHS AGO

22 MR HINSON IT HAS---

23 THE COURT ALL RIGHT GO AHEAD

24 MR HINSON THAT'S -- THOSE WERE THE TWO POINTS I
25 WANTED TO MAKE YOUR HONOR

1 THE COURT OKAY ANY -- YOU HAVE A QUANTUM MERUIT
2 AGAINST THE CITY FOR THE HOTEL BLOCK ROOM AGREEMENT?

3 MR HINSON YES, SIR, I THINK SO, AND THERE WAS
4 TESTIMONY IN MR GANTT'S 2006 DEPOSITION WHERE HE -- WHAT I
5 UNDERSTAND HIM TO BE SAYING IS THAT THE ROOM BLOCK AGREEMENT
6 THAT WAS ULTIMATELY UTILIZED BY THE CITY WAS THE ROOM BLOCK
7 AGREEMENT THAT MY CLIENTS WORKED TO NEGOTIATE AS KIND OF THE
8 -- AS THE DEVELOPER MY CLIENT WAS VERY MUCH INVOLVED IN THE
9 NEGOTIATION OF THESE AGREEMENTS THAT, AS THE DEFENDANTS
10 CORRECTLY ADVANCED WERE NEVER SIGNED THEY WERE -- MANY OF
11 THEM WERE BROUGHT TO FRUITION IN THE SENSE THAT THEY WERE
12 FULLY NEGOTIATED, AND MY UNDERSTANDING IS THAT THE CITY TOOK
13 ADVANTAGE OF THAT AGREEMENT AND IS USING THE ROOM BLOCK
14 AGREEMENT THAT MY CLIENTS WORKED TO CREATE

15 THE COURT AND WHAT'S THE VALUE OF THAT TO THE
16 DEFENDANT? COULD THEY NOT SHOW THEY WOULD HAVE BEEN --
17 INEVITABLY GOT TO THE SAME AGREEMENT WITH THE---

18 MR HINSON THERE WOULD CERTAINLY BE VALUE IF THERE'S
19 AN AGREEMENT THEY CAN PICK UP AND HIT THE DOOR RUNNING THAT
20 HAS -- THAT CERTAINLY HAS VALUE

21 THE COURT WHAT WOULD YOUR DAMAGES BE?

22 MR HINSON I THINK OUR DAMAGES WOULD BE THE HOURS AND
23 THE TIME WE SPENT WORKING ON THAT AGREEMENT

24 THE COURT AND WHAT WOULD THAT BE?

25 MR HINSON I'M NOT SURE THAT WOULD HAVE TO -- THE

1 GARFIELDS AND MR TRAUB WOULD BE ABLE TO TESTIFY TO THAT

2 THE COURT SO IN THE SCHEME OF THINGS IN THIS CASE,
3 THAT WOULD BE RELATIVELY SMALL POTATOES

4 MR HINSON IN THE SCHEME OF THIS CASE I WOULD ADMIT
5 THAT THAT'S RELATIVELY SMALL, BUT I DON'T KNOW

6 THE COURT SO WHAT IS UNIQUELY IDENTIFIED WITH GARFIELD
7 AS TO WHAT YOUR QUANTUM MERUIT RECOVERY WOULD BE BASED ON?
8 WHAT IS YOUR -- MR NEWMAN SAID THE PICTURE AND THE PLANS
9 WERE HIS MAIN THRUST ON HIS QUANTUM MERUIT WHAT'S YOURS?

10 MR HINSON WELL -- AND I THINK TO SOME DEGREE EVEN THE
11 PLANS -- I MEAN, MY CLIENT IS STANDING AS THE DEVELOPER
12 THERE, THE MIDDLEMAN, IN COMMUNICATING ALL THIS THE WORK
13 THEY DID HAD SOME VALUE EVEN GETTING THE PLANS TO THE POINT
14 THAT THEY WERE

15 THE COURT SO WHEN A JURY WOULD SIT DOWN AND SAY, "ALL
16 RIGHT WE AWARD THIS TO GARFIELD AND THIS TO STEVENS &
17 WILKINSON ON QUANTUM MERUIT," HOW WOULD A JURY POSSIBLY BE
18 ABLE TO SEPARATE THAT OUT AS FAR AS THE PLANS ARE CONCERNED?

19 MR HINSON WELL, I'M NOT CERTAIN YOUR HONOR, I THINK
20 MR GARFIELD AND MR TRAUB CAN TESTIFY AS TO THE WORK THAT
21 WENT INTO CREATING SUCH AN AGREEMENT AND BETWEEN -- I'M
22 SPEAKING RIGHT THERE OF THE ROOM BLOCK AGREEMENT AS FAR AS
23 THE PLANS THAT THEY -- I BELIEVE THEY COULD TESTIFY AS TO THE
24 NUMBER OF HOURS NECESSARY TO SERVE AS KIND OF A LIAISON FOR
25 THAT TYPE WORK

1 THE COURT ALL RIGHT ANYTHING ELSE FROM YOU ON
2 QUANTUM MERUIT?

3 MR HINSON NO, YOUR HONOR

4 THE COURT ALL RIGHT HOW ABOUT TURNER? Y'ALL STILL
5 DOWN THERE?

6 MR KALISH YES, WE ARE, YOUR HONOR YOUR HONOR, I
7 WOULD SUBMIT TO THE COURT THAT ON TURNER'S QUANTUM MERUIT
8 CLAIM THAT EXHIBIT 2 OF MARK ALICE'S DEPOSITION -- AND IT'S
9 ITEM NUMBER 5 IN AN E-MAIL THAT WAS SENT FROM JACK PLAXCO
10 (PHONETIC) TO MARK---

11 THE COURT SAY THAT -- WHERE IS THAT AGAIN?

12 MR KALISH IT'S EXHIBIT 2 TO THE DEPOSITION OF MARK
13 ALICE AND ONE OF THE ITEMS OF QUANTUM MERUIT IF IT WAS
14 INDEED FOUND NOT TO BE A CONTRACT WOULD BE THE COST -- LET'S
15 SEE THERE'S THE CITY'S COST TO PREPARE THE HOTEL SITE THAT
16 NEEDS TO BE ACKNOWLEDGED SOMEWHERE THERE MAY BE WORK
17 REQUIRED TO PUT THE OVERHEAD UTILITIES UNDERGROUND ON PARK
18 STREET THE CURRENT INFRASTRUCTURE PROJECT WILL PLACE THESE
19 UTILITIES ON SENATE AND LINCOLN STREETS TO BE USED BY THE
20 HOTEL THERE MAY BEEN SOME ENVIRONMENTAL ISSUES WITH SOIL ON
21 THE D O T PORTION OF THE SITE

22 WHAT HAPPENED IS AS PART OF TURNER CONSTRUCTION'S SCOPE
23 OF WORK, THEY PROVIDED NOT ONLY AN ENVIRONMENTAL --
24 ENVIRONMENTAL IMPACT WORK, BUT THEY ALSO LOOKED AT THE
25 UTILITIES AND THEY LOOKED AT HOW THE HOTEL SHOULD BE SITED ON

1 THE ACTUAL PARCEL ITSELF AND WHICH WAY IT SHOULD FACE AND
2 THINGS OF THAT NATURE THOSE ADDED VALUE TO THE CITY WHICH
3 WERE LATER USED WHEN THE HOTEL WAS BUILT

4 THE COURT WAS WORK ACTUALLY DONE BY YOUR FOLKS OR WAS
5 IT JUST CONCEPTUALIZED BY YOUR FOLKS?

6 MR KALISH IT WAS DONE BY A SUBCONTRACTOR OF OUR
7 FOLKS, AND WE INCURRED THE COST IN THAT THAT PROVIDED A
8 BENEFIT TO THE CITY

9 THE COURT HAVE YOU EVER BEEN PAID FOR THAT?

10 MR KALISH WE HAVE NOT

11 THE COURT HOW ABOUT THAT, MR DETWILER? DO YOU KNOW
12 WHAT HE'S TALKING ABOUT? SEEMS LIKE---

13 MR DETWILER ABSOLUTELY NOT

14 THE COURT ---IF EARTH WAS TURNED AND YOU GOT A BENEFIT
15 FROM IT THAT THAT SHOULD BE PAID FOR RIGHT?

16 MR DETWILER YOUR HONOR, WE HAVE -- WE HAVE BEEN IN
17 THIS LAWSUIT FOR TWO AND A HALF YEARS WE HAVE SENT DOZENS
18 OF INTERROGATORIES WE HAVE PROBABLY TAKEN 15 TO 18

19 DEPOSITIONS WE ARE ON THE EVE OF TRIAL IT'S MY
20 UNDERSTANDING THAT WE'RE SUBJECT TO TRIAL AT ANY TIME---

21 THE COURT THE ANSWER TO THE QUESTION IS NO

22 MR DETWILER THE ANSWER---

23 THE COURT THE ANSWER IS WHAT HE SAID

24 MR DETWILER THE ANSWER IS NOT ONLY NO, BUT THEY
25 HAVE -- WE HAVE ASKED REPEATEDLY THAT THEY PRODUCE EVIDENCE

1 OF ANY DAMAGES AND THIS HAS NEVER BEEN MENTIONED IN ANY
2 ANSWER TO INTERROGATORY OR ANY DEPOSITION THAT I HAVE
3 REVIEWED WITH THE POSSIBLE EXCEPTION OF THIS VAGUE REFERENCE
4 IN THIS DEPOSITION

5 THE COURT ALL RIGHT

6 MR KALISH YOUR HONOR, WE'VE TURNED OVER ALL DOCUMENTS
7 RELATED TO THE GAGE ENVIRONMENTAL STUDIES UP TO AND THROUGH I
8 THINK IT WAS 12/27 OF '08 SO THOSE DOCUMENTS HAVE BEEN
9 TURNED OVER AND ARE IN THE POSSESSION OF THE DEFENDANTS

10 THE COURT ALL RIGHT SO YOU'RE SAYING YOU'RE ENTITLED
11 TO SOME QUANTUM MERUIT RECOVERY BASED ON ENVIRONMENTAL
12 STUDIES THAT WERE PERFORMED ON YOUR WATCH AND THAT WERE
13 TURNED OVER TO THE CITY

14 MR KALISH THAT IS AT LEAST ONE EXAMPLE OF THAT

15 THE COURT WHAT ARE YOUR OTHER EXAMPLES?

16 MR KALISH WELL, THAT WOULD BE A \$28,000 STUDY THAT
17 WAS DONE BY GAGE AND WHICH WAS TURNED OVER AND USED AS AN
18 EXHIBIT THERE ARE OTHER -- WE WOULD SUBMIT TO THE COURT
19 THAT ALL OF THE WORK THAT WE DID THROUGHOUT OUR TENURE ON THE
20 PROJECT PROVIDED SOME BENEFIT TO THE CITY IN MOVING THE
21 PROJECT FORWARD

22 THE COURT SUCH AS WHAT?

23 MR KALISH TURNER CONSTRUCTION, AS I SAID BEFORE THEY
24 DID THE SITING OF THE ACTUAL BUILDING THEY DID THE UTILITY
25 WORK THEY WERE PART AND PARCEL TO HELPING THE REST OF THE

1 PROJECT TEAM COORDINATE WE ALSO DID TAKE-OFFS ON THE
2 ARCHITECTURAL PLANS AND DRAWINGS

3 THE COURT ALL RIGHT AND WHAT -- CERTAINLY THERE'S
4 WORK YOU DID, BUT WHAT WAS THAT -- WHAT -- HOW DID THAT FALL
5 WITHIN THOSE THREE ELEMENTS OF QUANTUM MERUIT? SPECIFICALLY,
6 WHAT VALUE IS ALL OF THAT TO THE CITY?

7 MR KALISH WELL, WHAT THAT DID TO THE CITY IS IT
8 ALLOWED THE CITY TO -- WHEN THEY WENT FORWARD WITH THIS
9 SECONDARY PROPOSAL, THEY ALREADY HAD THE INFORMATION AND
10 KNOWLEDGE OR THEY HAD THE KNOWLEDGE BASE OF WHAT WORKED BEST
11 FOR THE HOTEL AND THAT WAS ALREADY INFORMATION THAT WAS
12 GAINED AND IN THEIR MEMORY BANKS AND THEY COULD SHARE WITH
13 WHOMEVER

14 THE COURT HAVE Y'ALL PUT PEN TO PAPER AND ANSWERED
15 THEIR QUESTIONS OR INTERROGATORIES OR WHATEVER THAT SAYS,
16 "THESE ARE OUR DAMAGES"? AND IF YOU HAVEN'T HOW WOULD YOU
17 GO ABOUT FIGURING OUT WHAT THOSE WERE?

18 MR KALISH WE BELIEVE THAT THE DAMAGES WOULD BE THE
19 AMOUNT OF WORK THAT WE'VE PROVIDED TO THE CITY IN OUR
20 RELATIONSHIP WITH THEM IN THIS PROJECT

21 THE COURT AND---

22 MR KALISH THAT'S A QUESTION FOR A JURY OUR---

23 THE COURT WELL, BUT IT'S A QUESTION FOR THE JURY, BUT
24 IT'S ALSO A QUESTION YOU HAVE TO ANSWER IF THEY ASK YOU TO
25 ITEMIZE YOUR DAMAGES

1 MR KALISH THAT'S CORRECT IN OUR DEPOSITION I
2 BELIEVE IT WAS MARK ALICE WHO SAID -- WHEN ASKED WHAT THE
3 DAMAGES WERE, HE SAID \$575,000

4 THE COURT DID HE BREAK THAT DOWN?

5 MR KALISH \$570,000 WELL, WE'VE ALSO PRODUCED A JOB-
6 COSTING ESTIMATE AS PART OF THE DOCUMENTATION PROVIDED TO THE
7 DEFENDANTS IT BREAKS DOWN EVERY ITEM OF WORK WE'VE DONE FOR
8 THE CITY ON THIS PROJECT

9 THE COURT ALL RIGHT ANYTHING ELSE ON THAT? ON THE
10 QUANTUM MERUIT?

11 MR KALISH YOUR HONOR, I WANT TO CORRECT THAT IT WAS
12 THE 12/27/2007 NOT 12/27/2008, REGARDING THE DOCUMENTS THAT
13 WERE PRODUCED---

14 THE COURT OKAY

15 MR KALISH ---WITH GAGE ENVIRONMENT STUDIES NOTHING
16 ELSE, YOUR HONOR

17 THE COURT 2007?

18 MR KALISH YES, YOUR HONOR

19 THE COURT ALL RIGHT MR DETWILER, HOW ABOUT THE
20 ENVIRONMENTAL STUDY? DID YOU USE THAT? I ASSUME YOU AGREE
21 THAT IT WAS DONE

22 MR DETWILER YOUR HONOR, I REALLY DON'T KNOW IF IT WAS
23 USED AND I DON'T EVEN KNOW THAT IT WAS DONE I DON'T -- I
24 DON'T DISPUTE THAT IT WAS DONE I DON'T HAVE ANY EVIDENCE IN
25 FRONT OF ME TODAY TO SAY THAT IT WASN'T

1 I DO HAVE A PROBLEM WITH THE NOTION THAT THIS WAS A --
2 THAT WE -- LET ME BACK UP WE HAVE ASKED REPEATEDLY FOR WHAT
3 THEIR -- AN ESTIMATE OF THEIR DAMAGES, AND I GOT THIS JOB-
4 COST ESTIMATE THAT TOTALED UP TO 500 SOME-ODD THOUSAND
5 DOLLARS AND IT INCLUDED THINGS LIKE TICKETS TO THE
6 N A A C P CONVENTION BANQUET AND THINGS LIKE THAT IT
7 DOESN'T -- AGAIN, THIS IS A -- WE'RE DEALING WITH THE QUANTUM
8 MERUIT QUESTION RIGHT NOW, AND THEY HAVE NOT SUBMITTED ANY
9 INVOICE THAT I'M AWARE OF AND ANY INDICATION THAT THERE'S
10 SOMETHING THAT AMOUNTS TO A VALUE CONFERRED UPON THE CITY
11 THIS IS THE FIRST TIME I'VE HEARD OF -- THAT I RECALL HEARING
12 OF THIS AND I -- YOU KNOW, I DON'T---

13 THE COURT WELL, YOU WOULD AGREE THAT AS FAR AS THE
14 ARCHITECT IS CONCERNED, IF YOUR NEW CONTRACTOR HIRED AN
15 ARCHITECT AND THAT ARCHITECT USED THOSE PLANS THAT FALLS
16 WITHIN THE QUANTUM MERUIT RIGHT?

17 MR DETWILER BUT THE CITY DIDN'T HAVE AN ARCHITECT
18 THE CITY -- THE WHOLE DEAL WAS TURNED OVER TO A PRIVATE
19 DEVELOPER THE CITY DIDN'T USE ANY OF THIS THE CITY---

20 THE COURT BUT YOU GOT YOUR HOTEL SO YOU'RE SAYING
21 THERE'S JUST A -- THERE'S JUST A BREAK IN THAT RELATIONSHIP?

22 MR DETWILER BO AUGHTRY HAS GOT A HOTEL WE HAVE --
23 WE HAVE -- YOU KNOW THE ONLY BENEFIT THAT WE HAVE IS THAT
24 THERE IS A HOTEL NOW NEXT TO THE CONVENTION CENTER

25 THE COURT WELL, WHO GOT SUED ON QUANTUM MERUIT THEN?

1 JUST YOU?

2 MR DETWILER THAT'S RIGHT, AND THAT'S WHY I'M
3 SUGGESTING THAT IT'S A CAUSE OF ACTION THAT DOESN'T LIE
4 AGAINST THE CITY

5 THE COURT BECAUSE YOU HAVE RECEIVED NO BENEFIT EXCEPT
6 CONCEPTUALLY THE CITY GOT WHAT IT WANTED A HOTEL NEXT TO
7 ITS CONVENTION CENTER

8 MR DETWILER THAT'S CORRECT AND -- BUT YOU KNOW, IN
9 TERMS OF OWNERSHIP OF ANYTHING WE DON'T OWN ANYTHING WE DO
10 NOT OWN THE LAND WE DON'T OWN THE HOTEL THAT WAS
11 SOMETHING THAT WAS CONTEMPLATED, BUT THAT IS NOT WHAT TURNED
12 OUT AND SO TO THE EXTENT THAT THERE WAS ANY BENEFIT
13 CONFERRED ON ANYONE -- AND I WOULD SUBMIT THAT THERE REALLY
14 WASN'T BUT TO THE EXTENT THAT THERE WAS ANY BENEFIT
15 CONFERRED ON ANYONE, IT WOULD HAVE BEEN BO AUGHTRY AND THE
16 AUGHTRY DEFENDANTS BUT NOT THE CITY OF COLUMBIA

17 AND, AGAIN, YOU KNOW, THIS JOB-COST ESTIMATE AND ALL OF
18 THESE ITEMIZED THINGS THAT THEY SAY THEY EXPENDED, THAT'S NOT
19 THE MEASURE OF DAMAGES IN QUANTUM MERUIT THE MEASURE OF
20 DAMAGES IS WHAT -- IS THE VALUE OF THE BENEFIT CONFERRED TO
21 THE CITY OR WHATEVER -- WHOEVER THE DEFENDANT MAY BE, IN THIS
22 CASE THE CITY

23 THE COURT SO IF THEY WERE MAKING REPAIRS TO THE CITY
24 OFFICE BUILDINGS AND DID SOME SITE WORK AND DID SOME PLANS
25 AND BUILT OR HAD A CONCEPT FOR YOU TO HAVE A NEW LOBBY AND

1 THAT WAS DONE TO YOUR BUILDING YOU MIGHT OWE THEM FOR THAT

2 MR DETWILER WE MIGHT OWE THEM FOR THAT IF THAT WERE

3 THE CASE THAT'S NOT WHAT WE'RE DEALING WITH HERE

4 THE COURT YOU'RE SAYING SINCE THE WHOLE CONCEPT

5 CHANGED AND IT WENT FROM CITY-OWNED TO PRIVATE-OWNED, YOU'RE

6 CUT OFF RIGHT THERE INSOFAR AS QUANTUM MERUIT

7 MR DETWILER AS A MATTER OF LAW NOW -- AND I WOULD

8 LIKE TO ALSO POINT OUT TO YOU THE ISSUE OF THE SITE

9 PREPARATION FEE YOU VERY CORRECTLY NOTED THAT WE -- IN THE

10 PACKAGE WE SUBMITTED TO YOU EARLIER THIS AFTERNOON THERE IS A

11 \$34,000 SITE PREPARATION FEE PAID FOR IN THE \$697 000 THAT

12 WAS PAID IN DECEMBER OF '03, AND I WOULD SUBMIT TO YOU THAT

13 THAT EXPLAINS ALL BUT 13,000 OF THE OVERAGE OVER THE 650

14 BECAUSE THE EARLY SITE PREP IS NOT SOMETHING THAT WAS EVER

15 INTENDED IN THE -- IN THE CITY COUNCIL VOTE IN JULY TO HAVE

16 BEEN INCLUDED IN THIS INTERIM ARCHITECTURAL FEES

17 RECALL THAT THE INTERIM ARCHITECTURAL FEES WERE FOR FEES

18 THAT WERE RENDERED OR INCURRED DURING A SPECIFIC FINITE-----

19 PERIOD OF TIME THAT TIME WAS EXTENDED A LITTLE BIT,

20 GRANTED, BUT IT WAS FOR A FINITE PERIOD OF TIME THE EARLY

21 SITE PREP WORK WE WOULD SUBMIT SHOULDN'T HAVE BEEN IN THERE,

22 BUT IT WAS AND IT WAS PAID YOU KNOW NO HARM, NO FOUL, AT

23 LEAST AS FAR AS THE PLAINTIFFS ARE CONCERNED

24 AND I DIDN'T HEAR, YOU KNOW, THE PLAINTIFFS ANY OF THE

25 PLAINTIFFS, INDICATE THAT THERE WAS ANY OTHER SITE -- SHOW

1 ANY EVIDENCE TO THIS COURT AND WE'RE HERE -- THIS IS A
2 SUMMARY JUDGMENT MOTION WE'VE ASKED -- I THINK WE HAVE GONE
3 FAR BEYOND OUR BURDEN IN SHOWING THAT THERE'S NO GENUINE
4 ISSUE OF MATERIAL FACT IT IS UP TO THEM NOW TO SHOW THAT
5 THAT IS NOT CORRECT, AND THEY HAVE YET TO SHOW ANY SORT OF
6 BENEFIT CONFERRED WITH RESPECT TO THE SITE PREPARATION FEE
7 THAT THEY MENTIONED AWHILE AGO

8 THE RENDERING ISSUE, LET ME JUST MAKE A POINT OR TWO
9 ABOUT THAT T V S WAS REFERRED TO AS A SUBCONTRACTOR AWHILE
10 AGO T V S IS A SIGNATORY TO THE M O U IT IS -- IT IS --
11 IT IS PART OF THE ARCHITECTURAL DESIGN TEAM BUT T V S IS
12 ACTUALLY THE SIGNATORY TO THE M O U THEY'RE THE ONES THAT
13 ARRANGED AND WERE PAID \$400 OUTSIDE OF ANY OTHER CONTRACTUAL
14 RELATIONSHIP THAT MAY OR MAY NOT HAVE BEEN IN PLAY TO ARRANGE
15 THIS \$4,000 RENDERING THAT THE CITY PAID FOR

16 AND WE DON'T HAVE A CHECK AS IT HAS BEEN POINTED OUT
17 THERE HAS BEEN NO CHECK THERE IS EVIDENCE IN THE RECORD
18 THAT WE SUBMITTED TO YOU IN OUR REPLY MEMORANDUM THAT
19 INDICATES THAT THE CITY WAS RESPONSIBLE, THE CITY AGREED, AND
20 THE CITY DID PAY FOR IT I HAVE NOT SEEN A CHECK EITHER I
21 WILL -- I MUST TELL YOU -- TELL THE COURT THAT AND THAT'S
22 ALL YOUR HONOR, I HAVE TO SAY ABOUT QUANTUM MERUIT

23 THE COURT ALL RIGHT WE'LL TAKE FIVE MINUTES, AND
24 THEN YOU CAN TALK WHAT YOU WANT ABOUT QUANTUM MERUIT AND THEN
25 WE'LL GO ON TO ESTOPPEL AND THAT'LL BE IT RIGHT?

1 MR WARD WE'VE GOT THE MOTION TO AMEND

2 THE COURT OH, I THOUGHT I SIGNED THAT

3 MR WARD THAT WAS THE MOTION TO AMEND RELATIVE TO THE
4 CITY OF COLUMBIA AND GARY

5 THE COURT QUANTUM MERUIT?

6 MR HINSON ESTOPPEL

7 MR WARD ESTOPPEL

8 THE COURT ESTOPPEL SO---

9 MR WARD WE HAVE A MOTION TO AMEND RELATIVE TO THE
10 THIRD CAUSE OF ACTION -- SECOND CAUSE OF ACTION IN WHAT WOULD
11 BE A FOURTH AMENDED COMPLAINT BY GARY REALTY

12 THE COURT ALL RIGHT WELL, WE'LL DO THAT WHEN I GET
13 BACK OKAY

14 (WHEREUPON, A SHORT BREAK WAS TAKEN)

15 THE COURT KEEP YOUR SEATS ALL RIGHT WHAT'S NEXT?

16 MR DETWILER YOUR HONOR, I THINK WHAT'S NEXT ON THE
17 AGENDA IS OUR MOTION FOR SUMMARY JUDGMENT WITH REGARD TO
18 THE---

19 THE COURT THEY'RE RAISING THEIR HANDS IN---

20 MR DETWILER I'M SORRY

21 THE COURT ---PROTEST

22 MR KALISH YOUR HONOR, I JUST HAVE BRIEFLY IN REPLY A
23 COUPLE OF COMMENTS THAT WERE MADE BY MR DETWILER

24 MR DETWILER SORRY

25 MR KALISH YOUR HONOR, BRIEFLY IN REPLY, THE EXPENSES

1 HE WAS TALKING ABOUT THAT WERE FOUND ON OUR JOB-COST SHEET
2 ARE THE ONES THAT I TALKED ABOUT MUCH EARLIER THIS AFTERNOON
3 ABOUT THE TICKETS TO THE DINNER AT THE URBAN LEAGUE WE'RE
4 CERTAINLY NOT CLAIMING THAT \$2500 EXPENSE TO THE CITY
5 ALTHOUGH WE WOULD CERTAINLY ACCEPT THEIR \$25 CHECK AS A
6 PARTIAL PAYMENT BUT THAT IS NOT A DAMAGE THAT WE'RE
7 CLAIMING EITHER UNDER THE M O U OR UNDER A QUANTUM MERUIT
8 THEORY AT THIS TIME

9 THE SECOND PIECE OF REPLY IS AT THE TIME THAT WE DID THE
10 WORK, THE CITY OWNED THE LAND AND WHEN I'M TALKING ABOUT
11 THE WORK, I'M TALKING ABOUT THE G M P I'M TALKING ABOUT THE
12 UTILITIES I'M TALKING ABOUT THE PLACEMENT ALL OF THAT WAS
13 A BENEFIT THAT WAS CONFERRED TO THE CITY NOW IF THE CITY
14 LATER CONFERRED THAT BENEFIT TO SOMEONE ELSE, THEN THAT'S THE
15 CITY'S PREROGATIVE, BUT WE ARE ENTITLED TO COMPENSATION FOR A
16 BENEFIT THAT THE CITY RECEIVES FROM US AT THE TIME THAT
17 THEY'RE IN POSSESSION OF THE LAND OR THE OWNERSHIP OF THE
18 LAND AND FINALLY YOUR HONOR, REGARDING THE HOTEL
19 OPERATION, I KNOW THAT IT'S BEEN---

20 THE COURT HAVE Y'ALL MEDIATED ALL THESE LITTLE POINTS
21 LIKE THIS? IN OTHER WORDS, HAVE Y'ALL SAT DOWN WITH SOMEBODY
22 AND SAID "ALL RIGHT WE DID THIS WE DID THE ENVIRONMENTAL
23 -- WE GOT THE ENVIRONMENTAL STUDY DONE WE DID THIS
24 ENGINEERING WE DID THIS SITE WORK"? HAVE Y'ALL SAT DOWN
25 AND SAID, YOU KNOW GENTLEMAN TO GENTLEMAN "THIS IS WHAT WE

1 REALLY OWE YOU FOR STUFF YOU DID FOR US THAT WE HAVE GOT THE
2 BENEFIT OF"? HAVE Y'ALL EVER SAT DOWN AND DONE THAT?

3 MR DETWILER NO SIR AND EVEN BEYOND THAT, THE ONLY
4 RESPONSE TO DISCOVERY THAT I REMEMBER SEEING IS HERE ARE
5 ALL OUR DOCUMENTS YOU KNOW, AND WITHOUT ANY INDICATION OF
6 WHAT THEY WERE AND SO FORTH I'VE GOT MY PARALEGAL RIGHT NOW
7 SEARCHING FURIOUSLY TO SEE IF I'VE EVER RECEIVED AN INVOICE
8 FOR THIS ENVIRONMENTAL STUDY

9 THE COURT ALL RIGHT SO WHAT ELSE DO YOU HAVE?
10 YOU'VE GOT -- I SEE YOU'RE SAYING THAT SOMEHOW THAT WOULD BE
11 A VALUE RECEIVED OR A BENEFIT CONFERRED, BENEFIT REALIZED,
12 AND A VALUE TO THE DEFENDANT IF SOMEBODY ELSE DIDN'T HAVE TO
13 DO THAT FOR THE CITY AGAIN AND THE CITY DIDN'T HAVE TO PAY
14 FOR IT

15 MR KALISH THAT'S CORRECT, YOUR HONOR

16 THE COURT SO I CAN SEE THAT SO -- BUT IS THERE
17 ANYTHING THAT YOU'VE GIVEN THEM THAT SHOWS THAT WITH ANY
18 CERTAINTY?

19 MR KALISH ABSOLUTELY, YOUR HONOR NOT ONLY HAVE WE
20 PROVIDED THE JOB-COST INVOICING THAT WE PROVIDED IN
21 DISCOVERY, BUT MARK ALICE'S DEPOSITION WAS TAKEN BY MR
22 DETWILER, AND THE EXHIBITS I WAS REFERRING TO EARLIER WITH
23 THE INVOICES FOR THE ENVIRONMENTAL IMPACT STUDY AS WELL AS
24 THE UTILITY INFORMATION ARE EXHIBITS THAT HE SUBMITTED OR
25 WERE SUBMITTED AT THAT DEPOSITION SO AT LEAST AT THAT TIME

1 OR BY THAT TIME SOMEONE HAD POSSESSION OF THOSE DOCUMENTS AND
2 WAS ABLE TO ASK QUESTIONS

3 THE COURT BUT DID YOU -- I ASSUME THAT THE
4 INTERROGATORIES SAID, "PLEASE SET FORTH AN ITEMIZED STATEMENT
5 OF DAMAGES CLAIMED BY THE PARTY AS TO EACH CAUSE OF ACTION "
6 I WOULD ASSUME THAT YOU WOULD HAVE SAID AS TO QUANTUM MERUIT
7 THE FOLLOWING, COLON, SUB-PARAGRAPH A

8 MR KALISH I WILL HAVE TO GO BACK AND DOUBLE-CHECK,
9 BUT THIS WAS PROVIDED AS OUR DAMAGES---

10 THE COURT BUT YOU CAN'T -- YOU CAN'T JUST SAY, "LOOK
11 AT THESE DOCUMENTS AND FIND IT IN THERE " YOU HAVE TO SAY --
12 BECAUSE THE INTERROGATORY SAYS, "PLEASE SET FORTH A LIST "
13 THAT DOESN'T SAY, "PLEASE GIVE ME A BUNCH OF PAPER THAT HAS
14 IT IN THERE SOMEWHERE FOR ME TO FIGURE OUT " IT HAS TO BE
15 SOMETHING YOU PUT DOWN

16 MR KALISH I'LL -- LIKE I SAID, YOUR HONOR, I'LL GO
17 BACK AND CHECK ON THE INTERROGATORY AS TO THE REQUEST, BUT
18 THIS WAS OUR ITEMIZED JOB TRANSACTION REPORT FOR THE
19 ENTIRE---

20 THE COURT OKAY AND I INTERRUPTED YOU TWICE I
21 APOLOGIZE FOR THAT SO WHAT ELSE DO YOU HAVE ON THE --
22 BESIDES THE ENVIRONMENTAL IMPACT STUDY AND THE OTHER SITE
23 WORK?

24 MR KALISH YOUR HONOR, AS AN OVERALL BENEFIT TO THE
25 CITY IN LOOKING AT THE BENEFIT THAT'S CONFERRED TO THE CITY,

1 THE CITY IS NOT NECESSARILY IN A POSITION TO BECOME A HOTEL
2 OWNER/OPERATOR AND THAT'S WHY THEY BROUGHT HILTON IN AS A
3 POTENTIAL OPERATOR OF THE HOTEL WHAT MAYOR COBLE SAID IN
4 THE FEBRUARY 11TH, 2004, MINUTES IS THAT -- THE SUM AND
5 SUBSTANCE IS WE'RE TRYING TO BUILD AN ECONOMIC INFRA-
6 STRUCTURE THEY WANTED TO SUPPORT THE CONVENTION CENTER
7 WHAT THE HOTEL WAS GOING TO PROVIDE FOR THEM WAS AN
8 OPPORTUNITY TO COLLECT MORE SALES TAXES, MORE FOOD TAXES,
9 MORE REVENUE HOSPITALITY REVENUE, TO THE CITY, IN ADDITION
10 TO BENEFITS THAT WOULD BE EXCUSE ME, IN ADDITION TO JOBS
11 THAT WOULD BE CREDITED FOR CITIZENS OF THE CITY OF COLUMBIA
12 TO COME IN AND MAKE MORE MONEY AND THOSE WOULD IN TURN
13 BENEFIT THE CITY AT LARGE
14 SO THE CITY, WHILE IT WAS TALKING ABOUT THIS HOTEL, IT
15 WAS IN CONJUNCTION TO EXPONENTIALLY EXPAND THE POWER OF THIS
16 CONVENTION CENTER AND BRING PEOPLE INTO THE CONVENTION, PUT
17 THEM UP OVERNIGHT, FEED THEM, DO ALL THAT THE CITY REALIZES
18 A BENEFIT NOT JUST IN THE REVENUES CREATED FROM RUNNING A
19 HOTEL
20 THE COURT TALKING ABOUT TAXES?
21 MR KALISH YES, YOUR HONOR
22 THE COURT ALL RIGHT DO YOU HAVE YOUR VERSION OF
23 OLIVER WOOD TO SAY WHAT THAT IS?
24 MR KALISH WE DON'T THAT GOES TO THE DAMAGES BUT---
25 THE COURT BUT YOU -- BUT YOU'RE CHARGED AT THIS LATE

1 DATE WITH HAVING ALL THAT DONE IN OTHER WORDS, YOU'RE
2 SAYING WELL, THE BENEFIT CONFERRED IS GOING TO BE THE CITY
3 IS GOING TO HAVE IN PLACE THIS HUGE HOTEL AND IT'S GOING TO
4 BE ABLE TO COLLECT ROOM TAX OR THE HOSPITALITY TAX OR
5 WHATEVER ELSE, AND YOU WANT A PIECE OF THAT?

6 MR KALISH NO, YOUR HONOR WHAT I'M TRYING TO EXPLAIN
7 IS THE CITY IS NOT JUST IN THE HOTEL OPERATIONS BUSINESS, BUT
8 PART OF THE BENEFIT THAT WE CONFERRED -- THAT WE -- THAT THE
9 CITY RETAINED AS A RESULT OF OUR WORK INCLUDES THIS LARGER
10 SUM OF MONEY WE'RE NOT CERTAINLY CLAIMING A PIECE OF THE
11 TAXES AND EVERYTHING ELSE

12 THE COURT WELL, THEN WHY IS THAT RELEVANT IF YOU'RE
13 NOT---

14 MR KALISH IT'S RELEVANT TO SHOW THAT THE CITY IS
15 RETAINING SOME BENEFIT FROM US AND IT'S MULTIPLYING OUT
16 EXPONENTIALLY TO RECEIVE MORE TAX BENEFIT

17 THE COURT ALL RIGHT SO WHAT -- HOW WOULD YOU DO A
18 TAKE-OFF ON WHAT YOUR DAMAGES ARE FOR THAT?

19 MR KALISH I THINK THAT IT BUTTRESSES THE FACT THAT
20 OUR WORK ON THIS PROJECT PROVIDED BENEFIT TO THE CITY THAT
21 THEY RETAINED AND WERE ABLE TO CAPITALIZE ON

22 THE COURT MR DETWILER, IS THE LAW IN -- IS THE LAW ON
23 QUANTUM MERUIT, THAT THIRD ELEMENT THE VALUE CONFERRED OR
24 THE VALUE RETAINED BY THE CITY, IS THAT A DAMAGE FIGURE? IN
25 OTHER WORDS, HE'S SAYING THAT IT'S JUST SATISFYING THE

1 ELEMENT OF THE VALUE THAT YOU'VE RECEIVED, BUT IT'S NOT
2 NECESSARILY TIED TO A DOLLAR AMOUNT OF DAMAGE THEY WOULD GET

3 MR DETWILER I DON'T QUITE FOLLOW THAT ARGUMENT THE
4 ELEMENTS ARE A BENEFIT CONFERRED UPON THE DEFENDANT, IN
5 THIS CASE THE CITY -- THE RETENTION OF THAT BENEFIT, THAT'S
6 THE SECOND ELEMENT BY THE CITY AND THAT WOULD BE BASED UPON
7 THE VALUE TO THE CITY, NOT TO THEM, AND THEN THE THIRD
8 ELEMENT IS THE RETENTION AND FAILURE TO PAY FOR IT AND UNDER
9 CIRCUMSTANCES THAT WOULD MAKE IT UNJUST FOR US TO KEEP IT

10 THE COURT AND HE'S SAYING THE FACT THAT YOU GET TO
11 COLLECT ALL THESE HOSPITALITY TAXES IS EVIDENCE OF THAT YOU
12 HAVE RECEIVED -- A BENEFIT HAS BEEN REALIZED BY YOU AND HAS A
13 VALUE TO IT

14 MR DETWILER YOUR HONOR YOU ABSOLUTELY ASK THE RIGHT
15 QUESTIONS OF THESE DEFENDANTS I MEAN, WE'RE -- THIS IS THE
16 SUMMARY JUDGMENT STAGE

17 THE COURT YOU'RE THE DEFENDANT

18 MR DETWILER PARDON? _____

19 THE COURT YOU'RE THE DEFENDANT

20 MR DETWILER I MEAN OF THESE -- OF THESE PLAINTIFFS
21 WE'RE AT THE SUMMARY JUDGMENT STAGE WE'RE ON THE EVE OF
22 TRIAL THIS IS WHERE YOU -- THIS IS WHERE THE RUBBER MEETS
23 THE ROAD SHOW ME THE BEEF IF THEY -- WE HAVE -- WE HAVE
24 MADE A MOTION SAYING WE DON'T SEE ANY EVIDENCE OF A BENEFIT
25 CONFERRED UPON THE CITY IT'S UP TO THEM TO PRODUCE THE

1 EVIDENCE THEY HAVE NOT PRODUCED ONE SHRED OF EVIDENCE
2 EXCEPT A REFERENCE TO A -- FOR THE FIRST TIME A REFERENCE TO
3 AN INVOICE IN A DEPOSITION THAT WE TOOK A YEAR AGO

4 I'VE HAD MY PARALEGAL ACTUALLY SEARCH THAT, AND WHAT I
5 AM NOW TOLD IS THAT BACK IN I BELIEVE '02 THERE WAS A -- MARK
6 ALICE OF TURNER ENGAGED GAGE OR GAGE TO PERFORM A STUDY, AND
7 THE ESTIMATED FEE WAS \$16,500 FOR GEOTECHNICAL EXPLORATION
8 AND SEISMIC SITE ASSESSMENT AND IT APPEARS THAT -- AND
9 THERE WAS AN INVOICE TO TURNER FROM GAGE AND THEN THERE WAS
10 AN INVOICE -- A SPECIFIC INVOICE TO THE CITY, CARE OF TURNER
11 FROM GAGE AND THAT'S ALL WE HAVE THAT'S THE ONLY EVIDENCE
12 WE HAVE, AND HERE I AM---

13 THE COURT DID YOU PAY IT?

14 MR DETWILER ---PRODUCING IT FOR THEM

15 THE COURT DID YOU PAY IT?

16 MR DETWILER WE DON'T HAVE ANY EVIDENCE -- THIS IS THE
17 FIRST IT'S COME UP, SO I DON'T KNOW IF IT'S BEEN PAID OR NOT
18 YOUR HONOR BUT THE REALITY IS TURNER HAS NOT EVEN FILED A
19 MOTION -- A MEMORANDUM IN SUPPORT OF OR IN OPPOSITION TO OUR
20 MOTION THEY HAVE PRODUCED NO AFFIDAVITS THEY'VE PRODUCED
21 NO EVIDENCE THEY'VE SHOWN UP FOR THE FIRST TIME IN THIS
22 CASE AND -- AND ARGUING FOR THE FIRST TIME SOMETHING THAT
23 WE'VE NEVER HEARD OF

24 IT'S UP TO THEM TO HAVE COME FORTH AND PROVIDED ALL OF
25 US WITH SOME ESTIMATE OF THEIR DAMAGES AND I WILL TELL YOU

1 THAT AS AN OFFICER OF THIS COURT THE INTERROGATORY ANSWERS
2 THAT WE HAVE RECEIVED DO NOT SPELL OUT THE ITEMIZED DAMAGES
3 AS THEY RELATE TO QUANTUM MERUIT WE DID RECEIVE A COPY OF
4 THIS -- MAY I BORROW THAT?

5 MR KALISH CERTAINLY

6 MR DETWILER I DON'T HAVE A COPY OF IT THIS IS WHAT
7 HE KEEPS WAVING AROUND SAYING THIS IS OUR DAMAGES THIS IS
8 OUR DAMAGES THIS IS AN INTERNALLY-GENERATED, COMPUTER-
9 GENERATED JOB-COST TRANSACTION REPORT GENERATED BY TURNER
10 THIS IS NOT EVEN EVIDENCE, AND IT'S CERTAINLY NOT SUBMITTED
11 IN THE RECORD OF THIS CASE

12 THE COURT ALL RIGHT ANYTHING ELSE FROM THE
13 PLAINTIFFS ON THE QUANTUM MERUIT?

14 MR HINSON YOUR HONOR, I JUST WOULD LIKE TO MAKE AS AN
15 EXHIBIT THE AFOREMENTIONED STEVE GANTT DEPOSITION TESTIMONY

16 THE COURT OKAY IS THAT SOMETHING THAT I DON'T HAVE
17 ALREADY?

18 MR HINSON I'M NOT SURE THAT YOU DO YOUR HONOR

19 THE COURT ALL RIGHT

20 MR HINSON IT'S THE ROOM BLOCK TESTIMONY THAT I
21 REFERENCED EARLIER

22 THE COURT OKAY

23 (MR HINSON HANDS A DOCUMENT TO THE COURT THAT WAS NOT
24 MADE AN EXHIBIT)

25 THE COURT ALL RIGHT ANYTHING ELSE, MR NEWMAN?

1 MR NEWMAN NO, SIR I THINK WE'VE BEAT THIS HORSE TO
2 DEATH

3 THE COURT ALL RIGHT MR DETWILER ESTOPPEL?

4 MR DETWILER ESTOPPEL THANK YOU YOUR HONOR I'LL
5 TRY TO BE AS BRIEF AS I POSSIBLY CAN ESTOPPEL BEGINS WITH
6 AN UNAMBIGUOUS PROMISE WHAT IS THAT UNAMBIGUOUS PROMISE
7 THAT THEY'RE RELYING ON TO PROVE SOME SORT OF ESTOPPEL? IT
8 CAN'T BE THE M O U , AND THIS IS WHY THE M O U CLEARLY
9 STATES THAT EVERYONE IS AT RISK UNTIL THE BONDS CLOSE IT
10 TALKS IN TERMS OF THE BONDS IN AN AMOUNT ACCEPTABLE TO THE
11 CITY, THE CITY STAND-BY SUPPORT PAYMENTS IN AN AMOUNT
12 ACCEPTABLE TO THE CITY

13 THROUGHOUT THERE IS LANGUAGE IN HERE THAT IF THE BONDS
14 DON'T CLOSE YOU DON'T GET PAID YOU MIGHT GET PAID YOUR
15 COSTS UNDER CERTAIN CIRCUMSTANCES IF THE BONDS DON'T CLOSE,
16 BUT THAT'S IT AND THOSE CIRCUMSTANCES DON'T EXIST TODAY OR
17 DON'T EXIST IN THE FACTS OF THIS CASE AND I'LL CALL YOUR
18 SPECIFIC ATTENTION, YOUR HONOR, TO PARAGRAPH -- SEVERAL
19 PARAGRAPHS PARAGRAPH 6 -- EXCUSE ME SECTION 6, PARAGRAPH
20 3, THE PRE-DEVELOPMENT FUNDING IT DEALS WITH WHAT HAPPENS
21 IF THE BONDS DON'T CLOSE, DON'T APPLY HERE, AND IT ONLY
22 SPEAKS IN TERMS OF COSTS

23 THE COURT OKAY

24 MR DETWILER THE NEXT PARAGRAPH I WOULD CALL TO YOUR
25 ATTENTION IS SECTION ROMAN NUMERAL 7, PARAGRAPH 1, AND THIS

1 IS THE -- THIS SPELLS OUT THE DESIGN BUILDER'S FEE NOW,
2 THIS IS THE PERCENTAGE FEE THAT THEY WANT TO COLLECT IN THIS
3 CASE FOR A HOTEL THEY DIDN'T BUILD, AND IT SAYS, "IF THE
4 UNDERWRITER DOES NOT CLOSE THE FINANCING, THE CITY WILL NOT
5 BE RESPONSIBLE FOR REIMBURSING ANY OF THE COSTS INCURRED
6 EXCEPT AS PROVIDED UNDER SECTION 6, PARAGRAPH 3," WHICH AGAIN
7 DON'T APPLY HERE

8 SECTION 8, PARAGRAPH 1 SAME LANGUAGE WITH REGARDS TO
9 THE ARCHITECT'S FEE IF THE UNDERWRITER DOES NOT CLOSE THE
10 FINANCING, THE CITY WILL NOT BE RESPONSIBLE FOR REIMBURSING
11 ANY COSTS NO MENTION OF EVEN, YOU KNOW, THE IDEA OF
12 REIMBURSING THE FEE

13 EVERYBODY KNEW THAT THEY WERE GOING INTO THIS AT RISK
14 SO THIS SO-CALLED UNAMBIGUOUS PROMISE THAT THEY WANT TO
15 ASSERT IN THEIR ESTOPPEL CAUSE OF ACTION CAN'T BE THE M O U
16 IT CAN'T BE THE JULY '03 VOTE AS WE HAVE PRESENTED AND THAT
17 EVIDENCE IS CLEAR THAT WAS NOTHING MORE THAN AN ADVANCE ON
18 FEEES TO BE EARNED IF THE BONDS CLOSE AND THERE'S NO POINT
19 -- UNLESS YOU HAVE ANOTHER QUESTION ABOUT THAT, I DON'T WANT
20 TO BEAT THAT DEAD HORSE

21 THE UNAMBIGUOUS PROMISE CAN'T BE ANYTHING THAT A CITY
22 EMPLOYEE -- BECAUSE A CITY EMPLOYEE DOESN'T HAVE ANY
23 AUTHORITY TO BIND THE CITY IT CAN'T BE ANYTHING THAT THE
24 N P C DID BECAUSE IT HAS NO AUTHORITY TO BIND THE CITY
25 THE SOUTH CAROLINA CODE SPECIFICALLY PROVIDES THAT ALL

1 POWERS ARE VESTED IN THE MUNICIPAL COUNCIL, THE CITY COUNCIL
2 THE CITY COUNCIL ORDINANCE IN THIS -- IN THIS AREA THAT'S
3 APPLICABLE TO THIS IS SECTION 2 -- ORDINANCE SECTION 2-81,
4 AND IT SPECIFICALLY PROVIDES THAT THE COUNCIL MUST APPROVE
5 APPROPRIATING FUNDS AND BORROWING MONEY AND ISSUING BONDS,
6 AND IT MUST APPROVE THAT BY A CITY COUNCIL VOTE WITH ALL THE
7 TRAPPINGS THAT ANY OTHER COUNCIL VOTE HAS INCLUDING NOTICE TO
8 THE PUBLIC AND SO FORTH AND THERE'S A REASON FOR THAT
9 BECAUSE THE CITY CAN'T GO OUT AND SPEND TAXPAYERS' MONEY
10 UNLESS THE TAXPAYERS APPROVE IT OR AT LEAST HAVE NOTICE OF IT
11 BEFORE COUNCIL DOES IT

12 THE CITY COUNCIL NEVER VOTED ON A BOND ORDINANCE THEY
13 NEVER VOTED TO BORROW THE MONEY OR GUARANTEE THE LOAN, AND I
14 WOULD SUBMIT, YOUR HONOR, THAT THE CITY BACKSTOP WOULD
15 REQUIRE A VOTE JUST LIKE GOING OUT AND ACTUALLY BORROWING
16 MONEY IF THEY'RE GOING TO GUARANTEE MONEY THAT WOULD
17 REQUIRE A VOTE AND THEY NEVER VOTED TO APPROPRIATE FUNDS
18 EXCEPT SPECIFICALLY AS IT RELATES TO THE JULY '03 VOTE

19 THE SECOND ELEMENT OF ESTOPPEL IS WHETHER -- IS WHETHER
20 OR NOT THERE WAS REASONABLE RELIANCE ON ANY UNAMBIGUOUS
21 PROMISE I DON'T THINK THERE WAS ANY UNAMBIGUOUS PROMISE
22 UPON WHICH THEY COULD RELY ON EVEN IF THEY COULD RELY ON
23 IT, THEY COULDN'T RELY ON IT WITH ANY -- IN A REASONABLE WAY
24 FOR THE REASONS I'VE ALREADY STATED

25 CITY COUNCIL IS THE ONLY PERSON -- ONLY ENTITY IN THIS

1 WHOLE THING THAT HAS THE AUTHORITY TO VOTE ON THE BOND ISSUE
2 THEY CAN'T -- THEY CANNOT RELY ON A, YOU KNOW, ON A
3 GOVERNMENT ENTITY IN THIS INSTANCE UNTIL THE GOVERNMENT
4 ENTITY VOTES TO APPROPRIATE THE FUND OR BORROW THE MONEY OR
5 ISSUE THE BONDS AND, OF COURSE, THERE HAS TO BE INJURY AS A
6 RESULT OF THE RELIANCE NO RELIANCE NO PROMISE SO THERE
7 IS NO INJURY THAT FLOWS

8 THE COURT ALL RIGHT

9 MR DETWILER THANK YOU, YOUR HONOR

10 THE COURT THANK YOU ALL RIGHT MR NEWMAN?

11 MR NEWMAN I'LL TRY TO MATCH MR DETWILER'S BREVITY
12 AND EXCEED HIM IN QUALITY JUDGE, SOUTH CAROLINA COURTS HAVE
13 OBSERVED THAT EVIDENCE SHOWING AN UNAMBIGUOUS PROMISE WITH
14 REGARD TO ESTOPPEL INCLUDES WHETHER A PARTY CAN ARTICULATE,
15 QUOTE, THE TERMS OF THE ALLEGED CONTRACT, HOW MUCH MONEY WILL
16 ULTIMATELY BE EXCHANGED, OR HOW THE PARTIES WOULD SETTLE UP
17 THIS SOUNDS AN AWFUL LOT LIKE THE INDEFINITE --
18 INDEFINITENESS ARGUMENTS THAT WE'VE ALREADY ADDRESSED AND
19 SHOWN THE COURT THAT A DEFINITE MEANS OF REACHING THE FEES TO
20 BE EARNED BY THE PARTIES IN THIS CASE WERE SUPPORTED WITHIN
21 THE M O U

22 THE UNAMBIGUOUS PROMISE APPARENTLY IS NEGATED --
23 APPARENTLY FROM THE PERSPECTIVE OF THE CITY IS NEGATED BY THE
24 FACT THAT THIS FEASIBILITY ARGUMENT WAS FOLDED INTO THE
25 DOCUMENT HOWEVER, IT WAS A CONDITION SUBSEQUENT THE

1 FEASIBILITY ARGUMENT STATED THAT THE CITY WAS LIABLE IF AND
2 UNTIL IT FOUND AND IT DETERMINED THAT THE -- THAT THE PROJECT
3 WAS NOT -- WAS NOT FEASIBLE THE VARIOUS WITNESSES IN THIS
4 CASE, INCLUDING MR LUMPKIN, MR LYLES, AND MR TRAUB, HAVE
5 ALL TESTIFIED THAT THEY EXPECTED THE CITY TO LIVE UP TO ITS
6 GOOD-FAITH PROMISES THAT IT SET FORTH IN SEEKING A PUBLICLY-
7 FINANCED HOTEL

8 REASONABLE RELIANCE UPON THE CITY'S PROMISES THROUGHOUT
9 THIS ACTION THE CITY, THE MEMBERS OF THE CITY COUNCIL BOTH
10 AS COUNCIL AND INDIVIDUALS, WORKED VERY CLOSELY WITH MEMBERS
11 OF THE PROJECT TEAM THEY LISTENED TO THEM TALK SEVERAL
12 PRESENTATIONS WERE MADE TO CITY COUNCIL ITSELF ABOUT THE
13 PROGRESS OF THE ACTION

14 LUMPKIN TESTIFIED, QUOTE, THE MAYOR WAS THERE SEVERAL
15 MEMBERS OF COUNCIL WERE THERE, YOU KNOW, AGAIN WORKING TO GET
16 THE BOND AND THAT THEY WERE WORKING WITH VARIOUS BOND
17 PROVIDERS, QUOTE, WITH THE CITY'S PARTICIPATION AGAIN,
18 WE'RE GOING TO THE FEBRUARY 11TH 2009, MEETING THAT AGAIN
19 EMPHASIZED THAT EVEN THOUGH THE CITY DISAVOWS ANY KIND OF
20 AUTHORITY THAT THE CONVENTION CENTER HOTEL CORPORATION MAY
21 HAVE HAD AT THAT POINT IN TIME, THEY'VE ALREADY FORFEITED
22 THAT POSITION THROUGH PRIOR LEGAL POSITIONS IN THIS CASE

23 THE JULY 30TH VOTE IS IMPORTANT AGAIN BECAUSE THAT WAS
24 AN ACTION CITY COUNCIL HELD OUT TO MR LYLES, MY FOLKS, AND
25 TO THE REST OF THE TEAM WE WERE MOVING INTO A POST-M O U

1 PHASE IN WHICH THE VARIOUS WORK THAT HAD BEEN DONE NECESSARY
2 TO COMPLETE THE GUARANTEED MAXIMUM PRICE WAS ACKNOWLEDGED AND
3 THAT OUR FOLKS WERE TO CONTINUE WORKING AND WERE GOING TO BE
4 COMPENSATED ONE OF THE POINTS THAT MR DETWILER HAS RELIED
5 ON IS THAT THAT COMPENSATION WAS TO BE DEDUCTED FROM THE
6 EVENTUAL FEE PAID UNDER THE M O U I THINK WITH REGARD TO
7 ESTOPPEL THAT HELPS US BECAUSE NOW THE CITY IS
8 ACKNOWLEDGING WE ARE PAYING YOU OUT OF THE MONEY THAT YOU'RE
9 EVENTUALLY GOING TO EARN---

10 THE COURT BUT THAT'S THE CASE ON ANY DEAL LIKE THIS,
11 THAT WHAT YOU'RE PAID ALONG AND ALONG IS GOING TO BE DEDUCTED
12 FROM YOUR FINAL PERCENTAGE

13 MR NEWMAN I DON'T KNOW THAT IT'S GOING -- WITH REGARD
14 TO ANY TYPE OF CONTRACTUAL STRUCTURE THAT'S DEVELOPED HERE
15 THERE'S SOME TESTIMONY IN THE RECORD THAT DESIGN/BUILD
16 AGREEMENTS LIKE WHAT WE'VE GOT IN THIS SITUATION ARE
17 TYPICALLY DEVELOPED ON AN M O U BASIS WITH THE VARIOUS FEE
18 STRUCTURES SET UP

19 THE COURT SO YOU'RE -- OKAY I'M WITH YOU

20 MR NEWMAN OKAY AND BOBBY LYLES' TESTIMONY IN
21 RESPONSE TO MR DETWILER'S INQUIRIES WERE THAT I WOULD HAVE
22 NEVER DONE ANY MORE WORK UNLESS THE CITY ASKED ME TO DO MORE
23 WORK, WHICH THEY DID STEVE GANTT, AGAIN TESTIFYING AS A
24 30(B)(6) WITNESS OF THE CITY REGARDING THE REASONABLENESS OF
25 THE RELIANCE OF THE VARIOUS PROJECT TEAM MEMBERS, QUESTION

1 FROM MR HARPOOTLIAN IS IT REASONABLE FOR THEM TO BELIEVE
2 THAT THEY SHOULD HAVE BEEN PAID FOR WHAT THEY DID AFTER CITY
3 COUNCIL TOLD THEM TO PICK UP -- TO PICK THEIR PENCILS BACK
4 UP? ANSWER I DON'T KNOW QUESTION SO YOU HAVE A
5 QUESTION ABOUT THAT THEY COULD HAVE REASONABLY BEEN -- THEY
6 COULD HAVE REASONABLY EXPECTED TO BE PAID? ANSWER I GUESS
7 THEY COULD HAVE, YES THAT'S THE CITY SPEAKING THROUGH ITS
8 30(B) (6) WITNESS

9 THE REASONABLENESS OF THE PLAINTIFFS' RELIANCE AS I
10 SAID EARLIER, THE VARIOUS PROJECT TEAM MEMBERS WERE WORKING
11 HAND IN HAND WITH THE CITY THROUGHOUT THIS PROCESS EVERYONE
12 WAS AWARE OF THE STRUCTURE OF THE M O U THAT HAD BEEN SET
13 UP, AND SHAWN EPPS, WHO WAS A CITY STAFF MEMBER WHO HAS NOT
14 BEEN MENTIONED AT THIS POINT IN TIME, WARNED CITY COUNCIL
15 ALTHOUGH SITTING AS CITY COUNCIL ON OCTOBER 15TH, 2003, A
16 FULL FIVE MONTHS BEFORE THE SECOND R F P WAS SENT OUT, THAT
17 THE VARIOUS TEAM MEMBERS WERE CONTINUING TO WORK ON THE
18 PROJECT AND CONTINUING TO INCUR THE EXPENSES AND I QUOTE
19 FROM MR EPPS I WANTED TO REMIND THEM I DIDN'T WANT THEM
20 TO HAVE ANY MISUNDERSTANDING THAT, YOU KNOW, PEOPLE ARE STILL
21 WORKING, THAT WORK WAS STILL GOING ON, THAT THOSE CONSULTANTS
22 WERE STILL EXPENDING TIME AND EFFORT AS IT RELATED TO THE
23 PROJECT

24 QUESTION AND IT WOULD BE -- IF YOU KNEW YOU WEREN'T
25 GOING TO DO THIS PROJECT IT WOULD BE FAIR TO STOP THEM FROM

1 DOING ANY MORE WORK RIGHT? ANSWER YES

2 THE COURT SO WAS YOUR CLIENT EVER AT RISK?

3 MR NEWMAN MY CLIENT AGREED TO BE AT RISK UP 'TIL THE
4 POINT WHERE THE WORK THAT WAS REQUIRED FOR THE DEVELOPMENT OF
5 THE GUARANTEED MAXIMUM PRICE

6 THE COURT ALL RIGHT AND THEN WHAT HAPPENED?

7 MR NEWMAN THEY COMPLETED THE WORK THAT WAS NECESSARY
8 FOR THAT THEY WENT BACK TO THE CITY AND SAID---

9 THE COURT BEFORE WE DO ANY---

10 MR NEWMAN ---WE'RE PUTTING OUR PENCILS DOWN---

11 THE COURT BEFORE WE DO ANY MORE, YOU'VE GOT TO PAY US
12 650 PLUS \$75 -- \$75,000 A WEEK

13 MR NEWMAN CORRECT

14 THE COURT ALL RIGHT SO YOUR CLIENT WAS AT RISK UP TO
15 THAT POINT

16 MR NEWMAN CORRECT AT RISK ONLY TO THE EXTENT THAT
17 THE PROJECT WOULDN'T BE FEASIBLE

18 THE COURT ALL RIGHT SO WE'RE GETTING BACK TO THAT

19 MR NEWMAN CORRECT

20 THE COURT ALL RIGHT SO YOU HAVE NO QUARREL IF
21 SOMETHING MADE IT UNDENIABLY NOT FEASIBLE WITH BEING AT RISK
22 FROM THE ZERO DAY TO THE DAY YOU'RE SAYING THE G M P WAS
23 REACHED

24 MR NEWMAN IF SOMETHING MADE IT UNDENIABLY FEASIBLE
25 AND THE CITY HAD PURSUED---

1 **THE COURT** NOT FEASIBLE UNDENIABLY NOT FEASIBLY

2 **MR. NEWMAN** CORRECT AND THE CITY HAD PURSUED IN GOOD
3 FAITH PUBLIC FINANCING OF THE HOTEL PROJECT, THEN UNDER THE
4 TERMS OF THE M O U THE WORK DONE AT RISK WOULD HAVE BEEN --
5 WELL, THE ESCAPE CLAUSE KICKS IN

6 **THE COURT** ALL RIGHT SO WHERE DOES YOUR ESTOPPEL
7 ARGUMENT COME IN? ISN'T IT NECESSARILY INTERTWINED WITH YOUR
8 CONTRACT ARGUMENT?

9 **MR. NEWMAN** THERE'S A LOT OF OVERLAP IN BOTH ARGUMENTS,
10 PARTICULARLY WITH REGARD TO FACT THAT A CONDITION SUBSEQUENT
11 IS SET UP WITHIN THE DOCUMENT WITH THE NECESSARY
12 UNDERSTANDING THAT A DOCUMENT ITSELF IS BINDING IF AND UNTIL
13 THAT CONDITION SUBSEQUENT ACTUALLY OCCURS WHICH WE CONTEND IN
14 THIS CASE IT DID NOT

15 **THE COURT** AND THAT CONDITION SUBSEQUENT WAS?

16 **MR. FOSTER** THE CITY'S DETERMINATION IN GOOD FAITH THAT
17 THE HOTEL PROJECT WAS NOT FEASIBLE

18 **THE COURT** OKAY ALL RIGHT ANYTHING ELSE?

19 **MR. NEWMAN** JUDGE, I THINK THAT'S PRETTY MUCH IT MY
20 COLLEAGUES MAY HAVE SOMETHING TO ADD TO THE ESTOPPEL
21 ARGUMENT

22 **THE COURT** OKAY ALL RIGHT ANYTHING FROM GARFIELD?

23 **MR. HINSON** YOUR HONOR, WE WOULD JUST ASSERT THAT AS
24 MEMBERS OF THE TEAM WE -- WE'RE ENTITLED TO RELY ON THE
25 ACTIONS OF THE CITY IN REGARD TO OUR FELLOW TEAM MEMBERS,

1 STEVENS & WILKINSON

2 THE COURT ALL RIGHT ANYTHING FROM TURNER?

3 MR KALISH I THINK GRAHAM HAS COVERED THE BASES

4 THE COURT ALL RIGHT ANYTHING IN RESPONSE, MR
5 DETWILER?

6 MR DETWILER THANK YOU YOUR HONOR, VERY BRIEFLY THE
7 AT -- STEVENS & WILKINSON, GARFIELD TRAUB, ALL THESE GUYS
8 WERE AT RISK UNTIL BONDS ACTUALLY CLOSED THERE IS NOTHING
9 -- AND I CAN'T EMPHASIZE THIS STRONGLY ENOUGH THERE'S
10 NOTHING IN THE M O U THAT SUGGESTS THAT THE AT-RISK ELEMENT
11 IS PEGGED TO THE GUARANTEED MAXIMUM PRICE IT'S JUST NOT IN
12 THERE EVERYTHING DEALS WITH THE BOND CLOSING, THE BOND
13 CLOSING, THE BOND CLOSING THE BOND NEVER CLOSED

14 NOW, BOBBY LYLES STATED IN HIS TESTIMONY THAT I WOULD
15 HAVE NEVER DONE MORE WORK, YOU KNOW, UNLESS THE CITY ASKED ME
16 TO WELL, THE CITY ASKED ME TO DO IT AND GUESS WHAT? THEY
17 PAID FOR IT THEY PAID \$697,000 FOR HIS ADDITIONAL WORK, AND
18 THAT'S BEEN MADE VERY CLEAR TODAY STEVE GANTT, THEY
19 WOULD---

20 THE COURT I'M JUST CURIOUS WHAT WAS DONE THAT HE WAS
21 PAID \$697,000 FOR? WAS IT DRAWINGS?

22 MR DETWILER I THINK JUST MORE DETAILED DRAWINGS AS
23 FAR AS I KNOW, YOUR HONOR, AND I'M NOT SURE THAT I'M
24 QUALIFIED TO ANSWER THAT QUESTION

25 THE COURT ALL RIGHT

1 MR DETWILER I ASSUME THAT WHATEVER HE DID IT WAS
2 LEGITIMATE AND HE WAS PAID FOR IT BUT -- AND I THINK IT WAS
3 LARGE -- KEEP IN MIND THE G M P -- STRIKE THAT THAT'S JUST
4 COMPLICATING MATTERS HE WAS PAID FOR WORK DURING THIS
5 INTERIM PERIOD OF TIME

6 NOW, THE DEFENDANT -- EXCUSE ME THE PLAINTIFFS RELY
7 VERY HEAVILY ON THIS EXCERPT, THIS EXTRACTED PORTION OF STEVE
8 GANTT'S TESTIMONY WHAT THEY'RE NOT TELLING YOU, YOUR HONOR,
9 AND YOU NEED TO READ ALL OF THAT TESTIMONY IN CONTEXT IS THAT
10 STEVE GANTT IS TALKING ABOUT THE \$650,000 HE'S NOT TALKING
11 ABOUT ANYTHING OTHER THAN THAT JULY PAYMENT AND -- AND -- AND
12 HE SAID RIGHTFULLY THAT, YEAH I GUESS MAYBE POSSIBLY THESE
13 FOLKS THAT DID THIS WORK DURING THAT INTERIM PERIOD OF TIME
14 MIGHT HAVE A RIGHT TO EXPECT PAYMENT AND GUESS WHAT? WHAT
15 THE QUESTION THAT WASN'T ANSWERED WAS THAT THEY GOT PAID
16 THEY GOT PAID FOR THAT WORK SO STEVE -- THIS TESTIMONY OF
17 STEVE GANTT, IN MY VIEW, IS TAKEN WHOLLY OUT OF CONTEXT, AND
18 WHEN YOU PUT IT IN CONTEXT, IT MAKES COMPLETE SENSE AND IS
19 COMPLETELY CONSISTENT WITH THE CITY'S POSITION

20 I HEARD FOR THE FIRST TIME TODAY THIS NOTION OF A POST-
21 M O U PHASE THAT WAS AN INTERESTING PHASE AND MAYBE THAT'S
22 GOING TO RESULT IN YET ANOTHER AMENDED COMPLAINT, BUT THAT'S
23 -- I DON'T RECALL THAT ONE BEFORE AND, YOUR HONOR, THE --
24 ARGUABLY THE CASE THAT WE CITED IN OUR BRIEF THAT CAME OUT
25 OF THE GREENWOOD SCHOOL DISTRICT, IT WAS AN ESTOPPEL CASE

1 AGAINST THE CITY OR, EXCUSE ME, THE SCHOOL DISTRICT BUT A
2 GOVERNMENTAL ENTITY NONETHELESS, ADDS A FOURTH ELEMENT TO
3 ESTOPPEL IN THE CONTEXT OF A -- OF A MUNICIPALITY OR A
4 GOVERNMENTAL ENTITY AND THAT IS THAT THEY NEED TO SHOW THAT
5 WHATEVER THEY RELIED UPON IF IT WERE -- IF IT HAPPENED TO BE
6 AN EMPLOYEE OF THE CITY HAD SOME AUTHORITY IN OTHER WORDS,
7 I THINK THE BURDEN -- THAT CASE STANDS FOR THE PROPOSITION
8 ARGUABLY THAT THE BURDEN IS ON THEM TO SHOW THAT WHATEVER
9 THEY RELIED UPON FROM STEVE GANTT OR WHOMEVER, IF THAT IS, IN
10 FACT, WHAT THEY'RE RELYING ON, THAT HE HAD AUTHORITY TO MAKE
11 ANY SORT OF PROMISE

12 THE COURT ALL RIGHT

13 MR DETWILER THANK YOU, YOUR HONOR

14 MR NEWMAN JUST BRIEFLY IN RESPONSE, YOUR HONOR

15 THE COURT ALL RIGHT LET'S MAKE IT BRIEF BECAUSE I
16 THINK THE RULES SAY THEY GO FIRST, YOU GO, AND THEN THEY GO
17 LAST BUT---

18 MR NEWMAN YES SIR

19 THE COURT ---IF YOU CAN'T RESIST, GO AHEAD

20 MR NEWMAN I'LL BE VERY, VERY BRIEF MR DETWILER WAS
21 RIGHT TO CORRECT ME IT'S A POST-G M P THING NOT A POST-
22 M O U THING, AND I'M QUOTING FROM HIS ATTACHMENT TO THE
23 SUPPLEMENTAL REPORT OF TODAY, LETTER FROM JOHN LUMPKIN DATED
24 JUNE 26TH OF '03 "AS IT RELATES TO THE ARCHITECTURAL AND
25 ENGINEERING WORK, THE AT-RISK WAS LIMITED TO SUFFICIENT PLANS

1 AND SPECS IN ORDER TO OBTAIN---

2 THE COURT WAIT A MINUTE I CAN'T FOLLOW YOU BECAUSE
3 IF YOU'RE READING IT, YOU CAN READ IT AND PROCESS IT BUT I
4 CAN'T HEAR YOU ANY FASTER

5 MR. NEWMAN YES, SIR

6 THE COURT SO READ IT SLOWER

7 MR. NEWMAN OKAY "AS IT RELATES TO THE ARCHITECTURAL
8 AND ENGINEERING WORK, THE AT-RISK WAS LIMITED TO SUFFICIENT
9 PLANS AND SPECS IN ORDER TO OBTAIN A GUARANTEED MAXIMUM
10 PRICE, G M P , FROM TURNER CONSTRUCTION THE CONTRACTOR "
11 SKIP DOWN A LITTLE BIT, STARTING WITH THE G M P "WITH THE
12 G M P IN HAND, THE CITY WOULD THEN BE ABLE TO PURSUE BOND
13 CLOSINGS CURRENTLY SCHEDULED TO BE HELD " THAT WAS THE
14 CONTEXT IN WHICH THE JULY 30TH AGREEMENT WAS REACHED THAT'S
15 WHAT MY FOLKS RELIED ON WE THINK IT GIVES RISE TO ESTOPPEL
16 BOTH AS TO THE M O U AND EVERYTHING THAT HAD BEEN PERFORMED
17 UP TO THAT POINT

18 THE COURT ALL RIGHT

19 MR. NEWMAN I'LL LEAVE IT AT THAT

20 MR. DETWILER YOUR HONOR, MAY I, ON THAT ONE POINT?

21 THE COURT TWELVE SECONDS

22 MR. DETWILER THAT PASSAGE JUST CITED BY MR. NEWMAN IS
23 ENTIRELY CONSISTENT WITH THE M O U AND OUR POSITION BECAUSE
24 STEVENS & WILKINSON, THEY WERE AT RISK THEY GOT THE G M P
25 THEY WERE NOT GOING TO -- THE M O U IN THEIR SCOPE OF WORK

1 DID NOT CONTEMPLATE THAT THEY WOULD DO ANY MORE WORK UNTIL
2 WHEN? UNTIL THE BOND CLOSED THEN THEY'D PICK THEIR PENS
3 BACK UP BUT IT WAS DURING THIS INTERIM PERIOD THAT THEY
4 SAID IF YOU WANT US TO DO MORE WORK, WE CAN DO IT TO
5 EXPEDITE THINGS SO THAT'S ENTIRELY CONSISTENT AND IT
6 DOESN'T CHANGE OR ADD ANYTHING TO THE EQUATION KEEP IN MIND
7 THAT WAS A LETTER WRITTEN BY A TEAM MEMBER NOT -- NOT BY THE
8 CITY

9 THE COURT ALL RIGHT THAT WILL BE THE LAST WORD ON
10 THAT ALL RIGHT SO WHAT I'VE GOT OR WHAT WE'VE DONE TODAY
11 -- I THINK I'VE GOT ALL THESE THINGS SEPARATED OUT ALL
12 RIGHT HOW MANY AMENDED -- HOW MANY COMPLAINTS EXIST RIGHT
13 -- DO YOU HAVE SOMETHING?

14 MR WARD I HAVE THAT MOTION TO AMEND

15 THE COURT WELL, I'M GETTING READY TO DO THAT HOW
16 MANY COMPLAINTS HAVE BEEN FILED SO FAR? THREE? THE
17 ORIGINAL?

18 -- MR WARD --WELL,-- THERE--ARE--SEVERAL ACTIONS - THERE HAVE
19 BEEN THREE FILED IN THE CASE OF 6488---

20 THE COURT OKAY

21 MR WARD ---WHICH IS GARY GARFIELD VERSUS AUGHTRY
22 DEFENDANTS AND HILTON, AND THE ONE THAT MR HINSON AND I ARE
23 GOING TO ARGUE ABOUT NEXT IS THE FOURTH PROPOSED AMENDED
24 COMPLAINT

25 THE COURT BY?

1 MR WARD GARY

2 MR HINSON GARY AND GARFIELD

3 THE COURT AND SO I GUESS THE EASY QUESTION IS WHAT
4 DO YOU WANT TO ADD?

5 MR HINSON WELL, THIS IS THE ISSUE THAT CAME UP DURING
6 THE NOERR-PENNINGTON ARGUMENTS WHICH IS WE'RE ALLEGING THAT
7 AFTER THE CITY ISSUED THE SECOND R F P AND THERE'S THIS
8 REQUEST FOR BIDS OUT THERE THAT DEFENDANT AUGHTRY AND THE
9 AUGHTRY PARTIES TORTIOUSLY INTERFERED WITH THE PROSPECTIVE
10 CONTRACTUAL RELATIONSHIP THAT MY CLIENTS HAD WITH THE CITY,
11 ESSENTIALLY IT BOILS DOWN TO, BY UNFAIR COMPETITION BY
12 CHEATING IN THE R F P PROCESS

13 THE COURT SO TOTALLY UNRELATED TO THE M O U GOT TO
14 BE

15 MR HINSON RELATIVELY SPEAKING

16 THE COURT THAT'S THE ONLY PROSPECTIVE RELATIONSHIP YOU
17 WOULD HAVE THAT YOU HAVEN'T ALREADY ALLEGED

18 MR HINSON YES, SIR

19 THE COURT ALL RIGHT ALL RIGHT SO IS THERE A NOERR-
20 PENNINGTON DEFENSE IF THEY WANT TO ALLEGE THAT? AND THAT
21 DOESN'T MAKE ANY -- HAVE ANY INPUT ON WHETHER I GRANT THE
22 AMENDMENT AND, BY THE WAY, IS THIS SOMETHING THAT I'M TO
23 HEAR OR IS JUDGE BARBER TO HEAR THIS? SOME -- SOME CIRCUITS
24 REQUIRE THESE TYPES OF MOTIONS TO BE HEARD BY THE
25 ADMINISTRATIVE JUDGE, BUT IF Y'ALL ARE CONFIDENT THAT IT

1 DOESN'T THEN I'LL HEAR IT

2 MR WARD WE'RE PREPARED TO ARGUE IT TODAY

3 THE COURT ALL RIGHT SO DO YOU -- YOU OBJECT TO THAT

4 MR WARD YES, SIR

5 THE COURT YOU WANT TO INSERT ANOTHER CAUSE OF ACTION
6 FOR INTERFERENCE WITH A PROSPECTIVE CONTRACTUAL RELATIONSHIP
7 BASED ON APRIL 2, 2004, FORWARD

8 MR HINSON WELL, YOUR HONOR, IT'S ACTUALLY JUST --
9 IT'S THREE EXTRA PARAGRAPHS WE ALREADY HAVE A---

10 THE COURT BUT THAT'S WHAT YOU WANT TO ALLEGE

11 MR HINSON YES, SIR

12 THE COURT ALL RIGHT AND ANY -- WHY COULDN'T THIS
13 HAVE BEEN DONE A LONG TIME AGO?

14 MR HINSON WELL, YOUR HONOR, THAT'S A -- THAT'S A VERY
15 VALID QUESTION THE AFFIDAVIT OF DONNA JUMPER WHICH WE
16 SUBMITTED TO YOU EARLIER REALLY -- THIS WAS SOMETHING THAT
17 HAS ALWAYS BEEN AT THE FOREFRONT OF THIS CASE IS THE AUGHTRY
18 PARTIES' ACTIONS DURING THE R F P THERE'S THE ISSUE---

19 THE COURT THE SECOND R F P

20 MR HINSON THE SECOND R F P , YES, SIR THERE'S AN
21 R F Q TECHNICALLY AND AN R F P THAT DURING THE SECOND
22 R F P , IF YOU WILL ONE OF MR AUGHTRY'S AGENTS, DAMON
23 JETER, THIS LOBBYIST THAT HE SAT IN IMPROPERLY ON MY
24 CLIENT'S PRESENTATION TO THE CITY THAT THESE PRESENTATIONS
25 WERE SUPPOSED TO BE CLOSED-DOOR PRESENTATIONS

1 THE COURT MR JETER DID?

2 MR HINSON HE DID, YES, SIR AND SO THAT'S ALWAYS
3 BEEN AT THE FOREFRONT OR AN ISSUE---

4 THE COURT WHY WAS IT IMPROPER?

5 MR HINSON WELL, BECAUSE THE RULES STATED THAT OTHER
6 COMPETING TEAMS WERE NOT TO SIT IN ON THE PROPOSALS OF THEIR
7 COMPETING BIDDERS

8 THE COURT WHO SET THE RULES?

9 MR HINSON THE CITY SET THE RULES

10 THE COURT ALL RIGHT WOULDN'T IT BE UP TO THE CITY TO
11 ENFORCE THOSE? I MEAN, DID EVERYBODY SIGN OFF SAYING I'M NOT
12 GOING TO VIOLATE THESE RULES OR WAS THAT JUST SOMETHING THE
13 CITY DID TO---

14 MR HINSON I THINK IMPLICITLY EVERYONE DID, BUT I MEAN
15 THE CITY HAS---

16 THE COURT ALL RIGHT HERE'S WHAT I'M PICTURING I'M
17 PICTURING ME -- LET'S JUST SAY IT WAS IN THIS ROOM CITY
18 COUNCIL MEETS IN THIS COURTROOM AND THEY'RE GOING TO HEAR
19 YOUR PRESENTATION DAMON JETER WALKS IN ALL RIGHT? YOUR
20 MAN PROBABLY DIDN'T KNOW WHO DAMON JETER WAS, ARGUABLY SO
21 WHAT IS SUPPOSED TO HAPPEN NEXT UNDER THAT RULE?

22 MR HINSON UNDER -- I'M SORRY WHICH RULE?

23 THE COURT UNDER THE RULE THAT HE'S NOT SUPPOSED TO BE
24 IN THERE

25 MR HINSON WELL, I THINK---

1 THE COURT SHOULD SOMEBODY FROM THE CITY -- LET'S JUST
2 SAY STEVE GANTT SINCE EVERYBODY TALKED ABOUT HIM SO MUCH
3 MR GANTT IS SUPPOSED TO SAY, "GET OUT OF HERE"?

4 MR HINSON WELL, I THINK SO---

5 THE COURT OKAY

6 MR HINSON ---AND THAT'S THE FIRST THING THAT SHOULD
7 HAPPEN

8 THE COURT ALL RIGHT NOBODY DID THAT

9 MR HINSON AND NO ONE DID THAT NO, SIR, YOUR HONOR
10 AND I -- AND THE OTHER -- I THINK IT GIVES -- IT GIVES THE
11 AUGHTRY PARTIES AN ADVANTAGE I MEAN, THEY'RE NOT PLAYING
12 FAIRLY, SO TO SPEAK, IN THIS -- IN THIS PROCESS

13 THE COURT ALL RIGHT

14 MR HINSON THEY'RE SENDING WHAT WE'VE ALLEGED IS A SPY
15 INTO -- INTO OUR PRESENTATION

16 THE COURT ALL RIGHT AND, AGAIN, THAT IS A PROCEDURAL
17 MATTER HERE, NOT ANYTHING ABOUT THE MERITS YOU OBJECT FROM
18 A PROCEDURAL STANDPOINT

19 MR WARD WE DO, YOUR HONOR

20 THE COURT ALL RIGHT AND WITHOUT -- I GUESS YOU GOT
21 SOME -- WHAT, DO YOU HAVE A PREJUDICE ARGUMENT?

22 MR WARD YES, SIR

23 THE COURT OKAY

24 MR WARD AND THAT IS THAT THE -- AS THE COURT KNOWS,
25 TYPICALLY A MOTION TO AMEND IS LIBERALLY GRANTED HOWEVER,

1 IF PREJUDICE TO A PARTY RESULTS IT'S A DIFFERENT ANALYSIS
2 WE THINK THAT PREJUDICE RESULTS HERE THE PREJUDICE IS
3 REALLY QUITE EASY TO UNDERSTAND AND THAT IS BECAUSE AFTER
4 FIVE YEARS WE'RE NOW FACING A CLAIM THAT THEY WANT TO BASE A
5 CAUSE OF ACTION ON A NEW ISSUE, NOT AN ISSUE ARISING OUT OF
6 INTERFERING WITH THE MEMORANDUM OF UNDERSTANDING AND NOT AN
7 ISSUE ARISING OUT OF INTERFERING WITH THE DEVELOPMENT
8 AGREEMENT THAT MIGHT HAVE ARISEN OUT OF THE MEMORANDUM OF
9 UNDERSTANDING, BUT A CAUSE OF ACTION -- A CLAIM, AN ISSUE,
10 BASED UPON THE SECOND BID PROCESS WHICH WAS OPEN TO THE
11 PUBLIC

12 THEY KNEW MR JETER SAT IN THEY WROTE A DEMAND LETTER
13 TO THE CITY AND OTHERS TO EXPLAIN THEMSELVES, SO THEY KNEW
14 THAT SOMETHING UNTOWARD THEY FELT HAD HAPPENED, ALL THAT IN
15 MAY OF 2004, AND THEY WAIT UNTIL JULY 24TH OF 2009 TO MAKE
16 THE COMPLAINT WE'VE DONE MORE THAN THREE YEARS OF DISCOVERY
17 IN THIS CASE WE'VE TAKEN THE DEPOSITIONS YOU HEARD RECITED
18 NO ONE HAS ASKED ANY QUESTIONS ABOUT THIS PROSPECTIVE
19 CONTRACT THAT MIGHT ARISE OUT OF A BID PROCESS

20 AND SO WE FEEL VERY STRONGLY -- AND WE WOULD HAVE
21 CONSENTED IF WE DIDN'T BELIEVE THAT IT TRULY IS PREJUDICIAL
22 WE FEEL VERY STRONGLY THAT, ALTHOUGH THEY ARE RARE THAT THIS
23 IS A -- REALLY A DESPERATE ATTEMPT TO SAVE SOME CAUSE OF
24 ACTION IT AROSE OUT OF A COMMENT THAT MR VAIL MADE ON THE
25 RECORD IN THE JULY 9TH HEARINGS THAT THEY PROBABLY NEED A

1 CAUSE OF ACTION BASED ON THE ALLEGED INTERFERENCE WITH THE
2 BID PROCESS BUT WE DON'T BELIEVE THAT THE CIRCUMSTANCES ARE
3 RIPE TO ALLOW THEM AT THIS LATE STAGE -- WE'RE BACK-UP FOR A
4 TRIAL WE HAVEN'T DONE ANY DISCOVERY ON THIS POINT

5 THEY'LL MAKE AN ARGUMENT THAT THIS RELATES BACK
6 HOWEVER, IF YOU'LL READ THEIR COMPLAINT WHAT THEY HAVE
7 ALWAYS BEEN COMPLAINING ABOUT IS THE BUSINESS RELATIONSHIP
8 THAT AROSE OUT OF THE M O U AND/OR THE PROSPECTIVE
9 DEVELOPMENT AGREEMENT THIS CLAIM THAT THEY NOW WANT TO
10 ASSERT ARISES NOT OUT OF THE M O U OR THE PROSPECTIVE
11 DEVELOPMENT AGREEMENT BUT, RATHER, IT ARISES OUT OF THE
12 SECOND BID PROCESS WHICH THE CITY OF COLUMBIA NOTICED TO
13 EVERYBODY THEY PARTICIPATED IN THEY KNEW WHAT THEY SAY
14 HAPPENED THAT IS, THEY SAY IMPROPER, AND THEY NEVER MAKE A
15 COMPLAINT ABOUT IT UNTIL FIVE YEARS LATER

16 THE COURT ARE YOU SAYING THE STATUTE OF LIMITATIONS
17 APPLIES THERE?

18 MR WARD --YES, SIR --

19 THE COURT BUT THAT WOULD BE A -- NOT A PREJUDICE
20 ARGUMENT THAT WOULD BE JUST A DEFENSE TO IT IN OTHER
21 WORDS, IF I WERE TO ALLOW THE AMENDMENT YOU COULD STILL GET
22 SUMMARY JUDGMENT POSSIBLY IF YOUR ARGUMENT IS CORRECT ON THE
23 STATUTE OF LIMITATIONS

24 MR WARD YES, SIR AND WE THINK THAT YOU DO GET TO
25 TAKE INTO ACCOUNT WHETHER OR NOT THE PROPOSED AMENDMENT IS

1 FUTILE AND WE THINK THAT IT WOULD BE FUTILE HERE BECAUSE IT
2 SHOULD NOT RELATE BACK AND IF YOU LOOK AT THE CONTEXT THAT
3 IT'S ARISING OUT OF -- MR PAUL TOUCHED ON THIS IT'S
4 ARISING OUT OF THE CONTEXT OF A BID THAT IS NOT AN ACTIVITY
5 WHICH IS A CONTRACT NOR, WE SUBMIT, A PROSPECTIVE CONTRACT,
6 AND IF THE PARTIES TO THE BID PROCEDURE ARE ALL PROSPECTIVE
7 CONTRACT---

8 THE COURT EVERYBODY IS INTERFERING WITH EVERYBODY

9 MR WARD EVERYONE IS INTERFERING WITH EVERYONE ELSE'S
10 AND ISN'T UN -- ISN'T COMPETITION ONE OF THE FEW THINGS THAT
11 IS BASICALLY AN EXCEPTION TO THE INTERFERENCE WITH A
12 PROSPECTIVE---

13 THE COURT I'LL COME BACK TO YOU IN A MINUTE, MR WARD
14 ALL RIGHT MR HINSON, YOU SAY THIS WAS AT THE FOREFRONT OF
15 THE CASE FROM THE BEGINNING SO WHY DIDN'T YOU ALLEGE IT?

16 MR HINSON WELL YOUR HONOR, TO BE QUITE FRANK I
17 THINK THAT THE DEPOSITION OR, I'M SORRY, THE AFFIDAVIT OF
18 DONNA JUMPER WAS CRUCIAL TO US FEELING THAT WE HAD ENOUGH
19 EVIDENCE TO MOVE FORWARD ON THAT CAUSE OF ACTION, AND SHE
20 HASN'T ALWAYS BEEN WILLING -- ONLY RECENTLY CAME FORWARD AS
21 SOMEONE WILLING TO PROVIDE THAT

22 THE COURT HOW LONG HAS SHE BEEN WORKING FOR YOU?

23 MR HINSON SHE DOESN'T WORK FOR ME SHE WORKS---

24 THE COURT STEVENS & WILKINSON?

25 MR HINSON SHE WORKS FOR STEVENS & WILKINSON

1 THE COURT HOW LONG HAS SHE BEEN WORKING FOR THEM?

2 MR HINSON I'M NOT SURE I HONESTLY DIDN'T KNOW OF
3 HER RELATIONSHIP WITH MR GANTT UNTIL WITHIN THE LAST THREE
4 OR FOUR MONTHS

5 THE COURT WAS SHE WILLING -- WAS HER WILLINGNESS TO
6 COME FORWARD TIED ON THE TIMING OF HER LEAVING THE CITY OR
7 WHEN DID SHE LEAVE THE CITY?

8 MR HINSON I'M NOT SURE, YOUR HONOR I DO NOT KNOW

9 THE COURT OKAY BUT -- SO IT WASN'T A QUESTION OF
10 WHETHER OR NOT YOU HAD A CAUSE OF ACTION YOU HAD A QUESTION
11 OF WHETHER OR NOT YOU COULD PROVE IT

12 MR HINSON YOUR HONOR, I THINK---

13 THE COURT YOU DON'T NEED HER TO PROVE THAT DAMON JETER
14 CAME INTO THE MEETING ROOM

15 MR HINSON NO NO, YOUR HONOR, BUT---

16 THE COURT HOW DID YOU FIND OUT HE WAS IN THERE?

17 MR HINSON WELL, CHARLES GARY, WHO IS ONE OF -- WHO IS
18 ONE OF MY TWO CLIENTS, SAW -- SAW DAMON JETER IN THE MEETING

19 THE COURT DID HE OBJECT?

20 MR HINSON HE DID

21 THE COURT RIGHT THEN AT THE MEETING

22 MR HINSON I'M NOT SURE IF HE DID IT RIGHT THEN, BUT
23 AFTER -- AFTER THE PRESENTATIONS THE ISSUES CERTAINLY CAME UP
24 THAT MR JETER HAD SAT IN ON THE PRESENTATIONS THAT WAS --
25 THAT WAS VERY MUCH A SOURCE OF CONTROVERSY

1 THE COURT DO YOU HAVE ANY EVIDENCE THAT MR JETER
2 RELAYED ANY INFORMATION TO AUGHTRY?

3 MR HINSON WE HAVE NOW DONNA JUMPER SAYING THAT SHE
4 SAW MR JETER IN THE HALLWAY OR STANDING WITH MR AUGHTRY
5 IMMEDIATELY FOLLOWING THAT PRESENTATION

6 THE COURT AND DO YOU HAVE ANY---

7 MR HINSON WHAT THEY SAID I DO NOT KNOW, BUT AGAIN
8 THERE'S AN INFERENCE THAT CAN BE DRAWN THAT HE WAS IN THAT --
9 WAS SNEAKING INTO THAT MEETING FOR A PURPOSE AND THAT HE
10 WASN'T -- I THINK THE INFERENCE IS HE WASN'T TALKING WITH MR
11 AUGHTRY ABOUT THE WEATHER A FEW MINUTES BEFORE THE
12 PRESENTATION

13 THE COURT DOES MR JETER KNOW HOTEL CONSTRUCTION LINGO
14 SUFFICIENTLY TO RELAY IT ALL TO MR AUGHTRY IN AN INTELLIGENT
15 MANNER OR---

16 MR HINSON I THINK MR JETER CERTAINLY IS INTELLIGENT
17 ENOUGH TO SEE OR TAKE NOTE OF THE ISSUES THAT THE CITY -- THE
18 QUESTIONS THAT THE CITY WAS ASKING MY CLIENT'S TEAM---

19 THE COURT WELL, I KNOW THAT, BUT I'M TALKING ABOUT --
20 I KNOW THAT BUT WOULDN'T IT HAVE BEEN BETTER FOR THEM TO
21 SEND IN A SECRET HOTEL BUILDING EXPERT?

22 MR HINSON I'M NOT CERTAIN, YOUR HONOR I CERTAINLY
23 WOULDN'T SPECULATE AS TO WHY THEY CHOSE MR JETER AS TO
24 SOMEONE ELSE

25 THE COURT ALL RIGHT HOW ABOUT THE -- JUST LOOKING

1 DOWN THE ROAD, HOW ABOUT THE STATUTE OF LIMITATIONS ISSUE?

2 MR HINSON YOUR HONOR, THIS IS -- THIS IS THE SAME
3 FACTS AND CIRCUMSTANCES AS THE WHOLE CASE I MEAN, PART OF
4 -- THERE'S FOUR THINGS THAT WE ALLEGE THAT THE AUGHTRY
5 DEFENDANTS DID IMPROPERLY IN THE SECOND BID ONE IS LOBBYING
6 THE CITY DESPITE THE FACT THE RULES SET FORTH IN THEIR
7 REQUEST FOR PROPOSAL STATED THAT PROPOSERS WERE NOT TO LOBBY
8 OR OTHERWISE CONTACT MEMBERS OF CITY COUNCIL THAT'S
9 ABSOLUTELY BEEN AN ISSUE IN THIS CASE SINCE DAY ONE

10 NUMBER TWO IS -- IT KIND OF GOES TO THE SAME THING, THAT
11 THE AUGHTRY DEFENDANTS POSED QUESTIONS TO THE CITY THROUGH
12 DIRECT PHONE CALLS AND PERSONAL CONTACT WITH CITY EMPLOYEES
13 IN BLATANT -- IN BLATANT VIOLATION OF THE RULES AGAIN, THIS
14 HAS BEEN AN ISSUE DISCUSSED SINCE DAY ONE IN THIS CASE

15 C IS THAT THE -- THIS IS THE WHOLE BAIT AND SWITCH OF
16 THE HOTEL, THAT THE RULES SPECIFICALLY SAID THAT YOUR WRITTEN
17 PROPOSAL WAS TO BE YOUR FINAL PROPOSAL, AND DURING HIS ORAL
18 REPRESENTATIONS TO THE CITY, AUGHTRY SWAPS FROM A HILTON
19 GARDEN INN TO AN ACTUAL BIG RED H HILTON YOU HEARD THIS
20 ISSUE WITH THE NOERR-PENNINGTON -- THE NOERR-PENNINGTON
21 ARGUMENTS THIS WAS -- THIS ISSUE WAS THOROUGHLY COVERED IN
22 MR AUGHTRY'S DEPOSITION THIS WHOLE SWAP FROM ONE HOTEL TO
23 ANOTHER HAS BEEN -- HAS BEEN CENTRAL TO THIS CASE SINCE DAY
24 ONE

25 AND THE FOURTH IS THE DAMON JETER SECRET -- SECRET AGENT

1 AT THE PRESENTATION SO ALL FOUR OF THESE ARE THE SAME FACTS
2 AND CIRCUMSTANCES THAT THIS CASE HAS INVOLVED SINCE IT WAS
3 FILED

4 THE COURT WELL IF THE MOTION IS GRANTED, WHAT OTHER
5 DISCOVERY WOULD YOU HAVE TO DO?

6 MR HINSON I DON'T THINK THERE'S ANYTHING ADDITIONAL
7 WE NEED

8 THE COURT WELL YOU DON'T THINK I MEAN, YOU WOULDN'T
9 WANT TO DEPOSE NOBODY ELSE NOTHING

10 MR HINSON THERE'S A LOT OF PEOPLE I WOULD LIKE TO
11 DEPOSE WITHIN LIMITED TIME AND RESOURCES, YOUR HONOR, BUT
12 THERE'S NOBODY WHO WE ANTICIPATE DEPOSING IF THIS AMENDMENT
13 IS GRANTED

14 THE COURT RIGHT SO YOU'RE SAYING NO YOU WOULDN'T
15 -- YOU WOULDN'T SEND A SINGLE EXTRA INTERROGATORY AND YOU
16 WOULDN'T SEND OUT A SINGLE EXTRA REQUEST FOR PRODUCTION OR A
17 SINGLE EXTRA DEPOSITION NOTICE

18 MR HINSON NO, YOUR HONOR, I WOULDN'T BECAUSE I THINK
19 THIS ISSUE HAS BEEN ONE THAT WE HAVE -- THAT ALL THE PARTIES
20 HAVE CONTEMPLATED SINCE DAY ONE I MEAN, IN THE
21 INTERROGATORY---

22 THE COURT WELL, IF IT'S BEEN -- IF IT'S BEEN
23 CONTEMPLATED SINCE DAY ONE, WHY DIDN'T YOU ALLEGE IT?

24 MR HINSON WELL AGAIN, YOUR HONOR, I THINK THAT---

25 THE COURT I MEAN, IT IS -- IT HAS BEEN FIVE YEARS

1 MR HINSON WELL, IT WAS -- IT MAY HAVE BEEN AN
2 OVERSIGHT ON OUR PART, YOUR HONOR, BUT I DON'T THINK THERE'S
3 ANY QUESTION AS TO WHETHER IT'S ANY PREJUDICE TO THE
4 DEFENDANTS AND I DON'T THINK THERE IS AND I HAVE A BRIEF FOR
5 YOU ACTUALLY THAT CITES SOME LAW TO THAT POINT TO SAY---

6 THE COURT IS THIS SOMETHING THAT I DON'T HAVE?

7 MR HINSON IT IS, YOUR HONOR, AND---

8 THE COURT HOW BIG IS IT?

9 MR HINSON IT'S PRETTY SHORT, YOUR HONOR

10 THE COURT I REALLY DON'T THINK -- WELL, HOW -- HOW
11 LONG IS IT?

12 MR HINSON IT'S NINE PAGES, YOUR HONOR

13 THE COURT HOW MANY ATTACHMENTS?

14 MR HINSON IT HAS SEVEN VERY SHORT ATTACHMENTS

15 THE COURT HOW SHORT?

16 MR HINSON MOST OF THEM ARE DEPOSITION EXCERPTS OF TWO
17 TO THREE PAGES

18 THE COURT SO IT'S ACTUALLY ABOUT 30 PAGES

19 MR HINSON YES, SIR, PROBABLY A LITTLE BIT -- SLIGHTLY
20 LESS

21 THE COURT BECAUSE I'VE GOT A LOT OF SHORT MEMOS WITH A
22 LOT OF ATTACHMENTS

23 MR HINSON THIS IS -- THIS IS AMONG THE SHORTEST ON
24 YOUR DESK, YOUR HONOR

25 THE COURT AND THIS IS -- THIS IS A MEMO ON THE

1 AMENDMENT ISSUE?

2 MR HINSON THIS IS -- WE FILED A MOTION TO AMEND THE
3 AUGHTRY PARTIES FILED A MEMO OPPOSING OUR MOTION TO AMEND
4 CLAIMING PREJUDICE, AND THIS ADDRESSES WHY THERE IS NO
5 PREJUDICE TO THE AUGHTRY PARTIES, YOUR HONOR

6 THE COURT ALL RIGHT IF I CAN POSSIBLY READ ANYTHING
7 ELSE, I'LL BE HAPPY TO LOOK AT IT HAVE YOU GIVEN THEM A
8 COPY?

9 MR HINSON I HAVE, YOUR HONOR

10 THE COURT TODAY OR WHEN?

11 MR HINSON I E-MAILED ONE AT 2 30 A M THIS MORNING
12 AND PROVIDED A WRITTEN COPY WHEN WE GOT IN HERE ABOUT 9 00

13 THE COURT ALL RIGHT

14 MR HINSON BUT

15 THE COURT ALL RIGHT

16 (MR HINSON HANDS A DOCUMENT TO THE COURT)

17 MR HINSON THERE WAS A LITTLE ISSUE WITH MY RECEIPT OF
18 THEIR MEMO, BUT THAT'S BEEN RESOLVED

19 THE COURT SO WHEN -- AND I'M NOT BEING FACETIOUS I'M
20 JUST ASKING BECAUSE THIS IS -- THIS IS JUST A TON OF STUFF
21 WHEN YOU DID YOUR FIRST AMENDED COMPLAINT, THIS DIDN'T GET
22 PUT IN, NOR IN THE SECOND NOR THE THIRD

23 MR HINSON WELL, THE EARLIER AMENDMENTS TO THE
24 COMPLAINT REALLY DEALT WITH HILTON YOUR HONOR THEY -- WE
25 HAD PLED -- THAT'S A -- I'LL TRY TO BE AS BRIEF AS POSSIBLE

1 BUT ONE OF THE ISSUES FOR INSTANCE, WAS THAT WE PLED BREACH
2 OF GOOD FAITH AND FAIR DEALINGS HILTON SAID THAT WASN'T A
3 CAUSE OF ACTION IN SOUTH CAROLINA WE HAD TO CHANGE THE
4 PLEADING TO BREACH OF CONTRACT, AND THERE'S JUST BEEN A WHOLE
5 LOT OF ISSUES THAT WE'RE TRYING TO IRON OUT HOW THE -- HOW
6 THE PLEADINGS WERE WORDED SO THAT'S -- THAT'S ONE OF THE
7 REASONS THAT WE NOW HAVE SO MANY AMENDMENTS TO THIS COMPLAINT
8 WAS -- AND I HATE TO USE THE PHRASE BUT SOME NIT-PICKY ISSUES
9 WITH HOW THE COMPLAINT WAS DRAFTED

10 THE COURT ALL RIGHT WOULD THE OTHER BIDDERS OR
11 PEOPLE WHO SUBMITTED R F P 'S HAVE THIS CAUSE OF ACTION, TOO,
12 OR WOULD THEY HAVE HAD IT, TOO?

13 MR HINSON YES, YOUR HONOR I THINK THEY WOULD HAVE

14 THE COURT ALL RIGHT WHY COULDN'T THEY ASSERT ONE
15 NOW? BECAUSE THE STATUTE HAS EXPIRED RIGHT?

16 MR HINSON THE OTHER BIDDERS THAT AREN'T IN THIS ROOM?

17 THE COURT RIGHT

18 MR HINSON WELL, I THINK THEY HAVEN'T -- THEY HAVEN'T

19 -- THEY DON'T GET THE BENEFIT OF -- I MEAN, WE FILED OUR
20 COMPLAINT IN 2006 I THINK IT WAS THAT AGAIN INVOLVES FACTS
21 UNDER THE -- INVOLVES THE SAME CIRCUMSTANCES AND SET OF FACTS
22 SO -- WOULD BE SITTING IN MUCH DIFFERENT SHOES THAN THE OTHER
23 MEMBERS OF THE TEAM WHO DIDN'T FILE SUIT THREE YEARS AGO

24 THE COURT OKAY MR WARD, HAVE YOU HAD A CHANCE TO
25 READ HIS MEMO AND ATTACHMENTS?

1 MR WARD I DID, YOUR HONOR, AND WHAT I WOULD LIKE TO
2 SAY IS THIS THAT, FIRST OF ALL, WITH RESPECT TO MR JETER,
3 THE TESTIMONY IN HIS AFFIDAVIT IS VERY CLEAR THAT HE WAS AT
4 THAT MEETING INADVERTENTLY, AND THAT'S NEVER BEEN REFUTED
5 AND HE SAID, IN FACT, IN HIS DEPOSITION THAT WHEN HE REALIZED
6 WHY HE WAS THERE HE -- OR THAT HE WAS THERE BUT WASN'T
7 SUPPOSED TO BE THAT IT WASN'T MR AUGHTRY'S PRESENTATION
8 GOING FORWARD HE LEFT, AND I DON'T THINK THAT'S REFUTED,
9 THAT IS, THAT THAT WAS HIS---

10 THE COURT ALL RIGHT WELL, THAT GOES TO THE MERITS OF
11 IT THE PREJUDICE IS DO YOU FORESEE -- NOW HE'S ALREADY
12 SAID - AND I'M GOING TO HOLD HIM TO IT - THAT HE'S NOT GOING
13 TO SEND OUT ANY MORE INTERROGATORIES, ANY MORE REQUESTS FOR
14 PRODUCTION, ANY MORE DEPOSITION NOTICES AT ALL

15 MR WARD WELL -- AND I WOULD LIKE TO HOLD HIM TO THAT,
16 BUT MR -- THE AUGHTRY DEFENDANTS CANNOT AGREE TO NOT DO
17 DISCOVERY ON A NEW CLAIM THAT ARISES OUT OF A DIFFERENT SET
18 OF EVENTS, THAT IS, THE SECOND BID PROTEST WHICH IS ALLEGED
19 TO BE A PROSPECTIVE CONTRACT WE WOULD NEED TO DEPOSE AT A
20 MINIMUM MS JUMPER WHO HERETOFORE -- SHE'S BEEN NAMED AS A
21 WITNESS FOR A LONG TIME, BUT ONLY RECENTLY DID IT BECOME
22 APPARENT THAT SHE KNEW WHAT SHE CLAIMS TO KNOW NOW WHICH, TO
23 THE EXTENT HIS MOTION RELIES ON HER AFFIDAVIT, FIRST OF ALL,
24 WHAT SHE SAYS HAPPENED HAS NO PROBATIVE VALUE
25 SECOND OF ALL IT WOULD BE VERY PREJUDICIAL IF IT

1 WERE -- IF THAT WERE HER TESTIMONY AT TRIAL BECAUSE SHE JUST
2 SAYS THAT THERE WERE PHONE CONVERSATIONS SHE DOESN'T SAY
3 WHAT HAPPENED SO THE FINDER OF FACT WOULD BE LEFT TO
4 SPECULATE AS TO WHAT SHE SAID SO WE WOULD WANT TO ASK HER

5 WE WOULD ALSO WANT TO FIND OUT FROM THE PEOPLE WHO IT IS
6 CLAIMED WERE CONTACTED DURING THIS PROHIBITED PERIOD WHAT MR
7 AUGHTRY OR HIS REPRESENTATIVES SAID AND WHEN THEY SAID IT SO
8 THAT WE CAN DETERMINE WHETHER OR NOT THERE IS, IN FACT, A
9 VALID CAUSE OF ACTION FURTHERMORE, THIS IS A -- THE CLAIM
10 THAT A BID PROCESS RESULTS IN A PROSPECTIVE CONTRACT THAT
11 ALLOWS LAWSUITS TO ARISE FROM -- ON TORT THEORIES IS NOVEL IN
12 OUR STATE, AND WE WOULD WANT A CHANCE TO TEST THE SOUNDNESS
13 OF THAT AS WELL AS THE STATUTE OF LIMITATIONS

14 THE COURT ALL RIGHT OKAY

15 MR WARD SO IF THE AMENDMENT IS ALLOWED, WE WOULD WANT
16 FULL DISCOVERY WITH RESPECT TO THAT NEW CLAIM BECAUSE WE
17 DON'T BELIEVE THAT IF YOU READ THE THIRD AMENDED COMPLAINT
18 WHERE THEY WANT TO GO TO THE FOURTH AMENDED COMPLAINT ---THE
19 THIRD AMENDED COMPLAINT TALKS ABOUT THIS LAWSUIT FOR
20 INTERFERENCE WITH A PROSPECTIVE CONTRACT IS ABOUT A BUSINESS
21 RELATIONSHIP THAT AROSE EITHER OUT OF THE M O U OR THE
22 PROPOSED DEVELOPMENT AGREEMENT

23 THE COURT AND I GUESS I SHOULD HAVE NEVER ASKED THAT
24 QUESTION OF MR VAIL ABOUT THE NOERR-PENNINGTON DOCTRINE
25 INSOFAR AS ANYTHING AFTER APRIL THE 2ND

1 MR WARD IF IT WERE WITHIN MY POWER, I WOULD HAVE
2 REFRAINED FROM -- HAD YOU REFRAIN FROM ASKING THAT QUESTION,
3 BUT IT IS NOT THANK YOU, YOUR HONOR

4 THE COURT OKAY NO, Y'ALL DON'T GET THE LAST WORD
5 BECAUSE Y'ALL HAVE BEEN GETTING THE LAST WORD ON ALL THE
6 OTHER MOTIONS ALL RIGHT IS THERE ANYTHING ELSE WE HAVE TO
7 DO TODAY?

8 MR DETWILER NOTHING FROM THE CITY, YOUR HONOR

9 THE COURT I KNOW THAT -- I KNOW THAT I OWE THE HILTON
10 AND THE PLAINTIFFS A RULING ON MY OTHER -- ON THE OTHER
11 MOTIONS THAT WERE HEARD, AND I'VE PURPOSEFULLY HELD OFF ON
12 THAT BECAUSE I WANTED TO HEAR EVERYTHING BECAUSE -- I GUESS A
13 LOT OF IT THE ARGUMENTS ARE IDENTICAL EXCEPT FOR THE NOERR-
14 PENNINGTON ANGLE THAT WAS ARGUED THE LAST TIME WHICH DIDN'T
15 INVOLVE HILTON

16 MAYBE I WON'T BE THE JUDGE WHO HEARS THIS BECAUSE I
17 MIGHT HAVE A STROKE WHAT'S THE -- I DON'T KNOW HOW THE
18 TRIAL SCHEDULE WORKS IN RICHLAND COUNTY, BUT I UNDERSTAND
19 THAT THERE'S A MEDICAL CASE THAT I HAVE TO TRY BEGINNING I
20 GUESS THE LAST PARTIAL WEEK IN SEPTEMBER? I DON'T KNOW HOW
21 THIS FALLS I KNOW THIS IS---

22 MR WARD I THINK RIGHT NOW WE'RE THE---

23 THE COURT I KNOW THIS IS THE BACK-UP CASE

24 MR WARD BEHIND MR HINSON'S MEDICAL MALPRACTICE CASE
25 THAT I BELIEVE YOU'RE THE JUDGE FOR

1 **THE COURT** RIGHT, AND THAT'S SUPPOSED TO TAKE TWO
2 WEEKS?

3 **MR HINSON** THAT'S MY UNDERSTANDING YOUR HONOR AND MY
4 UNDERSTANDING AGAIN IS THAT IT'S GOING FORWARD

5 **THE COURT** MAYBE IT'S GOING FORWARD JUST SO THIS ONE
6 WON'T?

7 **MR HINSON** I WOULD NOT---

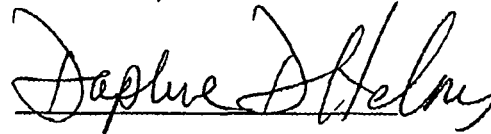
8 **THE COURT** HOW LONG DOES THIS TAKE -- LET'S ASSUME THAT
9 ALL THE PARTIES STAY IN THIS CASE BECAUSE WE'RE GOING TO TAKE
10 IT FROM A TO Z IF ALL THE PARTIES STAY IN, IS THIS CASE
11 GOING TO -- NUMBER ONE, IS IT -- WE DON'T NEED TO BE ON THE
12 RECORD NOW

13 (WHEREUPON, AN OFF-THE-RECORD DISCUSSION WAS HELD, AND
14 THE PROCEEDINGS WERE CONCLUDED THERE WERE NO EXHIBITS
15 INTRODUCED)
16
17
18
19
20
21
22
23
24
25

I, THE UNDERSIGNED DAPHNE D HELMS, OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY SOUTH CAROLINA, ON THE 17TH OF AUGUST, 2009

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO

AUGUST 29, 2009

A handwritten signature in cursive script, reading "Daphne D. Helms", written over a horizontal line.

DAPHNE D HELMS, COURT REPORTER

WILLIAM CORRADO

Page 1

STATE OF CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Realty Company Inc
and Garfield Traub Development
LLC

CONSOLIDATED

Plaintiffs

v

CIVIL ACTION NO 2007-CP-40-1252

City of Columbia South Carolina

Defendant

(2005-CP 40-1014)

-----X
Stevens & Wilkinson of South
Carolina Inc

Plaintiffs

v

City of Columbia South Carolina

Defendants

(2005-CP-40-3361)

-----X
Stevens & Wilkinson of South
Carolina Inc

Plaintiffs

v

Paul C Bo Aughtry III
Windsor/Aughtry Co Inc
and Vista Hotel Partners LLC

Defendants

2006 CP-5092

-----X

Gary Realty Company Inc and
Garfield Traub Development, LLC

HG LITIGATION SERVICES
HGLITIGATION COM

WILLIAM CORRADO

Page 2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Plaintiffs

v

Paul C "Bo" Aughtry, III,
Windsor/Aughtry Co , Inc ,
Vista Hotel Partners, LLC,
and Hilton Hotels Corporation,

Defendants

-----X

Volume I

December 22, 2008
New York, New York

Oral deposition of WILLIAM CORRADO, taken
on behalf of the Plaintiffs, at Paul Weiss Rifkind Wharton
& Garrison, 1285 Avenue of the Americas, New York, New
York, commencing at 9 01 a m , December 22, 2008, before
Anthony Armstrong, a Certified Shorthand Reporter of the
State of New York

HG LITIGATION SERVICES
HGLITIGATION COM

1 A P P E A R A N C E S

2 CALLISON TIGHE & ROBINSON, LLC
1812 Lincoln Street, Suite 200

3 P O Box 1390
Columbia, South Carolina 29202

4 BY RICHARD C DETWILER, ESQ ,
BY KATHLEEN M McDANIEL, ESQ ,
5 Attorneys for the City of Columbia
6 CITI

Office of the General Counsel
7 388 Greenwich Street, 17th Floor
New York, New York 10013

8 BY REBECCA J NELSON, ESQ Senior Vice President
Attorneys for Citi and the Witness
9

CHAMBERLAIN HRDLICKA WHITE WILLIAMS & MARTIN
10 191 Peachtree Street, N E , 34th Floor
Atlanta, Georgia 30303

11 BY JAMES L PAUL, ESQ ,
BY LAURI J MCKENNA, Paralegal
12 Attorneys for Windsor Aughtry, Bo Aughtry, and Vista
13 NELSON MULLINS RILEY & SCARBOROUGH
Meridian/17th Floor

14 1320 Main Street
Columbia, South Carolina 29201
15 BY ROBERT W FOSTER, JR , ESQ ,
Attorneys for Hilton Hotel
16

RICHARD A HARPOOTLIAN, P A
17 1410 Laurel Street
P O Box 1090

18 Columbia, South Carolina 29202
BY GRAHAM L NEWMAN, ESQ , appearing telephonically
19 Attorneys for Stevens & Wilkinson

20 JANET JENNER & SNUGGS
500 Taylor Street

21 Columbia, South Carolina 29201
BY FRANCIS M HINSON, IV, ESQ ,
22 Attorneys for Gary Realty and Garfield Traub Development
23
24
25

1 which was ultimately rated and insured, the city
2 chose to issue one series of bonds and backstop a
3 portion of the debt service on one series of
4 bonds

5 Q When you say backstop, what does that
6 mean?

7 A It means that if we are selling, say,
8 60, \$70 million worth of bonds and there is debt
9 service on those bonds of five to \$6 million, to
10 get to investment grade ratings, to get the
11 interest of a bond insurance company, based upon
12 the coverage that the hotel is generating,
13 coupled with a certain level of city support,
14 gets you to the investment grade and gets you to
15 the bond insurance

16 And ultimately the amount of backstop
17 from the city to get to investment grade ratings
18 and get to bond insurance was 50 percent of the
19 debt service for the first 10 years and 70 percent
20 years 11 through 30

21 Q So when you say backstop, in other
22 words, that's what the City of Columbia --

23 A The city --

24 Q Let me finish my question

25 A Sorry

1 Q If I understand what you're telling
2 me is, that's what the City of Columbia would
3 guarantee if the hotel did not cash flow enough
4 to pay the bonds themselves?

5 A That's correct

6 Q Okay In other words, they would
7 have to take that from other revenues somewhere
8 else to subsidize the hotel?

9 A That's right

10 Q Now -- and I think you said
11 ultimately it got to 50 percent for the first
12 10 years and 70 percent for years 11 through 30,
13 is that correct?

14 A That's correct Again, to get to a
15 BBB- rating from Standard & Poor's, and to get
16 Ambac to agree to insure the bonds, the agreement
17 with the finance team, with the city, with the
18 agencies, with insurers, with a 50-percent
19 backstop from the city years one through 10,
20 70 percent years 11 through 30

21 Q What backstop was required in this
22 first scenario that we have been talking about?
23 I'm talking about the 12/5/02

24 A Sure This first scenario would have
25 assumed that 100 percent of the subordinate bonds

1 you've just identified?

2 A Yes This analysis shows as use of
3 funds, the lowering of their upfront fee from
4 2 9 percent to 2 85, and then an increase in the
5 aggregate cost of issuance to be inclusive of
6 insurance fees and Ambac legal fees

7 Q So as of 2/24/04, at least, this deal
8 was still evolving?

9 A Yes And Steve Gant from the city
10 was in receipt of an e-mail that showed the
11 impact of the revised Ambac fee and an additional
12 cost

13 Q Do you ever recall talking to anybody
14 about property taxes on the hotel?

15 A Typically in these not-for-profit
16 hotel transactions, property taxes are not
17 charged This is a -- if you will, a
18 governmental building, so typically these are not
19 on the tax rolls

20 Q In fact, your models do not reflect
21 any cost for tax -- property tax --

22 A Yes The PKF, as they prepare their
23 feasibility study, you know, again did not
24 include a property tax item If they saw a hotel
25 model for a privately-owned hotel, there would be

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF RICHLAND

3 GARY REALTY COMPANY, INC ,
4 AND GARFIELD TRAUB DEVELOPMENT,
5 LLC, AND STEVENS & WILKINSON OF
6 SOUTH CAROLINA, INC ,

COPY

Plaintiffs,

7 vs

CASE NO 05-CP-40-1014

8 CITY OF COLUMBIA, SOUTH CAROLINA,

Defendant

9
10 DEPOSITION OF SHAWN EPPS

11 DATE April 28, 2006

12 TIME 9 02 AM

13
14 LOCATION Callison Tighe & Robinson
15 1812 Lincoln Street
16 Suite 200
17 Columbia, SC 29201

18
19 TAKEN BY Counsel for the Plaintiff

20 REPORTED BY AMY TINGBERG,
21 Court Reporter

22 Computer-Aided Transcription By

23 A WILLIAM ROBERTS, JR , & ASSOCIATES

24 Charleston, SC Greenville, SC
25 (843) 722-8414 (864) 234-7030

Myrtle Beach, SC

Columbia, SC (843) 839-3376 Charlotte, NC
(803) 731-5224 (704) 573-3919

Page 2

1 APPEARANCES OF COUNSEL
2 ATTORNEYS FOR THE PLAINTIFF
3 GARY REALTY COMPANY, INC ,
4 AND GARFIELD TRAUB DEVELOPMENT, LLC
5 JANET, JENNER & SUGGS, LLC
6 BY KENNETH M SUGGS
7 500 Taylor Street
8 Columbia, SC 29201
9 (803) 726-0050

10 ATTORNEYS FOR THE PLAINTIFF
11 STEVENS & WILKINSON OF SOUTH
12 CAROLINA, INC

13 (Not present)

14 LAW OFFICE OF RICHARD HARPOOTLIAN
15 BY RICHARD HARPOOTLIAN
16 1410 Laurel Street
17 Columbia, SC 29202
18 (803) 252-4848

19 ATTORNEYS FOR THE DEFENDANT
20 CITY OF COLUMBIA, SOUTH CAROLINA
21 CALLISON TIGHE & ROBINSON, LLC
22 BY REESE WILLIAMS
23 1812 Lincoln Street
24 Suite 200
25 Columbia, SC 29201 -
(803) 256-2371

ALSO PRESENT
Amy L Davies and Steven Gantt

(INDEX AT REAR OF TRANSCRIPT)

1 A Yes, sir

2 Q Do you have any information that would
3 lead you to believe that Gary Realty and Garfield
4 Traub -- and I may call them the project team from
5 now on, that the project team failed to act in good
6 faith?

7 A No, sir

8 Q Okay And on page 3 of the agreement,
9 you may need to look at it I don't expect you to
10 have memorized it Paragraph V, sets out the role
11 of the City in this transaction, is that right?

12 A Yes

13 Q Okay The Paragraph V or Roman Numeral
14 5, number 1, says Hotel site assembly, the City
15 agrees to acquire the hotel site and then it goes
16 on to say some other things Did the City acquire
17 the-hotel-site?

18 A Yes, sir

19 Q Did it satisfy the environmental
20 issues?

21 A Yes

22 Q Were there existing structures that
23 needed to be demolished?

24 A Yes

25 Q And did the City do that?

Page 10

1 A We've demolished them currently

2 Q Before April of 2004, had those been
3 demolished?

4 A No, sir

5 Q Okay Was the land rezoned for the
6 hotel?

7 A I think it was zoned appropriately at
8 the time for the hotel, is what I recall I don't
9 think it was rezoned

10 Q Okay Didn't need to be rezoned, is
11 what you're saying?

12 A Yes, sir, that's what I recall

13 Q And was a nonprofit corporation
14 organized?

15 A By the City?

16 Q Yes

17 A Yes

18 Q And was the land transferred or
19 conveyed to the nonprofit corporation?

20 A I don't recall if it was actually
21 transferred or conveyed

22 Q Okay Paragraph 2 of the Roman numeral
23 5 refers to a parking facility Before April of
24 2004, did the City develop a nearby parking
25 facility?

John H Lumpkin 8/19/2008

Page 1

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
COURT OF COMMON PLEAS
CONSOLIDATED CIVIL ACTION NO 2007-CP-40-1252

Gary Realty Company Inc and
Garfield Traub Development LLC

Plaintiffs

vs

City of Columbia South Carolina

Defendant

(2005-CP-40-1014)

(Caption continued on page 2)

WITNESS JOHN H LUMPKIN JR
DATE August 19 2008
TIME 9 30 a m
LOCATION Callison Tighe & Robinson LLP
1812 Lincoln Street Suite 200
Columbia South Carolina
TAKEN BY Attorneys for the Defendant City
of Columbia
REPORTED BY YVONNE R BOHANNON
Registered Merit Reporter
Certified Realtime Reporter

COMPUSCRIPTS INC
A Full Service Court Reporting Agency
Post Office Box 7172
Columbia South Carolina 29202
1-803-988 0086
1-888-988 0086
www compuscriptsinc com

www compuscriptsinc com

1 Stevens & Wilkinson of South
2 Carolina, Inc ,
3 Plaintiff,
4 vs
5 City of Columbia, South Carolina,
6 Defendant
7
8 (2005-CP-40-3361)
9
10 Stevens & Wilkinson of South
11 Carolina, Inc ,
12 Plaintiff,
13 vs
14 Paul C "Bo" Aughtry, III,
15 Windsor/Aughtry Co , Inc , and
16 Vista Hotel Partners, LLC,
17 Defendants
18 (2006-CP-40-5092)
19 Gary Realty Company, Inc , and
20 Garfield Traub Development, LLC,
21 Plaintiff,
22 vs
23 Paul C "Bo" Aughtry, III,
24 Windsor/Aughtry Co , Inc ,
25 Vista Hotel Partners, LLC, and
Hilton Hotels Corporation,
Defendants
(2006-CP-40-6488)
Turner Construction Company,
Plaintiff,
vs
City of Columbia,
Defendant
(2007-CP-40-1252)

1 APPEARANCES

2 ATTORNEYS FOR THE PLAINTIFFS

3 GARY REALTY CO , INC , and GARFIELD
4 TRAUB DEVELOPMENT, LLC
5 JANET, JENNER & SUGGS, LLC
6 BY FRANCES "BRINK" HINSON
7 Post Office Box 8113
8 500 Taylor Street, Suite 301
9 Columbia, South Carolina 29202
(803) 726-0050
(803) 727-1059 - FAX
bhinson@medlawlegalteam com

10 ATTORNEYS FOR THE DEFENDANT

11 CITY OF COLUMBIA
12 CALLISON, TIGHE & ROBINSON, LLP
13 BY RICHARD C DETWILER
14 BY D REECE WILLIAMS, III
15 BY KATHLEEN M McDANIEL
16 Post Office Box 1390
17 1812 Lincoln Street, Suite 200
18 Columbia, South Carolina 29201
19 (803) 256-2371
20 (803) 425-1923 - FAX
21 rickdetwiler@crtlawfirm com
22 reecewilliams@crtlawfirm com
23 kathleenmcdaniel@crtlawfirm com

24 ATTORNEYS FOR THE PLAINTIFF

25 STEVENS & WILKINSON OF SOUTH CAROLINA,
INC
RICHARD A HARPOOTLIAN, PA
BY GRAHAM L NEWMAN
1410 Laurel Street
Columbia, South Carolina 29201
(803) 252-4848
(803) 252-4810 - FAX
gln@harpootlianlaw com

1 APPEARANCES OF COUNSEL CONTINUED

2 ATTORNEYS FOR THE DEFENDANTS

3 PAUL C "BO" AUGHTRY, III,
4 WINDSOR/AUGHTRY CO , INC , and VISTA
HOTEL PARTNERS, LLC

5 TODD & WARD, PC
6 BY TOBIAS G WARD, JR
Post Office Box 1549
7 1709 Devonshire Drive
Columbia, South Carolina 29202
8 (803) 779-4383
(803) 799-7604 - FAX
9 tgw@thw-law com

10 ATTORNEYS FOR THE DEFENDANT

11 HILTON HOTELS CORPORATION
12 NELSON, MULLINS, RILEY &
SCARBOROUGH, LLP
13 BY ROBERT W FOSTER, JR
Post Office Box 11070
14 1320 Main Street, 17th Floor
Columbia, South Carolina 29201
15 (803) 255-9414
(803) 255-5187 - FAX
16 robbie foster@nelsonmullins com

17 ALSO PRESENT

18 Lisa Miller (Telephonically)
19 Katie Minton

20 (INDEX AT REAR OF TRANSCRIPT)
21
22
23
24
25

1 with Strategic Advisory And I probably was the
2 one that had more conversation with him about the
3 document, you know, but received significant input
4 and direction, in fact, from in this case
5 Garfield-Traub and Turner Construction and others
6 in terms of what they were prepared to do and how
7 it ought to work

8 So I -- whether it came to me first or
9 it went to Garfield-Traub, I don't remember, but
10 I'm assuming -- again, this is -- you assume
11 things, but got the original, sent it to all
12 parties on our team and asked -- you know, asked
13 for input, and we -- yes, we went through a -- it
14 went through a process to get to this final
15 document

16 Q Do you recall how long of a process
17 that was? Was it a couple of weeks, couple of
18 months or six months, or do you recall?

19 A I don't remember

20 Q Is it fair to say, though, that you
21 were kind of the point man for the project in
22 interfacing with the City?

23 A I think it's fair to say I was the
24 point man, but, you know, again, I kind of looked
25 at it as keeping the train on the track

1 have taken Was there a -- was there a written
2 amendment to a document? No, there was no written
3 amendment to a document, but how and what the City
4 may have done itself in terms of what actions it
5 took and communication it held with the team and
6 what legal effect that has I guess is part of this
7 lawsuit, so -- and I'm not going to characterize
8 that because I'm not -- I'm not in a position to do
9 that

10 BY MR DETWILER

11 Q But -- okay I think I understand what
12 you're saying, and I don't mean to parse words with
13 you But it sounds like you're agreeing with me,
14 though, that -- forget what actions the City may or
15 may not have taken -- that some vote of City
16 Council would have been required to modify this
17 MOU?

18 A I'm not sure that's -- I don't know I
19 mean, I understand a legal document is a legal
20 document, but there could have been subsequent
21 actions and I don't -- and I'm not -- I'm not privy
22 to those, you know, myself, but whether they
23 were -- whether the City took certain steps,
24 actions and the like during the process that --
25 that had the effect of having some impact on the

1 MOU, I'm not -- I'm not here to say it did or
2 didn't

3 Q Going into this MOU, though, getting
4 everybody to sign it, unquestionably you
5 understood -- the project team understood that this
6 document was going to require City Council
7 approval?

8 A What I understood was that this
9 document did not obligate the City at the point and
10 that there were certain actions and requirements
11 the document spelled out that needed to be taken to
12 move forward to get to the final closing mutually
13 agreeable of all the parties, and that's the
14 process we followed to get to a closing -- to build
15 this Convention Center Hotel

16 Q And that this particular document
17 required City Council approval?

18 A This particular document -- yes, this
19 particular document at the time required City
20 Council approval

21 Q Okay And what was the purpose of
22 building the hotel? Why did the City want a hotel?

23 A I believe a primary -- the primary
24 driver for the convention -- for the hotel was to
25 support the convention center that the City and

1 Q That's what it says?

2 A Yes, sir

3 Q So everybody -- everybody just sort of
4 begins with that conclusion?

5 A Well, you know, I -- yes I mean,
6 that's what it says

7 Q And when we say public private
8 partnership, we're talking about a publicly
9 funded -- a publicly financed hotel?

10 A Well, not exactly because the way the
11 structure works, there are bonds issued A portion
12 of those bonds are not credit enhanced by the City
13 They're -- they're purely -- those bonds are paid
14 by the financial performance of the hotel So as
15 to that portion -- and I believe it was the
16 majority of the bonds If the hotel did not
17 perform, then the bondholder's recourse was to come
18 back and take the hotel back and had no recourse to
19 the City

20 Q Do you believe that if that were to
21 occur the City of Columbia would have left those
22 nonrecourse bondholders standing and not paid that
23 debt?

24 A I do not I think the City just as --
25 just as they would have in a private transaction

1 would not allow -- would allow a private developer
2 to go -- you know, to go under It would
3 necessarily need to step in and pick up the -- pick
4 up the -- you know, the -- the hotel, and it could
5 not afford to have this hotel go into a situation
6 where it would be taken back by a lender, whether
7 it's bondholders or -- or a private lender So
8 I --

9 Q So when we talk about the City only
10 having responsibility for a portion of the debt, in
11 fact, as a practical matter the City was on the
12 hook for all of it because they weren't going to
13 let those bondholders --

14 A I mean, I -- well, again, I won't
15 speak -- I'm speak -- my judgment would be that,
16 yes, the City should be -- you know, would want to
17 step up --

18 Q Right

19 A -- wasn't required to step up In
20 fact, even on the credit enhanced piece it's
21 subject to non-appropriation So the City could --
22 I mean, you know, other cities that I'm not going
23 to speak -- could have decided, "We're not going to
24 fund it a dime," and if it -- you know, just like a
25 state lease It's a ten year lease subject to an

1 conditions on the bottom of page one You
2 mentioned a while ago that -- and I'm going to
3 paraphrase you, but I think you mentioned a while
4 ago that the City didn't have any obligation under
5 this document

6 A I think that -- you know, I think the
7 memorandum -- and, again, I've not read it in a --
8 in a long time But I think the Memorandum of
9 Understanding is like a letter of intent It's,
10 "We all understand we're going to go forward
11 together in good faith together to do certain
12 things " No, there's no -- you know, there's no
13 little legal obligation until we get to the point
14 where those things are completed

15 Q Right

16 A But it's a Memorandum of Understanding
17 in terms of what the responsibility of the City
18 was, what the responsibility of the various
19 parties -- the role of the City, the role of the
20 developer, the role of the contractor, the role of
21 the architect or of the underwriter, the role of
22 the operator that each party signed it that says,
23 "Yes, we will move forward consistent with our
24 rules to a -- to conclude a transaction "

25 Q Well, "We'll try to conclude a

1 transaction, if we can"?

2 A "We'll endeavor in good faith to move
3 forward to include a transaction consistent with
4 this Memorandum of Understanding "

5 Q All right Let's talk about that
6 The -- paragraph one of the -- of Article I, the
7 general conditions, the second sentence does state,
8 consistent with what I think you said a while ago,
9 "Notwithstanding anything herein to the contrary,
10 if the City determines that it is not feasible to
11 proceed with the hotel project, it shall have no
12 liability under this MOU " Did I read that
13 correctly?

14 A That's correct

15 Q What would you call that provision?
16 I -- an escape clause?

17 A No I think it's much like a letter of
18 intent that you say that "Here is what we intend to
19 do and the steps we intend to take, but you, you
20 know, once -- until we get all the stuff together
21 neither party using a letter of intent has, you
22 know, obligations under this letter of intent "

23 It does not say that, "By virtue of the
24 steps you can subsequently take, subject to a
25 letter of intent, that those particular steps may

1 Q Another part of these general
2 conditions is found in paragraph two And it says,
3 "Unless superseded by an amendment to this MOU or
4 the final development management agreement, this
5 MOU identifies the understanding of the parties "
6 There was -- was a final development agreement ever
7 entered into?

8 A There was a development management
9 agreement drafted and provided to the City There
10 were at one or two meetings with -- with the city
11 attorney, Mr Meggs No, I -- there was never a
12 development management agreement signed with
13 finality

14 I believe that -- this is John
15 Lumpkin's thought process at the time -- that we
16 had reached a meeting of the minds with that
17 development management and, again, internal review,
18 but it was never -- it was never executed It was
19 not -- a development management was not executed,
20 but it had been negotiated in my mind

21 Q Okay And in your mind who was -- did
22 anybody representing the City with any authority
23 ever tell you that, "Okay, we have a deal, or there
24 are no other deal points that we need to talk
25 about"?

1 to begin scheduling final -- getting the final
2 pieces of the documents together to have a closing
3 within the period -- whatever period of time you
4 have a bond closing

5 Q So, in other words, there was still --
6 there was still agreements left to be put in place
7 and negotiated and -- and finalized and signed?

8 A Well, I think that there was still
9 piece -- there was still provisions in documents
10 that were necessarily, you know, central to the
11 transaction I'm not sure because in the hotel
12 operating agreement they were still dealing with
13 the tax issues, and there were, you know -- again,
14 theoretically if there was a tax issue that the tax
15 law changed in Washington and you could not -- no
16 longer to do these kind of deals, then, golly,
17 Houston, we have a problem But I wasn't aware any
18 of that happened

19 They were simply through the
20 machinations that tax lawyers do to work through
21 that, and, you know, there were these other things
22 that I think I mentioned But I wasn't at that
23 point aware that truly there was not -- there was
24 anything -- that based on the -- based on the
25 underwriting we had achieved -- and assuming we

1 could close on the basis that we had presented to
2 the City on February the 11th, that the City was
3 prepared to go -- the City -- the not-for-profit
4 corporation was prepared to go forward -- to move
5 forward on the basis of what we presented to them
6 on February the 11th

7 Q Okay Well, let's just go ahead and
8 complete the timeline and we'll fill in some things
9 as we -- and come back to them

10 At some point in time after February
11 11, 2004, you became aware that the City was moving
12 in a different direction, is that correct?

13 A I became aware that the City Council
14 had met and had -- had decided that it was going to
15 open the process up in some way, shape or form to
16 entertain a private solution -- a private approach,
17 you know, versus this public private approach that
18 we had been pursuing with the City

19 Q In other words, it was going to open up
20 that for discussion, not necessarily choosing one
21 financing structure over another, but it wanted to
22 look at that other angle?

23 A I would -- I -- you know, very candidly
24 I wasn't clear at all at that point what the City
25 was working to try to achieve in the context of

1 But, again, I was confused about, "Do
2 you still have this one up --" we actually had a
3 couple of meetings following all of this with City
4 staff there to move forward on the -- on the
5 project we were moving forward on and, you know,
6 stay the course We have a closing coming up, and
7 then I -- and then -- and, again, I don't -- I
8 mean, they're all friends, and the City just,
9 "We're going to put that on hold "

10 So that went on -- you know, the public
11 private went on hold while the City, you know, for
12 its own reasons decided to look at a private
13 alternative

14 Q And that action, that is, opening it up
15 for alternatives, took City Council approval?

16 A I -- I've always -- again, I keep
17 saying assume, assume I don't -- I'm assuming it
18 did I'm assuming the City Council voted to move
19 forward on an -- on an alternative

20 Q Was there ever a City Council meeting
21 that you're aware of that -- where they voted to
22 approve your proposal?

23 A Well, I think they voted to approve a
24 Memorandum of Understanding back when we worked on
25 the transaction through those many months -- I'm

1 we were that close in our minds to be able to close
2 bond financing

3 Q And, in fact, basically what this
4 indicates is moving forward exactly in accordance
5 with the MOU, moving forward in an effort to try to
6 come up with some definitive written agreements?

7 A Well, we had -- in certain respects had
8 come up with those agreements There were other
9 agreements that had certain -- that had certain
10 provisions that were still in discussion, as I
11 recall

12 Q Okay

13 A But I don't remember -- I mean, if
14 there were -- the materiality of a couple of those
15 Others would have to, you know, speak to that who
16 were more involved in that than I was, but I did
17 recall that -- say for -- there were tax things
18 There were things that needed to be finalized And
19 it wasn't a matter of Mr Gottlieb saying, "We've
20 got to sit down and start negotiating those
21 agreements " Those agreements had been sent to the
22 City back in the spring of 2003

23 Q And they were still under negotiation
24 according to Mr Gottlieb?

25 A According to Mr Gottlieb what this

1 member of the hotel team at this point

2 Q You're unsure of the --

3 A I am I'm honestly -- I mean, again,
4 I -- you asked the question and I gave you -- as I
5 recall someone said, but I never asked anybody
6 further about that, and that could just be, you
7 know, there's one of those community rumors that
8 are out there, do you know this, that and the
9 other So I don't deal in that kind of stuff

10 Q Yes, sir

11 A Close the chapter on that book and
12 you're gone

13 MR NEWMAN Yes, sir Well, thank
14 you I don't have anything further

15 RE-EXAMINATION

16 BY MR DETWILER

17 Q May I ask you a quick question

18 A Yes, sir

19 Q I really will try to be brief

20 A No problem

21 Q Everybody is ready to go home

22 The Memorandum of Understanding I think
23 you've -- you have said this did not create a
24 binding contract

25 A That in and of itself --

1 Q Right

2 A -- that's correct Yes, sir

3 Q Right And as of June 26th, 2003, you
4 understood that under the terms of the MOU members
5 of the development team agreed to be effectively at
6 risk up to the date of the bond closing That's
7 what you stated to Mr Steve Gantt?

8 A That's correct That's correct

9 Q Okay So I want to be clear about your
10 testimony earlier, particularly in response to some
11 of the questions that Mr Ward asked you Are you
12 suggesting now that sometime after June 26th, 2003,
13 the City did something specifically that changed
14 what you said to Mr Gantt in this June 26th, 2003,
15 letter?

16 A Let me -- I mean, I'll try to answer --
17 respond to you, Mr Detwiler

18 Q I'm sorry, but I'm -- excuse me Let
19 me make sure -- this is a -- this is a yes or no
20 question --

21 A Well --

22 Q -- and I want to know -- you're welcome
23 to explain it --

24 A Certainly

25 Q -- but if the City did something, I

Robert Lyles 8/21/2008

Page 1

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

GARY REALTY COMPANY INC AND
GARFIELD TRAUB DEVELOPMENT LLC

Plaintiff(s)

Consolidated Civil

vs

Action No 2007-CP-40-1252

CITY OF COLUMBIA SOUTH CAROLINA

Defendant(s)

(2005 CP 40-1014)

(Caption continued)

D E P O S I T I O N

WITNESS ROBERT LYLES

DATE Thursday August 21 2008

TIME 9 37 a m

LOCATION Callison Tighe & Robinson LLP
1812 Lincoln Street Suite 200
Columbia South Carolina

TAKEN BY Attorneys for the Defendant(s)

REPORTED BY SHERI L BYERS
Registered Professional Reporter

COMPUSCRIPTS INC
A Full-Service Court Reporting Agency
Post Office Box 7172
Columbia South Carolina 29202
803-988-0086
1-888-988-0086
www compuscriptsinc com

www compuscriptsinc com

1 CAPTION CONTINUED
2 STEVENS & WILKINSON OF SOUTH
3 CAROLINA, INC
4 Plaintiff(s),
5 VS
6 CITY OF COLUMBIA, SOUTH CAROLINA,
7 Defendant(s)
8 (2005-CP-40-3361)
9
10 STEVENS & WILKINSON OF SOUTH
11 CAROLINA, INC
12 Plaintiff(s),
13 VS
14 PAUL C "BO" AUGHTRY, III,
15 WINDSOR/AUGHTRY CO , INC , AND
16 VISTA HOTEL PARTNERS, LLC,
17 Defendant(s)
18 (2005-CP-40-5092)
19 (Caption continued)
20
21
22
23
24
25

1 CAPTION CONTINUED

2
3 GARY REALTY COMPANY, INC AND
4 GARFIELD TRAUB DEVELOPMENT, LLC

5 Plaintiff(s),

6 VS

7 PAUL C "BO" AUGHTRY, III,
8 WINDSOR/AUGHTRY CO , INC , AND
9 VISTA HOTEL PARTNERS, LLC, AND
10 HILTON HOTELS CORPORATION,

11 Defendant(s)

12 (2006-CP-40-6488)

13 TURNER CONSTRUCTION COMPANY

14 Plaintiff(s),

15 VS

16 CITY OF COLUMBIA,

17 Defendant(s)

18 (2007-CP-40-1252)

1 APPEARANCES

2 ATTORNEYS FOR THE PLAINTIFFS
3 GARY REALTY CO , INC AND
4 GARFIELD TRAUB DEVELOPMENT

5 JANET, JENNER & SUGGS, LLC
6 BY FRANCIS "BRINK" HINSON, IV, ESQUIRE
bhinson@medlawlegalteam com
500 Taylor Street
Columbia, South Carolina 29201

8
9 ATTORNEYS FOR THE PLAINTIFF
10 STEVENS & WILKINSON OF SOUTH CAROLINA, INC
11 RICHARD A HARPOOTLIAN, P A
BY GRAHAM L NEWMAN, ESQUIRE
gln@harpootlianlaw com
1410 Laurel Street
Columbia, South Carolina 29201

13
14 ATTORNEYS FOR THE DEFENDANT
15 HILTON HOTELS CORPORATION

16 NELSON, MULLINS, RILEY & SCARBOROUGH
17 BY JAY T THOMPSON, ESQUIRE
jay thompson@nelsonmullins com
1320 Main Street
Columbia, South Carolina 29201

18
19 ATTORNEYS FOR THE DEFENDANT
20 CITY OF COLUMBIA

21 CALLISON, TIGHE & ROBINSON, LLP
22 BY RICHARD C DETWILER, ESQUIRE
-and- D REECE WILLIAMS, ESQUIRE
-and- KATHLEEN M MCDANIEL, ESQUIRE
1812 Lincoln Street
Columbia, South Carolina 29201

1 ATTORNEYS FOR THE DEFENDANT
2 PAUL C "BO" AUGHTRY, III,
3 WINDSOR/AUGHTRY CO , INC AND
4 VISTA HOTEL PARTNERS, LLC

5 CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN
6 BY JAMES L PAUL, ESQUIRE
7 jimmy paul@chamberlainlaw com
8 191 Peachtree Street, N E , 34th Floor
9 Atlanta, Georgia 30303

10 TODD & WARD, PC
11 BY TOBIAS G WARD, JR , ESQUIRE
12 tgw@thw-law com
13 1709 Devonshire Drive
14 Columbia, South Carolina 29205

15 ALSO PRESENT

16 LISA MILLER (VIA TELEPHONE)
17 KATIE MINTON, PARALEGAL
18 LAURIE MCKENNA, PARALEGAL
19
20
21
22
23
24
25

(INDEX AT REAR OF TRANSCRIPT)

1 Q When you say John Lumpkin --

2 A Edens Avant

3 Q -- you mean Edens & Avant?

4 A Correct

5 Q Okay And I also see Gary Realty's name in
6 this

7 A Yes

8 Q All right Tell me about Gary -- Gary Realty
9 was also going to be the developer?

10 A Yes, sir

11 Q Now, to your knowledge, had Edens & Avant
12 ever done any kind of hotel work before?

13 A I don't know

14 Q You don't know? To your knowledge, they had
15 not? You don't know that they --

16 A I just don't know

17 Q How about Gary Realty?

18 A I don't know that either

19 Q All right How about Garfield Traub?

20 A The way their name got into the mix was TVS,
21 Thompson, Ventulett & Stainback, who were part of the
22 design team with us, had worked with them on several
23 hotels and they were suggested to be brought in

24 Q By TVS?

25 A By TVS

1 that few-month period following that?

2 A That's what they agreed to do then When the
3 nonprofit accepted the whole deal in -- whenever that
4 was, February 4th, to go to bond closing, is when
5 everything -- I mean, the project, my drawings were
6 finished, everything was done

7 Q Okay

8 A And as far as we were concerned, we had
9 delivered everything that we were supposed to do and it
10 had been approved And so they owed us for our
11 contract for the work performed, all the work
12 performed

13 Q Okay All right But you were part of a
14 project team, right?

15 A I was

16 Q And the project team was tasked with
17 delivering a package, correct?

18 A We did We were

19 Q Okay And the did the city -- did city
20 council ever vote to approve the overall package that
21 the project team presented?

22 A In July, yes

23 Q In July?

24 A Yes

25 Q All right Let me ask you this question, and

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

COURT OF COMMON PLEAS

GARY REALTY COMPANY INC AND
GARFIELD TRAUB DEVELOPMENT LLC

Plaintiff(s)

Consolidated Civil

vs

Action No 2007-CP-40-1252

CITY OF COLUMBIA SOUTH CAROLINA

Defendant(s)

(2005-CP-40 1014)

(Caption continued)

D E P O S I T I O N

WITNESS GREG GARFIELD

DATE Friday August 22 2008

TIME 9 03 a m

LOCATION Callison Tighe & Robinson LLP
1812 Lincoln Street Suite 200
Columbia South Carolina

TAKEN BY Attorneys for the Defendant(s)

REPORTED BY SHERI L BYERS
Registered Professional Reporter

COMPUSCRIPTS INC
A Full-Service Court Reporting Agency
Post Office Box 7172
Columbia South Carolina 29202
803-988 0086
1 888-988-0086
www compuscriptsinc com

www compuscriptsinc com

1 CAPTION CONTINUED
2 STEVENS & WILKINSON OF SOUTH
3 CAROLINA, INC

4 Plaintiff(s),

5 VS

6 CITY OF COLUMBIA, SOUTH CAROLINA,

7 Defendant(s)

8 (2005-CP-40-3361)

9
10 STEVENS & WILKINSON OF SOUTH
11 CAROLINA, INC

12 Plaintiff(s),

13 VS

14 PAUL C "BO" AUGHTRY, III,
15 WINDSOR/AUGHTRY CO , INC , AND
VISTA HOTEL PARTNERS, LLC,

16 Defendant(s)

17 (2005-CP-40-5092)

18
19 (Caption continued)
20
21
22
23
24
25

1 CAPTION CONTINUED

2
3 GARY REALTY COMPANY, INC AND
4 GARFIELD TRAUB DEVELOPMENT, LLC

5 Plaintiff(s),

6 VS

7 PAUL C "BO" AUGHTRY, III,
8 WINDSOR/AUGHTRY CO , INC , AND
9 VISTA HOTEL PARTNERS, LLC, AND
10 HILTON HOTELS CORPORATION,

11 Defendant(s)

12 (2006-CP-40-6488)

13 TURNER CONSTRUCTION COMPANY

14 Plaintiff(s),

15 VS

16 CITY OF COLUMBIA,

17 Defendant(s)

18 (2007-CP-40-1252)

1 APPEARANCES

2 ATTORNEYS FOR THE PLAINTIFFS
3 GARY REALTY CO , INC AND
4 GARFIELD TRAUB DEVELOPMENT

JANET, JENNER & SUGGS, LLC
5 BY FRANCIS "BRINK" HINSON, IV, ESQUIRE
bhinson@medlawlegalteam com
6 500 Taylor Street
Columbia, South Carolina 29201

7
8 ATTORNEYS FOR THE PLAINTIFF
9 STEVENS & WILKINSON OF SOUTH CAROLINA, INC
10 RICHARD A HARPOOTLIAN, P A
BY GRAHAM L NEWMAN, ESQUIRE
11 glh@harpootlianlaw com
1410 Laurel Street
12 Columbia, South Carolina 29201

13
14 ATTORNEYS FOR THE DEFENDANT
HILTON HOTELS CORPORATION

15
16 NELSON, MULLINS, RILEY & SCARBOROUGH
BY JAY T THOMPSON, ESQUIRE
jay thompson@nelsonmullins com
17 1320 Main Street
Columbia, South Carolina 29201

18
19 ATTORNEYS FOR THE DEFENDANT
CITY OF COLUMBIA

20
21 CALLISON, TIGHE & ROBINSON, LLP
BY RICHARD C DETWILER, ESQUIRE
-and- D REECE WILLIAMS, ESQUIRE
22 -and- KATHLEEN M MCDANIEL, ESQUIRE
1812 Lincoln Street
23 Columbia, South Carolina 29201

24
25 (Appearances continued)

1 APPEARANCES CONTINUED

2
3 ATTORNEYS FOR THE DEFENDANT

4 PAUL C "BO" AUTRY, III,
5 WINDSOR/AUGHTRY CO , INC AND
6 VISTA HOTEL PARTNERS, LLC

7 CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN
8 BY JAMES L PAUL, ESQUIRE
9 jimmy paul@chamberlainlaw com
10 191 Peachtree Street, N E , 34th Floor
11 Atlanta, Georgia 30303

12
13 TODD & WARD, PC
14 BY TOBIAS G WARD, JR , ESQUIRE
15 tgw@thw-law com
16 1709 Devonshire Drive
17 Columbia, South Carolina 29205

18
19 ALSO PRESENT

20 LISA MILLER (VIA TELEPHONE)
21 KATIE MINTON, PARALEGAL
22 LAURIE MCKENNA, PARALEGAL

23
24 (INDEX AT REAR OF TRANSCRIPT)
25

1 Q And did they tell you about anything that they
2 wanted you to say or points that they wanted you to make in
3 your deposition testimony?

4 A Not that I recall

5 Q What do you recall about any of those conversations?

6 A You know, I don't know that I really recall any
7 specifics I don't think I would have said anything that was
8 not, you know, in the rough draft of my deposition that was
9 provided to me and that, you know, they have probably either
10 read or have been provided

11 Q Okay Is there any part of the work that Garfield
12 Traub did or the development team did which was ultimately
13 used by the City of Columbia?

14 A You're talking about any of the work product that
15 our team prepared for the city that -- you're asking me if I
16 am aware that any such material was used by the city on the
17 deal it ultimately did with Bo Aughtry?

18 ---Q ---That's exactly what I'm asking you---

19 A I don't know I haven't been -- I'm not privy to
20 the plans and specifications of the hotel I have no idea
21 whether it, you know, borrows anything from the plans that our
22 team prepared other than what I indicated earlier, which is
23 that the rendering we saw of the hotel bears a striking
24 resemblance to the drawings that were prepared by our
25 architects

1 Q You mean the 300-room hotel has a resemblance to the
2 212-unit hotel that was ultimately built?

3 A I don't know that because I don't know that I've
4 really looked at the hotel that was ultimately built, but I
5 believe the -- the original rendering that we saw that he used
6 in his presentation, I think we believe that that did resemble
7 very much our work product

8 Q Okay Other than that, you're not aware of anything
9 that -- any work product that your team did or prepared that
10 was used by the City of Columbia?

11 A Not that I'm aware of other than -- I mean, I
12 assume -- I guess I should say not that I'm aware of

13 Q I want to ask you about a paragraph in your
14 Complaint Do you have that in front of you? Can you find
15 that?

16 A Is that one of the exhibits?

17 Q It is, but I don't remember which one 6, Exhibit
18 6, the Amended Complaint, Second Amended Complaint

19 A Okay I have it

20 Q I'm sorry Actually -- actually, I'm -- let me ask
21 it another way You don't need this in front of you I'll
22 read it to you I'm looking at the Complaint you filed
23 against the City of Columbia, not the one that you filed
24 against Bo Aughty and Hilton Okay?

25 A Okay

HG LITIGATION SERVICES
HGLITIGATION.COM

1 A Yes

2 Q (c) is in sharing the team's proprietary work
3 product with third parties How is -- tell me what -- what
4 the city shared with anybody that was proprietary to the
5 team

6 A Well, again, I talked about this earlier today, and
7 I talked about it -- I believe you asked me the same question
8 earlier in the deposition, and I referenced our team's
9 conceptual rendering for the hotel, which was provided to Bo
10 Aughtry and his architect presumably to help them prepare for
11 their submittal to the city in response to that second RFP/RFQ
12 process

13 Q Is there anything else?

14 A I'm not -- I can't recall -- I'm not aware of
15 anything that I could cite to you right now

16 Q And would that be a rendering that was a part of
17 what the city paid for in the \$700,000 00?

18 A -- I don't know if that was part of what the city paid
19 for, and I don't know the issues pertaining to the ownership
20 rights and usage rights of that product

21 Q Okay The next allegation is that the city allowed
22 a competing bidder to modify its proposal after the deadline
23 of proposals had passed Now, you've already testified about
24 that, right?

25 A I believe I have

HG LITIGATION SERVICES
HGLITIGATION.COM

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Realty Company Inc
and Garfield Traub
Development LLC

Plaintiffs

Consolidated Civil
Action No
2007-CP-40-1252

-vs-

City of Columbia South
Carolina

Defendant

(2005 CP-40-1014)

Stevens & Wilkinson of South
Carolina Inc

Plaintiff

vs-

City of Columbia South
Carolina

Defendant

(2005-CP 40-3361)

Stevens & Wilkinson of South
Carolina Inc

Plaintiff

vs-

Paul C 'Bo' Aughtry III
Windsor/Aughtry Co Inc
and Vista Hotel Partners
LLC

Defendants

(2006-CP-40-5092)

1 -----
2 Gary Realty Company, Inc ,
3 and Garfield Traub
4 Development, LLC,

5 Plaintiffs,

6 -vs-

7 Paul C "Bo" Aughtry, III,
8 Windsor/Aughtry Co , Inc ,
9 Vista Hotel Partners, LLC,
10 and Hilton Hotels
11 Corporation,

12 Defendants

13 (2006-CP-40-6488)

14 -----
15 Turner Construction
16 Company,

17 Plaintiff,

18 -vs-

19 City of Columbia,
20 Defendant

21 -----
22 (2007-CP-40-1252) -----
23 -----

24 D E P O S I T I O N

25 WITNESS Raymond Garfield

DATE October 2, 2008

TIME 9 13 a m

1 LOCATION Callison Tighe Robinson LLP
2 1812 Lincoln Street
3 Columbia, South Carolina

4 TAKEN BY Attorneys for the Defendant
5 City of Columbia

6 REPORTED BY Missy Graczyk, Court Reporter
7

8 - - - - -
9

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COMPUSCRIPTS, INC
A Full-Service Court Reporting Agency
Post Office Box 7172
Columbia, South Carolina 29202
803-988-0086
1-888-988-0086
www compuscriptsinc com

www compuscriptsinc com

1 APPEARANCES

2 ATTORNEYS FOR THE PLAINTIFF

3 For Gary Realty Co , Inc , and
4 Garfield Traub Development

5 Francis "Brink" Hinson, IV, Esquire
6 Janet, Jenner & Suggs, LLC
7 500 Taylor Street, Suite 301
8 Columbia, South Carolina 29201

8 ATTORNEYS FOR THE DEFENDANTS

9 For City of Columbia
10 Richard C Detwiler, Esquire
11 D Reece Williams, III, Esquire
12 Callison, Tighe & Robinson, LLC
13 1812 Lincoln Street, Suite 200
14 Columbia, South Carolina 29201

15 For Hilton Hotels Corporation

16 Robert W Foster, Esquire
17 Nelson Mullins Riley & Scarborough, LLP
18 Meridian
19 1320 Main Street, 17th Floor
20 Post Office Box 11070
21 Columbia, South Carolina 29211

22 For Paul C "Bo" Aughtry, III,
23 and Windsor/Aughtry Co , Inc
24 Jimmy L Paul, Esquire
25 Chamberlain Hrdlicka Law Firm
191 Peachtree Street, NE
Thirty-Fourth Floor
Atlanta, GA 30303

Tobias G Ward, Jr , Esquire
Todd & Ward, PC
1709 Devonshire Drive
Post Office Box 1549

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ALSO PRESENT

Katie Minton, Paralegal
Lisa Miller (via telephone)

(INDEX AT REAR OF TRANSCRIPT)

1 DEPONENT I think it's likely their
2 consultant reported this back to their client
3 BY MR DETWILER

4 Q Is there anything else?

5 A No

6 Q What of your project team's work was used by the City
7 of Columbia, ultimately used by the City of Columbia,
8 if anything?

9 A When you say the City of Columbia, are you talking
10 about the current project that exists there with
11 Aughtry?

12 Q No I'm talking about the City of Columbia You
13 sued the City of Columbia, and so what I want to know
14 is what part of your work product, if anything, has
15 been used by the City of Columbia or for the benefit
16 of the City of Columbia?

17 A You know, I'd say that our couple of years of effort
18 in this put the ball on the one yard line, it
19 informed all the staff, elected officials what this
20 whole concept was about It gave them the ability to
21 distinguish the different financing types, different
22 hotel types so much I mean, I think that everybody
23 was ready to do this deal, I think everybody was
24 ready to do it with us until the events, you know,
25 that were perpetrated by other outside forces

1 ultimately that are a party to this lawsuit as well,
2 brought this thing down I think the City was
3 educated significantly by us and by our team and in
4 all respects

5 Q Anything else that the City of Columbia gained from
6 your work product?

7 A That's probably enough

8 Q Okay So the answer is no, nothing else you can
9 think of?

10 A Not offhand

11 Q Okay Now, tell me what the City did to cause your
12 damages that you describe here today Now, we're
13 talking about the City, we're not talking about
14 outside forces We're talking about the City

15 A The City basically breached their agreement, our
16 entire agreement, the MOU and all the other
17 understandings that we had at the time

18 Q Okay Let's start with the MOU How did they breach
19 the MOU? How did the City of Columbia breach the
20 MOU?

21 A They did not complete their transaction on their side
22 of the bargain, and walked away from the table They
23 had a feasible transaction--

24 Q In your opinion?

25 A In PKF's opinion that the City hired and paid, and in

Charles Gary 9/3/2008

Page 1

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

COURT OF COMMON PLEAS

GARY REALTY COMPANY INC AND
GARFIELD TRAUB DEVELOPMENT, LLC

Plaintiffs

vs
CONSOLIDATED CIVIL ACTION
NO 2007-CP-40-1252

CITY OF COLUMBIA SOUTH CAROLINA

Defendant

(2005-CP-40-1014)

STEVENS & WILKINSON OF SOUTH
CAROLINA INC

Plaintiff

vs

CITY OF COLUMBIA SOUTH CAROLINA

Defendant

(2005-CP-40-3361)

D E P O S I T I O N

CHARLES GARY

Wednesday September 3 2008

COMPUSCRIPTS INC
A Full-Service Court Reporting Agency
Post Office Box 7172
Columbia South Carolina 29202
1-803-988-0086
1-800-988-0086
www compuscriptsinc com

www compuscriptsinc com

1 STEVENS & WILKINSON OF SOUTH
2 CAROLINA, INC ,

3 Plaintiff,

4 vs

5 PAUL C "BO" AUGHTRY, III,
6 WINDSOR/AUGHTRY CO , INC , AND
7 VISTA HOTEL PARTNERS, LLC,

8 Defendants

9 (2006-CP-40-5092)

10 GARY REALTY COMPANY, INC , AND
11 GARFIELD TRAUB DEVELOPMENT, LLC,

12 Plaintiffs,

13 vs

14 PAUL C "BO" AUGHTRY, III,
15 WINDSOR/AUGHTRY CO , INC , VISTA
16 HOTEL PARTNERS, LLC, AND HILTON
17 HOTELS CORPORATION,

18 Defendants

19 (2006-CP-40-6488)

20 TURNER CONSTRUCTION COMPANY,

21 Plaintiff,

22 vs

23 CITY OF COLUMBIA,

24 Defendant

25 (2007-CP-40-1252)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

D E P O S I T I O N

WITNESS CHARLES GARY
DATE September 3, 2008
TIME 1 38 p m
LOCATION Law Offices of
Callison, Tighe & Robinson, LLC
1812 Lincoln Street
Columbia, South Carolina

TAKEN BY Counsel for the Defendant City of
Columbia
REPORTED BY ANGELA D ZUVER,
Court Reporter

COMPUSCRIPTS, INC
A Full-Service Court Reporting Agency
Post Office Box 7172
Columbia, South Carolina 29202
1-803-988-0086
1-800-988-0086
www compuscriptsinc com

1 APPEARANCES OF COUNSEL
2 ATTORNEYS FOR THE PLAINTIFFS
3 GARY REALTY CO , INC , AND
4 GARFIELD TRAUB DEVELOPMENT
5 JANET, JENNER & SUGGS, LLC
6 BY FRANCIS "BRINK" HINSON, IV
7 500 Taylor Street
8 Columbia, SC 29201
9 803/726-0050
10 bhinson@medlawlegalteam com

11 ATTORNEYS FOR THE PLAINTIFF
12 STEVENS & WILKINSON OF SOUTH
13 CAROLINA, INC

14 RICHARD A HARPOOTLIAN, PA
15 BY GRAHAM L NEWMAN (VIA TELEPHONE)
16 1410 Laurel Street
17 Columbia, SC 29201
18 803/252-4848
19 glh@harpootlianlaw com

20 ATTORNEYS FOR THE DEFENDANT
21 CITY OF COLUMBIA

22 CALLISON, TIGHE & ROBINSON, LLC
23 BY RICHARD C DETWILER
24 D REECE WILLIAMS, III
25 KATHLEEN MCCOLL MCDANIEL
1812 Lincoln Street, Suite 200
Columbia, SC 29201
803/256-2371
rickdetwiler@ctrlawfirm com
reecewilliams@ctrlawfirm com
kathleenmcdaniel@ctrlawfirm com

ATTORNEYS FOR THE DEFENDANT
HILTON HOTELS CORPORATION

NELSON, MULLINS, RILEY &
SCARBOROUGH, LLP
BY JAY T THOMPSON
1320 Main Street, 17th Floor
Columbia, SC 29201
803/799-2000
jay thompson@nelsonmullins com

1 ATTORNEYS FOR THE DEFENDANTS
2 PAUL C "BO" AUGHTRY, III, AND
3 WINDSOR/AUGHTRY CO , INC
4 TODD & WARD, PC
5 BY TOBIAS G WARD, JR
6 1709 Devonshire Drive
7 Columbia, SC 29201
8 803/779-4383
9 tgw@thw-law com

ALSO PRESENT

10 Katie Minton, Paralegal
11 Lisa Miller (via telephone)
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(INDEX AT REAR OF TRANSCRIPT)

1 or not anything was modified as far as the
2 agreement itself is concerned

3 Q Okay So sitting here today, you
4 can't -- there were no modifications to the MOU?

5 A There were -- there were no written
6 modifications as to this MOU as presented here

7 Q We've covered that

8 A Right

9 Q I'm asking you about unwritten
10 modifications There were no modifications, oral
11 or otherwise, to the MOU, is that correct? And if
12 I'm incorrect in saying that I want you to tell me
13 what was modified

14 MR HINSON Object to the form

15 THE WITNESS What modifications that I
16 believe was made to this form other than what's not
17 written in this form? That's the question, right?

18 BY MR DETWILER

19 Q That's right

20 A I would say there was not -- no
21 modifications to this particular form that was
22 made

23 Q Okay And there were no other
24 agreements with the city?

25 A No other signed agreements

1 letter

2 A February 17, 2003

3 Q And what is the import of that letter?

4 A Where a percentage of the total of
5 the -- a total of the development fee was to be
6 paid to Gary Realty Company

7 Q All right And does that -- I'm a
8 little confused about the language in there I
9 just want to make sure I'm clear What was the
10 percentage that Gary Realty was looking for? How
11 much was Gary Realty looking at being compensated
12 in this deal?

13 A Fifteen percent of the total
14 development fee

15 Q Okay Whatever the development fee
16 was, you were going to get 15 percent of it?

17 A That's correct

18 Q And for that you were going to develop
19 some data, you said?

20 A We were going -- the -- from what I
21 understand, I got a call from John Lumpkin one day
22 He said they were looking for some minority
23 participation with a larger developer and someone
24 had given him my name that said I had done some
25 development -- I'd never done any hotel

1 development, but I'd done some commercial
2 development and some residential development -- and
3 John said that he wanted to talk with me and
4 wanted -- after he talked with me he said he wanted
5 me to be a part of the team

6 Q Okay

7 A And I told him, "John, I know nothing
8 about hotel development, but I'm -- I don't want to
9 be a part of a team that's -- I'm just going to be
10 doing window dressing " I said I would like to
11 learn that facet of real estate, hotel development
12 Then I said, you know, "Tell me what kind of
13 numbers y'all have in mind What percentage of the
14 minority participation are you willing to pay?"
15 And I threw a number out to him I said, you know,
16 based on my limited expertise that 15 percent of
17 the total fee would be sufficient

18 Q Okay

19 A And they agreed on that

20 Q And that was what you all ultimately
21 agreed on?

22 A That's correct

23 Q Okay

24 MR DETWILER Mark that

25 (DEF EXH 3, APRIL 9, 2003 LETTER

1 person just to get an understanding of the
2 financing, but, you know, that wasn't part of my
3 job I wanted to learn how to put together a
4 package, and I think that was the whole scope of
5 getting the minority participation, to learn Sort
6 of a mentor/protégé program That's basically what
7 it was, was for us to kind of learn the development
8 of hotels and how to put these public deals
9 together

10 Q Was there anything else that you were
11 going to do for the team as part of this deal?

12 A That was about the extent of it

13 Q Did the -- ultimately, the way things
14 worked out, did the City of Columbia use any of
15 your work product?

16 A I think, you know, as a part of the
17 development team I think they did, because I had
18 some input in putting that whole package together

19 Q Okay Well, what part of what you
20 did -- I'm talking about Gary Realty

21 A Uh-huh

22 Q What part of what Gary Realty did did
23 the City of Columbia ever ultimately use?

24 A Ultimately used?

25 Q Yes, sir

1 A I don't know whether they ultimately
2 used it, but when I take a look at the final
3 product down there, it has a pretty good
4 resemblance of what we put together

5 Q Okay The city of -- the location for
6 the hotel was always there, and that's something
7 that had been talked about for years prior to this,
8 isn't that correct?

9 A That's my understanding, yes

10 Q All right And the hotel that was
11 ultimately built was, what, about two-thirds the
12 size of what your team proposed?

13 A That's my understanding

14 Q But it has a resemblance to -- is that
15 what you're saying, it has a resemblance to what
16 y'all proposed?

17 A Yes, it does

18 Q Okay What else did the city of --
19 besides the resemblance of the facility, is there
20 anything you can tell me specifically that the city
21 used that y'all produced? When I say "y'all," I
22 mean the project team

23 A No, there's nothing I could tell you we
24 produced That we as a team produced

25 Q Okay All right Good And how about

Jeff Sachs

February 5, 2009

Page 1

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

GARY REALTY COMPANY INC AND
GARFIELD TRAUB DEVELOPMENT LLC

Plaintiffs

vs CONSOLIDATED DOCKET 2007-CP-40-1252

CITY OF COLUMBIA SOUTH CAROLINA

Defendant

STEVENS AND WILKINSON OF SOUTH
CAROLINA INC

Plaintiff

vs

CITY OF COLUMBIA SOUTH CAROLINA

Defendant

DEPOSITION OF JEFF SACHS
DATE February 5 2009
TIME 9 45 a m
LOCATION Law Offices of
Callison Tighe & Robinson LLP
1812 Lincoln Street
Columbia South Carolina
TAKEN BY Counsel for the Plaintiff
REPORTED BY ANGELA D ZUVER
Court Reporter

A WILLIAM ROBERTS, JR & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO COM

1 STEVENS AND WILKINSON OF SOUTH
2 CAROLINA, INC ,

3 Plaintiff,

4 vs

5 PAUL C "BO" AUGHTRY, III,
6 WINDSOR/AUGHTRY CO , INC , AND
7 VISTA HOTEL PARTNERS, LLC,

8 Defendants

9 GARY REALTY CO , INC AND GARFIELD
10 TRAUB DEVELOPMENT, LLC,

11 Plaintiffs,

12 vs

13 PAUL C "BO" AUGHTRY, III,
14 WINDSOR/AUGHTRY CO , INC , VISTA
15 HOTEL PARTNERS, LLC, AND HILTON
16 HOTELS CORPORATION,

17 Defendants

18 TURNER CONSTRUCTION CO ,

19 Plaintiff,

20 vs

21 CITY OF COLUMBIA, SOUTH CAROLINA,

22 Defendant

23 A WILLIAM ROBERTS, JR , & ASSOCIATES
24 Fast, Accurate & Friendly
25 Charleston, SC Hilton Head, SC Myrtle Beach, SC
(843) 722-8414 (843) 785-3263 (843) 839-3376
Columbia, SC Greenville, SC Charlotte, NC
(803) 731-5224 (864) 234-7030 (704) 573-3919

A WILLIAM ROBERTS, JR & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO COM

1 APPEARANCES OF COUNSEL

2 ATTORNEYS FOR THE PLAINTIFFS

3 GARY REALTY COMPANY, INC , AND
4 GARFIELD TRAUB DEVELOPMENT, LLC
5 JANET, JENNER & SUGGS, LLC
6 BY FRANCIS "BRINK" HINSON, IV
7 500 Taylor Street
Columbia, SC 29201
803/726-0050
bhinson@medlawlegalteam com

8 ATTORNEYS FOR THE DEFENDANT

9 CITY OF COLUMBIA
10 CALLISON, TIGHE & ROBINSON, LLC
11 BY D REECE WILLIAMS, III
12 KATHLEEN M McDANIEL
13 1812 Lincoln Street, Suite 200
Columbia, SC 29201
803/256-2371
reecewilliams@ctrlawfirm com
kathleenmcdaniel@ctrlawfirm com

14 ATTORNEYS FOR THE DEFENDANT

15 HILTON HOTELS
16 NELSON, MULLINS, RILEY &
17 SCARBOROUGH, LLP
18 BY JAY T THOMPSON
19 1320 Main Street, 17th Floor
Columbia, SC 29201
803/799-2000

20 jay thompson@nelsonmullins com

21 ATTORNEYS FOR THE DEFENDANT

22 PAUL C "BO" AUGHTRY, III
23 WINDSOR/AUGHTRY CO , INC , AND VISTA
24 HOTEL PARTNERS, LLC

25 TODD & WARD, PC
BY TOBIAS G WARD, JR
1709 Devonshire Drive
Columbia, SC 29201
803/779-4383
tgw@thw-law com

A WILLIAM ROBERTS, JR & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO COM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ALSO PRESENT

Mark Woodworth (via telephone)

Ray Garfield (via telephone)

(INDEX AT REAR OF TRANSCRIPT)

A WILLIAM ROBERTS, JR & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO COM

1 to call that a disagreement It was just something
2 we had to deal with that nobody really had a
3 solution for

4 Q Anything else, that you can think of?

5 A Let me see The parking There was an
6 outstanding item as it related to property taxes
7 We had to have approval from the county The cash
8 flows -- everything was predicated on a property
9 tax exemption, and we had not -- we, the
10 development team, had not gotten that exemption
11 It was a material exemption that would have made
12 that coverage go to all-in coverage, again, with
13 all the payments to a negative number

14 Property taxes and, you know, the
15 insurance -- while we had a commitment letter
16 for the -- from the insurance company, that
17 commitment letter was for a project that didn't
18 include this larger bond offering as it related to
19 capitalized interest, and that needed to be
20 resolved

21 Q When you say the insurance company --

22 A The bond insurance

23 Q -- you're speaking of Ambac?

24 A Yeah, Ambac Their commitment was for
25 a 60-some -- low \$60 million project, and by the

1 time that new transaction came around, excluding
2 the parking component, it was over 70 million So
3 Ambac would -- had to relook at everything, relook
4 at the coverage, reassess their position on whether
5 or not they were going to insure the project

6 Q Was there any indication that Ambac was
7 going to change their position?

8 A I have no opinion on that It was --
9 we had one letter for the 60-some million and --
10 but yet we had a \$71 million project

11 Q The property tax exemption, is that an
12 exemption that other public hotels have received?

13 A Yes

14 Q Do you know of any public hotels that
15 did not receive a property tax exemption from their
16 county?

17 A No, but we had indication that this one
18 was going to be a challenge

19 Q What was that indication?

20 A The preliminary discussions I can't
21 remember which attorney was working on that, but
22 said that this is not going to be a slam dunk
23 Because every -- in South Carolina, I understood it
24 that every county made that decision, it wasn't a
25 state level decision, that the county tax appraiser

1 had the authority to grant it or not to grant it

2 Q That was a conversation you had with an
3 attorney working on the case?

4 A I believe it -- I don't know if
5 Gottlieb was handling that or not I just remember
6 it being communicated back We did -- we, like
7 everyone, thought it was not going to be an issue,
8 and then we had heard that it's not a slam dunk, as
9 I recall it

10 Q And there was no resolution of that, to
11 your --

12 A Not that I know of, no Not that I
13 know of

14 Q So after the Garfield Traub/Edens and
15 Avant team is selected, SAG stayed on with the
16 city, correct?

17 A Correct

18 Q And was there another proposal for your
19 services after that?

20 A I don't recall We -- in this proposal
21 we laid out our billing rates and there was a fee
22 cap, and I don't recall if we actually issued
23 another proposal or just there was city council
24 action along the way to raise the cap I think
25 it's the latter, though I don't think there's

1 my witness, I have no objection to reopening the
2 deposition, but I think, Brink, what I heard
3 Mr Sachs say a few moments ago was he had
4 misspoken earlier and actually does not have an
5 expert opinion regarding Hilton's conduct, and to
6 the extent that affects your desire to reopen
7 anything, I just want to state that for the record

8 MR HINSON Okay Well, maybe you can
9 ask that

10 MR THOMPSON And I don't have any
11 objections He's not my witness Just for the
12 record

13 EXAMINATION

14 BY MR THOMPSON

15 Q Mr Sachs, my name is Jay Thompson My
16 law firm represents Hilton Hotels in this ongoing
17 litigation I expect to be very brief, just a few
18 questions for you Do you know who drafted the
19 MOU?

20 A I did

21 Q You personally?

22 A Yes

23 Q And as the person who drafted the MOU,
24 was it intended to be a binding contract?

25 A No

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND

Gary Realty Company Inc)
and Garfield Traub)
Development LLC)

Plaintiffs)

-vs-)

City of Columbia South)
Carolina)

Defendant)

(2005-CP 40-1014))
-----)

Stevens & Wilkinson of South)
Carolina Inc)

Plaintiff)

-vs-)

City of Columbia South)
Carolina)

Defendant)

(2005-CP-40 3361))
-----)

Stevens & Wilkinson of South)
Carolina Inc)

Plaintiff)

-vs-)

Paul C "Bo" Aughtry III)
Windsor/Aughtry Co Inc)
and Vista Hotel Partners)
LLC)

Defendants)

(2006-CP-40-5092))

Consolidated Civil
Action No
2007-CP-40-1252

1 Gary Realty Company, Inc ,)
and Garfield Traub)
2 Development, LLC,)
3 Plaintiffs)
4 -vs-)
5 Paul C "Bo" Aughtry, III,)
Windsor/Aughtry Co , Inc ,)
6 Vista Hotel Partners, LLC,)
and Hilton Hotels)
7 Corporation)
8 Defendants)
9 (2006-CP-40-6488))
-----)
10)
Turner Construction)
11 Company,)
12 Plaintiff,)
13 -vs-)
14 City of Columbia,)
15 Defendant)
16 (2007-CP-40-1252))
-----)

17
18
19 D E P O S I T I O N
20

21 WITNESS Eric "Tony" Traub
22 DATE December 4, 2008
23 TIME 9 10 a m
24 LOCATION Callison Tighe Robinson LLP
1812 Lincoln Street
25 Columbia, South Carolina

1 TAKEN BY Attorneys for the Defendant
2 City of Columbia
3 REPORTED BY Missy Graczyk, Court Reporter
4
5
6

7 -----
8
9
10
11 COMPUSCRIPTS, INC
12 A Full-Service Court Reporting Agency
13 Post Office Box 7172
14 Columbia, South Carolina 29202
15 803-988-0086
16 1-888-988-0086
17 www compuscriptsinc com
18
19
20
21
22
23
24
25

www compuscriptsinc com

1 APPEARANCES

2 ATTORNEYS FOR THE PLAINTIFF

3 For Gary Realty Co , Inc , and
4 Garfield Traub Development

5 Francis "Brink" Hinson, IV, Esquire
6 Janet, Jenner & Suggs, LLC
7 500 Taylor Street, Suite 301
8 Post Office Box 927
9 Columbia, South Carolina 29202

10 ATTORNEYS FOR THE DEFENDANTS

11 For City of Columbia
12 D Reece Williams, III, Esquire
13 Kathleen McDaniel, Esquire
14 Callison, Tighe & Robinson, LLC
15 1812 Lincoln Street, Suite 200
16 Columbia, South Carolina 29201

17 For Hilton Hotels Corporation

18 Robert W Foster, Esquire
19 Nelson Mullins Riley & Scarborough, LLP
20 1320 Main Street, 17th Floor
21 Post Office Box 11070
22 Columbia, South Carolina 29211

23 For Paul C "Bo" Aughtry, III,
24 Windsor/Aughtry Co , Inc , and Vista Hotels

25 Jimmy L Paul, Esquire
Chamberlain Hrdlicka Law Firm
191 Peachtree Street, NE
Thirty-Fourth Floor
Atlanta, GA 30303

1 Tobias G Ward, Jr , Esquire
2 Todd & Ward, PC
3 1709 Devonshire Drive
4 Post Office Box 1549
5 Columbia, South Carolina 29202

6 ALSO PRESENT

7 Lisa Miller (via telephone)

8
9
10
11 (INDEX AT REAR OF TRANSCRIPT)
12
13
14
15
16

1 fixtures and equipment?

2 A What about them?

3 Q Do you remember any unresolved issues about those?

4 A No We had budgeted them, and we knew exactly, we
5 could provide them for budget

6 Q Was there an unresolved issue concerning the
7 definition of substantial and final completion?

8 A Not to my knowledge, no

9 Q Was a Technical Services Agreement ever executed?

10 A Again, the Technical Services Agreement would only be
11 executed upon bond closing I don't recall whether
12 that's one we negotiated or not They're important,
13 but they're very minor in terms of any problems with
14 them They're fairly routine for hotels

15 Q And Room Block and Meeting Facilities Agreement, was
16 one ever executed?

17 A No Again, it would be executed upon the bond
18 closing, but it was negotiated, heatedly I might add,
19 and we spent a lot of time in arriving to a
20 conclusion which I believe both Hilton and the City
21 were comfortable with

22 Q Well, these things that you say were to be done upon
23 closing of the bonds, isn't it true that Standard &
24 Poors would not issue an investment grade rating
25 until those were executed?

Steven A Gantt December 9, 2008

Page 1

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF RICHLAND FIFTH JUDICIAL CIRCUIT

GARY REALTY COMPANY INC
AND GARFIELD TRAUB DEVELOPMENT LLC

Plaintiffs

vs CONSOLIDATED DOCKET 2007 CP-40-1252

CITY OF COLUMBIA SOUTH CAROLINA

Defendant

STEVENS AND WILKINSON OF SOUTH CAROLINA INC

Plaintiff

vs

CITY OF COLUMBIA SOUTH CAROLINA

Defendant

30(b)(6)
DEPOSITION OF STEVEN A GANTT
DATE December 9 2008
TIME 9 11 AM
LOCATION Janet Jenner & Suggs LLC
500 Taylor Street
Columbia SC 29201

TAKEN BY Counsel for the Plaintiffs

REPORTED BY Laura J Bash RPR

A WILLIAM ROBERTS, JR & ASSOCIATES (800) 743-DEPO
SCHEDULEDEPO COM

1 STEVENS AND WILKINSON OF SOUTH CAROLINA, INC ,
2 Plaintiff,

3 vs

4 PAUL C "BO" AUGHTRY, III,
5 WINDSOR/AUGHTRY CO , INC ,
6 AND VISTA HOTEL PARTNERS, LLC
Defendants

7
8 GARY REALTY CO , INC AND
9 GARFIELD/TRAUB DEVELOPMENT, LLC,
Plaintiffs,

10 vs

11 PAUL C "BO" AUGHTRY, III,
12 WINDSOR/AUGHTRY CO , INC ,
13 AND VISTA HOTEL PARTNERS, LLC,
AND HILTON HOTELS Corporation

Defendants

14
15 TURNER CONSTRUCTION CO
16 Plaintiff,

17 vs

18 CITY OF COLUMBIA, SOUTH CAROLINA,
19 Defendant

20
21 A WILLIAM ROBERTS, JR & ASSOCIATES
22 FAST, ACCURATE & FRIENDLY

23	Charleston, SC	Hilton Head, SC	Myrtle Beach, SC
	(843) 722-8414	(843) 785-3262	(843) 839-3376
24	Columbia, SC	Greenville, SC	Charlotte, NC
	(803) 731-5224	(864) 234-7030	(704) 573-3919

25

A WILLIAM ROBERTS, JR & ASSOCIATES (800) 743-DEPO
SCHEDULEDEPO COM

1 APPEARANCES OF COUNSEL

2 ATTORNEYS FOR THE PLAINTIFFS

3 GARY REALTY, COMPANY, INC ,
4 and GARFIELD TRAUB DEVELOPMENT, LLC

5 JANET, JENNER & SUGGS, LLC

6 BY KENNETH M SUGGS

7 FRANCIS M "BRINK" HINSON, IV

8 500 Taylor Street

9 Columbia, SC 29201

10 (803) 726-0050

11 ksuggs@medlawlegalteam com

12 bhinson@medlawlegalteam com

13 ATTORNEYS FOR THE PLAINTIFF

14 STEVENS AND WILKINSON

15 RICHARD A HARPOOTLIAN, P A

16 BY RICHARD A HARPOOTLIAN

17 GRAHAM NEWMAN

18 1410 Laurel Street

19 Columbia, SC 29201

20 (803) 252-4848

21 heather@harpootlianlaw com

22 ATTORNEYS FOR THE DEFENDANT

23 CITY OF COLUMBIA, SOUTH CAROLINA

24 CALLISON, TIGHE & ROBINSON, LLC

25 BY REECE D WILLIAMS, III

KATHLEEN M McDANIEL

1812 Lincoln Street, Suite 200

Columbia, SC 29201

(803) 256-2371

reecewilliams@ctrlawfirm com

kathleenmcdaniel@ctrlawfirm com

ATTORNEYS FOR THE DEFENDANT

HILTON HOTELS

NELSON MULLINS RILEY & SCARBOROUGH LLP

BY ROBERT W FOSTER, JR

1320 Main Street, 17th Floor

Columbia, SC 29201

(803) 255-9414

robbie foster@nelsonmullins com

A WILLIAM ROBERTS, JR & ASSOCIATES (800) 743-DEPO
SCHEDULEDEPO COM

ATTORNEYS FOR THE DEFENDANTS

"BO" AUGHTRY, WINDSOR/AUGHTRY CO ,
INC , AND VISTA HOTEL PARTNERS, LLC
CHAMBERLAIN, HRDLICKA, WHITE,
WILLIAMS & MARTIN
BY JAMES L PAUL
191 Peachtree St N E
Thirty-Fourth Floor
Atlanta, GA 30303
(404) 659-1410
jimmy paul@chamberlainlaw com

TODD & WARD, PC
BY J DERRICK JACKSON
1709 Devonshire Drive
Columbia, SC 29202
(803) 779-4383
dj@thw-law com

(INDEX AT REAR OF TRANSCRIPT)

A WILLIAM ROBERTS, JR & ASSOCIATES (800) 743-DEPO
SCHEDULEDEPO COM

1 the proposers This would be their written
2 proposal that they would submit to Council for
3 review or to the committee for review

4 Q You had a rendering of the proposed
5 hotel from the Edens & Avant group, correct?

6 A Yes, sir

7 Q That rendering would be in the category
8 of information, materials, or other documents,
9 would it not? It would be -- it was a document,
10 was it not?

11 A It was public information that had been
12 provided to us, had been in the paper We had had
13 that long before this request was made

14 Q Well, my question is Was it a
15 document?

16 A Yeah Yes, sir

17 Q And the Garfield Traub team was a
18 proposer under this RFQ, correct?

19 A Yes, sir

20 Q All right And that document had
21 previously been submitted by the team for which
22 Garfield Traub was working, correct?

23 A The rendering?

24 Q Yes

25 A I'm -- I don't think Garfield Traub had

1 submitted it I think that was something that one
2 of -- somebody from the previous development team
3 had prepared that Yes

4 Q It was done most likely by Stevens and
5 Wilkinson?

6 A I would assume Or TVS

7 Q All right And you -- the City gave
8 that rendering to Mr Aughtry, is that not correct?

9 A That's correct

10 Q What use did Mr Aughtry make of that
11 rendering?

12 A I do not know

13 Q Do you remember what that rendering
14 looked like?

15 A It looks much like the building, the
16 hotel that we presently have

17 Q All right Thank you

18 Now, under F, evaluation criteria,
19 Number 5, the document says The City has outlined
20 the incentives it is willing to grant for this
21 project below and greater consideration will be
22 given to proposals exceeding minimum hotel
23 specifications and/or requiring less City
24 incentives

25 Did I read that correctly?

A WILLIAM ROBERTS, JR & ASSOCIATES (800) 743-DEPO
SCHEDULEDEPO COM

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Realty Company, Inc , and)
Garfield Traub Development, LLC,)

CONSOLIDATED CIVIL ACTION NO
2007-CP-40-1252

Plaintiffs,)

vs)

City of Columbia, South Carolina,)

Defendant)

(2005-CP-40-1014))

Stevens & Wilkinson of South)
Carolina, Inc ,)

Plaintiff,)

vs)

City of Columbia, South Carolina,)

Defendant)

(2005-CP-40-3361))

Stevens & Wilkinson of South)
Carolina, Inc ,)

Plaintiff,)

vs)

Paul C "Bo" Aughtry, III,)
Windsor/Aughtry Co , Inc , and)
Vista Hotel Partners, LLC,)

Defendants)

2006-CP-40-5092)

Gary Realty Company, Inc and)
Garfield Traub Development, LLC,)

Plaintiff,)

AFFIDAVIT OF JOEL E GOTTLEB

JEANETTE W McBRIDE
CCP & GS

2009 AUG 11 PM 2:51

RICHLAND COUNTY
FILED

vs)
)
 Paul C "Bo" Aughtry, III,)
 Windsor/Aughtry Co , Inc ,)
 Vista Hotel Partners, LLC, and)
 Hilton Hotels Corporation,)
)
 Defendants)
)
(2006-CP-40-6488))
)
 Turner Construction Company,)
)
 Plaintiff,)
)
 vs)
)
 City of Columbia,)
)
 Defendant)
)
(2007-CP-40 1252))

PERSONALLY APPEARED BEFORE ME, Joel E Gottlieb, who being duly sworn,
testifies

1 The statements in this Affidavit are based upon my personal knowledge, unless
otherwise stated

2 I am competent to testify to the details related in this affidavit

3 I am member of the bar in the State of South Carolina.

4 I am currently a Shareholder with McNair Law Firm, P A

5 At the time of the events that gave rise to the above-captioned litigation, I was a
Shareholder with Gottlieb & Smith, P A

6 I provided legal advice and representation to the City of Columbia ("the City")
related to the City's consideration of the publicly funded convention center hotel proposed by
the Plaintiffs (the "Hotel Project")

7 I am providing this Affidavit at the request of the City

8 On April 17, 2003, the City and the Plaintiffs, among others, signed a Memorandum of Understanding ("MOU"), which, among other things, set forth an "intent to proceed in good faith to execute definitive written agreements with respect to the business terms and conditions" contained in the MOU

9 At the time the Columbia City Council voted to issue a second Request for Proposals ("RFP") for a privately funded hotel in March of 2004, there remained unresolved issues concerning (1) the payment of property taxes and (2) the numerous contractual agreements necessary to the Hotel Project

10 Whether the Columbia Convention Center Hotel Corporation would have been required to pay real estate and personal property taxes on the hotel was an issue that was never resolved. This was an important matter because it raised the question of whether the proposed hotel would be able to generate sufficient revenues to fund the bond debt service if real estate and personal property taxes were assessed against the hotel. None of the pro formas that I reviewed took into account the payment of property taxes

11 The MOU contemplated the negotiation and execution of certain definitive written agreements. None of those definitive written agreements were ever executed, and several important agreements that were not yet fully negotiated at the time the City voted to issue a second RFP were, among others (1) the Qualified Management Agreement (also referred to as the "QMA" or "Hotel Operating Agreement"), (2) the Design-Build Agreement, (3) the Development Management Agreement, (4) the Room Block Agreement, and (5) the Technical Services Agreement

12 At least three issues in the QMA remained unresolved at the time the Columbia City Council voted to issue a second RFP

- a First, it had not been determined how executive compensation to the members of Hilton Hotels' upper-level management would be handled in a manner that satisfied Hilton Hotels but that did not violate the requirements of the Internal Revenue Code
- b Second, it had not been determined how parking revenues earned by the proposed Hotel Project would be allocated between the hotel and the parking garage
- c Third, it had not been determined whether reserve funds for furniture, fixtures, and equipment ("FF&E") would be paid before or after debt service

13 By the time the Columbia City Council voted to issue a second RFP, the Design Build Agreement had not yet been fully negotiated or executed. The unresolved issue in the Design-Build Agreement was which party would have responsibility for purchasing the initial inventory for the hotel. The City expected the Guaranteed Maximum Price for the Hotel Project would include initial inventory for the hotel necessary for the operation of the hotel. Although I was advised by a third party that the construction company had agreed to this, I was never so advised by the contractor nor was I provided with a contract draft providing for it.

14 To my knowledge, the Room Block Agreement, the Development Management Agreement, and the Technical Services Agreement were not executed as of March 2004.

The information in this affidavit is true and correct to the best of my knowledge and belief

Executed on August 11, 2009

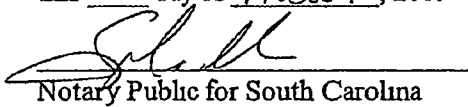
FURTHER AFFIANT SAYETH NOT



Joel E. Gottlieb

Richmond County, South Carolina

Sworn and subscribed before me
this 11 day of August, 2009



Notary Public for South Carolina

My Commission Expires 12-12-11

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Civil Action No 2005 CP 40-1014

Gary Realty Company Inc and
Garfield Traub Development LLC,

Plaintiffs,

vs

City of Columbia, South Carolina

Defendant

Civil Action No 2006-CP-40-6488

Gary Realty Company, Inc and
Garfield Traub Development LLC,

Plaintiffs,

vs

Paul C "Bo" Aughtry III, Windsor/Aughtry
Co Inc, Vista Hotel Partners LLC, and
Hilton Hotels Corporation

Defendants

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

(For Discovery Purposes, Part of Consolidated
Civil Action No 2007-CP-40-1252)

**AFFIDAVIT OF
GREG LAWRENCE GARFIELD**

I, Greg Lawrence Garfield, being duly sworn under oath declare under penalty of perjury as provided by law that I am an adult person over the age of 18 years and that if I were called as a witness in this matter, I would competently testify to the following

1 I am currently a principal and managing officer of Garfield Traub Development LLC ('GTD')

2 I have over a decade of experience in the financing development, design, construction and operations of essential facilities of many types of real property for the public sector My broad scope of responsibilities at GTD includes working with the company's investment banking partners and attorneys to engineer ownership and financing structures for developments I also negotiate project documents and agreements and lead problem solving of

political, legal and financial issues for clients and their essential developments. My duties also include collaborating with GTD's design and construction team members to program, design "value-engineer" and price facilities. I participate in the preparation of operating pro formas and perform financial and investment analysis and due diligence. I also have overall responsibility for the company's marketing efforts.

3 My experience includes participation in the development of 17 properties and the structuring and placement of more than \$270 million in debt and equity for creative public/private developments for GTD's clients. My ownership and structuring expertise involves public/private partnerships utilizing conventional debt and equity, long-term fixed and variable rate bonds and certificates of participation for lease purchase and installment sale financings and complex project financings, including tax-exempt revenue bond financings for headquarters hotels and other facility types. Prior to joining GTD in 1998, I worked for McCall, McBride & Lancaster, Inc., a financial consulting and management advisory firm with clients ranging from major law firms to real estate developers.

4 I have read the June 24, 2009 affidavit of Ray Garfield. My memory and opinions are in complete accord with all that Ray Garfield's affidavit contains. I would, however, make the following clarifications/qualifications:

a Regarding Paragraph 6 of Ray's affidavit, I was not involved in GTD's initial outreach to Hilton Hotels Corporation. John Weeman and Gary Mills did not offer to put me in touch with Hilton executives Steve Crabill and Brian Fry; that first contact rested solely with Ray.

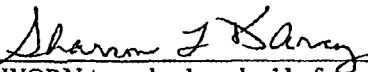
b While in agreement with the contents of Paragraph 25 of Ray's affidavit, I would also include mention of a telephone conversation I had with

Hilton's Chris Pfohl On the afternoon of May 25, 2004 shortly after receiving a copy of Mr. Aughtry's letter to Brian Fry dated that same day (Exhibit DD to Ray Garfield's affidavit) I called Mr. Pfohl on the telephone. Mr. Pfohl indicated to me that he was not aware of Mr. Aughtry's May 25th letter. I read him the contents of the correspondence, after which he expressed dismay to learn that other executives at Hilton had had discussions with Aughtry in which Hilton indicated it would support Aughtry for the development of a full service Hilton for the City. I said to Mr. Pfohl that the members of the GTD team felt that if Hilton simply refrained from responding to the Aughtry letter the City would give credence solely to the Hilton's letter of May 21st (Exhibit CC to Ray Garfield's affidavit) and would disregard Aughtry's May 26th letter. Mr. Pfohl indicated that if what Mr. Aughtry said in his letter was true then Hilton's franchise side had obviously overstepped its bounds. He concluded by saying that he would contact Bill Fortier to investigate the matter and report back to me on their conversation. I considered Mr. Pfohl's statement regarding Hilton's franchise division having overstepped its bounds to be consistent with all of the other representations to GTD that had been made by Mr. Pfohl and the other Hilton representatives, which, up until that time, had indicated that the right to build a full-service Hilton Hotel for the City of Columbia rested solely with the GTD team.

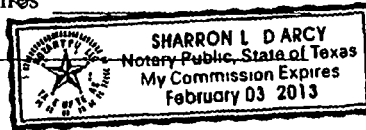
[signature and notarization on page following]

I declare under penalty of perjury that the foregoing statements are true and correct to the best of
my knowledge and belief


Greg Lawrence Garfield


SWORN to and subscribed before me
this 24th day of June, 2009
My commission expires

Notary Public for



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
Civil Action No 2005 CP 40 1014	)	(For Discovery Purposes, Part of Consolidated
	)	Civil Action No 2007-CP-40 1252)
Gary Realty Company, Inc and	)	
Garfield Traub Development, LLC,	)	
	)	
Plaintiffs,	)	
vs	)	
City of Columbia, South Carolina	)	
	)	
Defendant	)	
Civil Action No 2006-CP 40-6488	)	AFFIDAVIT OF
	)	RAYMOND GARFIELD
Gary Realty Company, Inc and	)	
Garfield Traub Development LLC,	)	
	)	
Plaintiffs,	)	
vs	)	
Paul C 'Bo' Aughtry III, Windsor/Aughtry	)	
Co , Inc , Vista Hotel Partners LLC and	)	
Hilton Hotels Corporation	)	
	)	
Defendants	)	

I, Raymond Garfield, being duly sworn under oath, declare under penalty of perjury as provided by law, that I am an adult person over the age of 18 years and that if I were called as a witness in this matter, I would competently testify to the following

1 I am currently a principal, managing officer, and founding member of Garfield Traub Development, LLC ("GTD")

2 I have more than 35 years of professional experience in the development, finance, and asset management of all types of real property and have an extensive Wall Street background. For over a decade now I have focused primarily on property development and in particular, hotel development. I work with investment banking partners and bond counsel to

engineer financing structures and secure capital for developments. I have great understanding and familiarity with the customs and practices of the hotel development industry.

3 Prior to forming Garfield Traub from 1992 to 1997, I served as Chairman and CEO of Vista Properties, Inc., a publicly held national land development company with more than 9,000 acres of urban land in its portfolio. From 1988 to 1992, I served as Senior Vice President and Managing Director of Cushman & Wakefield, Inc., where I managed the Financial Services Division for the western half of the United States. In this capacity, I directed the sales and financing of major properties throughout 21 offices and was responsible for more than \$2.5 billion of transactions for hotel properties and major commercial properties. As Vice President of Salomon Brothers from 1984 to 1988, I originated and closed more than \$2.5 billion in capital transactions as part of my investment banking responsibilities. Prior to that, from 1981 to 1984, I served at Merrill Lynch Commercial Real Estate as Executive Vice President, Chief Operating Officer, and Manager of National Sales for the company's commercial real estate services offices throughout the United States.

4 On or about January 15, 2001, the City of Columbia, South Carolina ("the City") issued a Request for Qualifications ("RFQ") for a team to develop a 300 room, first-class, full-service hotel ("the Hotel") next to the Columbia Convention Center. This RFQ is attached as Exhibit A to my affidavit. Conversations I had with various City officials made clear that the City was adamant that the Hotel needed to be full-service—that this was an essential element and was necessary to attract the types of trade shows, conventions, and other meetings that the City desired and believed would best support and complement its new convention center. The City's explicit desire for a full-service hotel was well known, a fact that I believe is supported by the January 15, 2001 letter from Charles Cole, Chairman of the Hotel Development Committee, to

Hilton's Thomas Davis, attached as Exhibit B. My conversations with City officials informed me, based on my years of experience in the hotel development business, that by 'full service' the City meant, at a minimum, high level appointments and amenities: a four-pipe heating and air conditioning system, a ballroom of at least 10,000 square feet, on-premises meeting space totaling around 20,000 square feet, one or more on-premises restaurants with full food and beverage service, and an industrial grade kitchen capable of delivering such service to the hotel's restaurants, meeting facilities and room service.

5 My company received a copy of the City's RFQ, was interested in the project, and began to assemble a development team to prepare a proposal responsive to the RFQ. As part of this process, a hotel developer typically recruits a hotel company for the team, and for this purpose GTD contacted executives at Hilton Hotels Corporation ("Hilton"). Ultimately sometime in 2001 we asked Hilton to join the GTD team, expressing that my partners and I expected any hotel operator that joined our group to commit itself exclusively to our team and no other. It is my company's common practice (and is the practice of most other hotel developers) to have an exclusive relationship with any hotel company that we ask to join one of our development teams.

6 Hilton employees John Weeman and Gary Mills put me in touch with Steve Crabill and Brian Fry, who were executives in the Hilton's southeastern office. I met with these two individuals regarding my company's interest in the Columbia Convention Center Hotel, and specifically recall either Mr. Crabill or Mr. Fry noting that the company did not have an invitation to join another team. Acceptance of our proposal was initially tendered on a conditional nature, for prior to fully committing to our team, Mr. Crabill and Mr. Fry wanted to check with their franchisees, including Mr. Aughtry, to see if any of them wanted to compete in

the City's RFP. Upon finding no issue with any of their franchisees, Mr. Crabill and Mr. Fry, on behalf of Hilton, accepted GTD's invitation and agreed to become an exclusive member of our team. From our conversations, it was absolutely clear that Hilton agreed it would not join any other team and that GTD would not offer the flag of any other hotel company in its proposal to the City. Furthermore, while our initial agreement made no specific mention of operating arrangements for the completed Hotel, it was absolutely without question that our exclusivity agreement covered any Hilton-branded hotel regardless of whether it was managed/operated by the Hilton Corporation or run as a franchise. To make a distinction between a corporately managed and a franchised hotel in an exclusivity agreement would be highly unorthodox in the hotel development industry and, if requested, would require specific, clear discussion and agreement in this regard.

7. Encompassing hundreds upon hundreds of hours of work, GTD put together a complete development team consisting of eleven (11) different entities ('the Team' or 'GTD Team') and responded to the aforementioned RFQ from the City. Choosing between several other respondents/bidders, in executive session on the morning of December 11, 2002, the City voted to select the GTD Team to undertake the development, design, financing, and operation of the Hotel, a decision that is documented in Exhibit C to my affidavit. The City's selection of the GTD Team's bid was communicated to us later that same day.

8. In April 2003, the City and the various members of the Team signed a Memorandum of Understanding ("MOU") laying out the project and the various duties, obligations, and compensation of the signatories. This document is attached to my affidavit as Exhibit D. I have seen Exhibit E (minutes from the City Council Meeting of Oct. 23, 2002) and Exhibit F (excerpt from Jeff Sachs' Feb. 5, 2009 deposition), both of which are consistent with

my recall of the events—that although some input came from GTD and other Team members, the MOU was primarily drafted by the City and its advisor, Strategic Advisory Group (“SAG”). The MOU sets forth the duties and tasks the various Team members are to fulfill and provides terms and conditions under which they are to be compensated. Each party agreed that they would complete certain duties and tasks necessary for the creation of the Hotel, and the City offered to pay the various members for their work. I considered then, and still believe, that this agreement formed a binding contract between and among all parties to the document. Vast amounts of work and attention were put into drafting the MOU, there were many detailed discussions of its provisions, and it was evident that all parties considered the document to be very important. I do not believe that this much attention and interest would have been given to the document if the parties had not considered it to form a binding agreement. GTD, for its part, never would have agreed to put in the effort necessary to develop the Hotel if we did not consider the MOU to form a contract and believe that all signatories felt similarly on the matter.

9 Paragraph 11 of the MOU states that “if the City determines that it is not feasible to proceed with the Hotel project it shall have no liability under this MOU” (see Exhibit D, p. 1). From numerous discussions with the City and other Team members, GTD understood this provision to mean that if the Team members were unable to put together a “feasible” Hotel project—meaning a project capable of meeting economic viability conditions necessary to obtain construction financing that could therefore be built—then the City would have no liability to pay for the work performed in preparing the proposal. If the Team did not perform its obligation under the agreement—that is, its obligation to put together a hotel project that was feasible—the City would be relieved of its duty to pay the team members. However, if the Team members were able to put together a plan for a feasible hotel, then the City would have an obligation to

build the hotel and compensate the Team members as set forth in the MOU. As I believe all parties to the MOU understood, the project would have to demonstrate economic feasibility in order to obtain construction financing and the obtainment of such financing would necessarily demonstrate that the project was economically feasible in the eyes of lenders or bondholders. It was my understanding then, and I still believe now, that all other parties to the MOU felt similarly, that if a feasible hotel project was able to be put together, and the City for whatever reason, chose not to build the hotel then the City would be in breach of contract and obligated to compensate the Team members for the fees they would have earned had the City not broken the agreement. I have seen the minutes from the City Council's February 11, 2004 executive session meeting (*see* Exhibit G) in which the City voted to approve the bond financing structure for the GTD Team's hotel and in which Councilwoman Devine stated that the City "must move forward to fulfill the commitments that have been made." I believe that this is exactly what Ms. Devine was speaking of at that time—that since the project was feasible the City was obligated to move forward with the Hotel's construction.

10 Two separate consulting firms, PKF International Limited (PKF') and Strategic Advisory Group ("SAG"), were hired by the City to study and analyze the proposed Hotel project and to advise the City in this regard. It was well understood that the City and all members of the GTD Team considered PKF to be well respected in the industry and unbiased and impartial in its analysis of the feasibility of the Hotel. This is demonstrated by the City Council Minutes from July 9, 2003, attached as Exhibit H, in which the term "unbiased" was used to describe PKF's report. To the best of my knowledge, neither of these companies ever determined the Hotel to be infeasible, and in fact, I have seen PKF's final report to the City that specifically states "Based upon the analyses and assumption herein, the hotel, operated as a

going concern and owned by the City of Columbia, appears to be an economically feasible Project" (*emphasis added*) (see Exhibit I final page of excerpt from PKF's Oct 2003 report) To this same point, I have seen Exhibit J, which is a portion of the transcript of the deposition of Jeff Sachs (the City's consultant from SAG) in which Mr Sachs clearly states that no determination of infeasibility was ever made by his company

11 Various SAG presentations and reports fully informed the City about the risks of the deal long before the MOU was signed and the City had already received negative political pressure concerning the public ownership of a hotel. Nonetheless, the City decided to move forward with the hotel project as proposed by GTD. I do not believe that, at the time the MOU was signed, any party to the agreement had ever contemplated that the City could back out of the agreement simply because it decided the proposed project was too risky, because of political resistance, or because the City simply changed its mind and decided not to go forward with the deal or that it did not want to own a hotel. In my mind, this would be an inconceivable definition of the term "feasible" and completely contrary to both the common understanding of the word and the manner in which it is typically used in the hotel development industry. In my experience as a hotel developer, the term "feasible hotel project" describes a project that is capable of being financed and constructed. The MOU embodied the parties' shared understanding that this definition was met. Any assertion that the MOU allowed the City to reverse its commitment on its own accord, based on considerations it had already rejected, would give the City the ability to back out of the deal simply on a whim. Neither GTD nor, in my experience, any reasonable hotel developer would ever have agreed to such a condition. In my mind, based on what GTD was told and from my years of experience in the hotel development industry, it was obvious the term "feasible," as used in the MOU, meant that the Hotel put forward by the Team was one for

which financing could be secured and which could be constructed for the amount of financing provided. Furthermore, the City never took a vote determining that our Hotel was not feasible. The City so testified in its Rule 30(b)(6) deposition, a portion of which is attached as Exhibit K.

12 Over the next year, the Team completed countless tasks necessary for the development of the hotel, many of which were specified in the MOU itself. Among its required duties, the Team designed and negotiated a construction commitment for the Hotel at a guaranteed maximum price, obtained design approvals for the Hotel from the City's Design Development Review Committee, secured commitments associated with the issuance of bonds to fund the Hotel's construction and operation, obtained an independent analysis of the Hotel's operations for bond issuance purposes, and negotiated and drafted numerous agreements associated with and necessary to the transaction. As an example of this work, Exhibit L represents one of the numerous drafts of the Design-Build Agreement that my Team put together. Exhibit M is a copy of one of the many iterations of the Development Management Agreement that GTD worked to produce. The GTD Team was intricately involved with bonds for the construction of the Hotel, and, as demonstrated by Exhibits N and O, Ambac and Standard & Poors both expected that the bonds would receive an investment grade rating upon issuance. In further confirmation of the project's feasibility, on February 17, 2004, Ambac also provided its Commitment of Financial Guaranty, as demonstrated in Exhibit P.

13 The hotel project put together by the GTD Team was fundable, workable, sustainable, and entirely feasible. In fact, as demonstrated by the City Council Meeting Minutes from February 11, 2004, attached as Exhibit G, the City Council approved the pricing of the Hotel as presented by the GTD development team, approved the design and the bond financing structure, and instructed the Team to go forward with the hotel as proposed.

14 It is my understanding that despite the feasibility of the GTD Team's hotel as explicitly recognized by the City, the City Council, on March 17, 2004, directed its staff to issue a new Request For Proposals (RFP) for the development of a hotel to support the City's convention center. Council minutes containing that direction are attached as Exhibit Q. This new RFP was issued on April 2, 2004 and is attached as Exhibit R. News of this decision caught me completely by surprise. I had not been (and have never been) informed of any determination by the City that my team's Hotel project was not feasible, and to the best of my knowledge no one ever determined that the Hotel we were working to build was not feasible. Furthermore, I have never been directed to stop working on the Hotel project.

15 I have seen various letters that Defendant Bo Aughtry sent to City Council members and City employees during the time my Team was working on the Hotel project. An example of such a letter is attached as Exhibit S. These letters make many misleading and even patently false statements and claims. It is my understanding that Aughtry represented to the City that the Columbia Convention Center and downtown market would not support a full service hotel, as is demonstrated in Exhibit T. As demonstrated by PKF's report (Exhibit I), industry research at the time showed the contrary—that the downtown Columbia market hotel could very much support a full-service hotel located near the City's convention center. I believe that if Mr. Aughtry is the sophisticated hotelier and hotel developer he claims to be, he would have been well aware that his statements regarding the Columbia hotel market were untrue. Ultimately, Mr. Aughtry built (and currently owns) a full-service hotel downtown beside the Columbia Convention Center. The very fact that Mr. Aughtry built what it was he was so adamantly telling the City would be a financial disaster creates a strong inference that he very well knew that what he was advising the City was false.

16 Although he chose not to submit a bid in response to the initial RFQ it is my understanding that Mr. Aughtry long encouraged the City to break its commitment to the GTD Team, and I believe that much of what he said to the City was intentionally misleading and, at times, rose to the level of being fraudulent. Among the conversations and exchanges of correspondence that I understand Mr. Aughtry to have had with City officials, I have seen a September 30, 2003 letter he wrote to all members of the City Council (*see* Exhibit U) in which he said that if the GTD Team's hotel was built, Columbia would be 'facing an economic calamity' in its downtown hotel market and a 'financial disaster for the city.' It is my belief that Mr. Aughtry in no way believed that the 300-room hotel my company was working to build would be a disaster or create an 'economic calamity' in the downtown hotel market. Mr. Aughtry, himself, wanted to build a hotel at this very location and ultimately built a hotel there that was only 25% smaller in size. My experience as a hotel developer informs me that if Mr. Aughtry truly believed that a 300-room hotel would create a 'calamity' and "economic disaster," it would be unlikely for him to expect a 222-room hotel to be a success, and it would be indefensible, as a business proposition, to seek, let alone pursue as aggressively as he did, the opportunity to build it. It is my belief that, at the time he was telling City officials that GTD's hotel would be a disaster, Mr. Aughtry very much knew that what he was saying was not true—that he was only saying what he did because he, himself, wanted to build and own the future hotel associated with the Columbia Convention Center and needed the City to breach its agreement with my company in order to be able to do so.

17 In a similar vein, on February 18, 2004, Mr. Aughtry e-mailed the various members of City Council saying that building GTD's hotel would have "catastrophic" results (*see* Exhibit V). He also stated that the consultants involved in forecasting the operation/feasibility of my

Team's hotel ' would only be rewarded IF the deal goes forward ' This is absolutely untrue as PKF had no incentive to see that my Team's hotel was built. The consulting company was hired at a flat fee and/or billing by the hour. In my experience as a hotel developer, consultants such as PKF are never "rewarded" for the consummation of a deal—their role is to be completely unbiased and as accurate in their predictions as possible, and their compensation is never contingent on the nature of their findings or conclusions. As a hotel developer, Mr. Aughtry surely was aware of this yet he was telling the City the opposite.

18. In this same February 18th e-mail, Mr. Aughtry also took issue with the list of hotels in other cities that PKF used to help forecast and analyze the expected demand for the GTD's Team's hotel. He stated that "the numbers [the City has] been given are extremely skewed" and proposed a list of hotels that, he claimed, would be "much [more] analogous" and accurate for comparison and forecasting purposes. However, Mr. Aughtry's alternative list (which, not surprisingly, painted a bleak picture for the occupancy of my team's hotel) was anything but analogous. Of the ten hotels that Mr. Aughtry presented, all of them had either one or more of the following characteristics: 1) old and greatly in need of renovation, 2) located in a metropolitan area with a population considerably smaller than that of Columbia, 3) positioned several miles from a downtown market, and, most important of all, 4) not adjacent to or in any way servicing a convention center. I have no doubt that Mr. Aughtry handpicked this list of hotels solely to suit his objective of disparaging my Team's project. Considering Mr. Aughtry's experience in the hotel industry, I believe the remarkably disparate character of the hotels on his list creates an inference that Mr. Aughtry was knowingly being untruthful when he claimed the hotels he presented were "analogous" to the hotel the City desired to have built and had selected my Team to build.

19 It is my belief that the March 17, 2004 vote by City Council directing its staff to draft a new Request for Proposals ('RFP') for a full-service Convention Center Hotel was the result of Mr. Aughtry's campaign to disparage my Team's Hotel and to interfere with my Team's contract through lies and misleading information regarding the Columbia hotel market. As described below, I believe there is evidence to show that Mr. Aughtry was deceptive and untruthful with regard to the type of hotel he planned to build, the price for which he intended to build it, and the time it would take him to complete its construction. Furthermore, I believe the evidence creates an inference that Mr. Aughtry was involved in a conspiracy with Hilton Hotels Corporation to have the bidding process for the Convention Center Hotel reopened and to allow him to win the new RFP with a fraudulent bid.

20 A local attorney named Steve Benjamin served as bond counsel for the GTD Team and was present at many Team meetings from 2002 onward. Nonetheless, after the April 2004 RFP went out, Mr. Benjamin asked City Council for a waiver to allow him to participate as a potential investor in the hotel project under the new RFP. The City Council reviewed his request in an executive session on May 12, 2004, and having seen Exhibit W, I now know that this waiver was granted. It is my understanding, confirmed by reading Mr. Aughtry's deposition (*see* Exhibit X), that Mr. Benjamin thereafter became a part owner of the hotel that Mr. Aughtry constructed. Given the timing of Mr. Benjamin's waiver request, and the obvious conflict of interest that arose where an attorney who worked for our Team became an investor in a competing team's project, in my mind Mr. Benjamin's behavior raises a strong inference that he was induced by Mr. Aughtry to break his commitment with the GTD team and work to influence the City Council's decision to abandon the GTD team in exchange for part ownership of the Aughtry team's hotel.

21 On May 20, 2004, the GTD and Aughtry teams presented their proposals to the City. Beforehand, the teams were specifically instructed that these were to be closed-door presentations, which is to say that the various team members and their affiliates were not to sit in or otherwise be privy to the presentations of other teams. Nonetheless, an individual named Damon Jeter, who I now know was a member of the Aughtry team, was present during the GTD Team's presentation to the City. Exhibit Y confirms that others witnessed Mr. Jeter's presence as well. I have read Mr. Jeter's affidavit, and although he recalls his presence in the room being shorter than I understand it to have been, he does admit that he sat in on our presentation (*see* Exhibit Z). From having read Mr. Aughtry's and Mr. Jeter's depositions (*see* Exhibit X and Exhibit AA), I also understand that Mr. Jeter later gained an ownership interest in the Aughtry hotel. Mr. Jeter's improper behavior, like Mr. Benjamin's, creates a strong inference that his actions were induced by Mr. Aughtry in exchange for the opportunity of ownership in the Aughtry team's hotel.

22 I have seen the Aughtry team's proposal to the City, an excerpt of which is attached as Exhibit BB. On its face, Aughtry's proposal offered only the choice between a Hilton Garden Inn and a Marriott Courtyard, neither of which are accepted in the hotel trade as full-service hotels, but both of which are considered to be "limited service" or "select service" establishments. I have also seen some of Mr. Aughtry's correspondence with the City, including Exhibit T, a letter dated February 13, 2001 from Mr. Aughtry to the City in which Mr. Aughtry states that a full-service hotel is not what the Columbia needs and proposing that a Hilton Garden Inn is better suited for the City's needs. I believe this demonstrates that even Mr. Aughtry did not consider a Garden Inn to be a full-service hotel. From having read Mr. Aughtry's deposition and having seen the May 21, 2004 letter from Brian Fry to Bo Aughtry (*see* Exhibit CC), I now

know that, despite the contents of the Aughtry team's written proposal, the group's presenters told the City orally at their presentation on May 20, 2004, (a) that they could modify the limited-service Hilton Garden Inn specified in their written proposal sufficiently to satisfy the City's 'full service' RFP criterion, and (b) that they had obtained, or could obtain, the Hilton Hotels Corporation's consent that such a facility carry the flagship Hilton brand rather than the Hilton Garden Inn brand specified in their written proposal

23 I was informed of these developments within hours after the Aughtry team's presentation on May 20, 2004. Greg Garfield and I spoke by telephone that afternoon with Chris Pfohl, a vice president at Hilton Corporation and one of the Hilton executives personally involved with the Hilton-GTD exclusivity agreement discussed above. Greg Garfield and I relayed to Mr. Pfohl our understanding that Aughtry had informed the City's Hotel Selection Committee that he could provide a full-service Hilton Hotel adjacent to the Convention Center. Mr. Pfohl seemed shocked and angry to learn that Mr. Aughtry had made such a representation to the City. Mr. Pfohl was very apologetic that the Hilton members of Aughtry's team had allowed this to happen (as Aughtry was offering a Hilton Garden Inn, there were Hilton employees on his team), and assured us that Mr. Aughtry was not, and would not, be approved to offer a full-service Hilton-brand hotel—that only the GTD Team held, and could hold, such approval. During this conversation, Mr. Pfohl made absolutely no distinction between Hilton-operated and franchised hotels. To have made such a differentiation would have been unnecessary, for our exclusivity agreement was in no way limited to any particular ownership and operation structure for the Hotel. Mr. Pfohl told us not to worry about what Mr. Aughtry had told the City, and said that he would get this matter straightened out and properly

communicate to City officials that Mr. Aughtry's team had not been permitted and would not be permitted to offer or build a Hilton brand hotel for the Columbia Convention Center project.

24 Having seen Exhibit CC, I now know that the following day, May 21, 2004, Hilton's Director of Franchise Development for the Southeast Region, Brian Fry, wrote a letter to Mr. Aughtry (including the City as a recipient), which stated: "Subject to receipt and processing of a Franchise Application, Hilton supports your proposed development of a Hilton Garden Inn Hotel at the Convention Center. Hilton continues to support the Garfield Traub team for development of a Hilton managed Hilton Full Service Hotel at the Convention Center." GTD also promptly received a copy of this letter, either as a blind carbon copy recipient or because Hilton otherwise faxed or mailed my company a copy. Although this letter was not worded as strongly as I had expected from my earlier conversation with Mr. Pfohl, I understood the letter to convey exactly what he had assured us was Hilton's position: that the right to build a Hilton-brand hotel (whether operated by the Hilton Corporation or run by a franchisee) lay exclusively with the GTD Team, and that Mr. Aughtry had no right to offer a Hilton brand hotel to the City (although he could offer a limited service Hilton Garden Inn).

25 Shortly after it was sent, GTD received a copy of a letter from Mr. Aughtry dated May 25, 2004, attached herein as Exhibit DD. In this letter, Mr. Aughtry responded to Mr. Fry's correspondence by stating: "You, Steve and I know that our Hilton alternative was well discussed among the three of us and that fact needs to be affirmatively conveyed to the City of Columbia." I believe this letter provides clear evidence that Mr. Aughtry was attempting to use his influence with Hilton, based on his business dealings with Hilton on other projects, to strong-arm Hilton into backing him up on a claim he had already made to the City that ran counter to Hilton's exclusivity agreement with GTD.

26 Although I was not originally a recipient of Exhibit EE, I now know that on the evening of May 25 2004, Bill Fortier an executive at Hilton s Beverly Hills headquarters, wrote in an e-mail to Brian Fry, Chris Pfohl, and another Hilton executive that Hilton would stand behind [GTD] for the Hilton and Bo [Aughtry] for the [Hilton Garden Inn]’ That e mail continued ‘However, we will do this through a phone call[,] not a letter We will only make one statement and that is to set the city straight on Bo, but we will not answer any other ‘what if’ questions about the deals [sic] outcome” In my judgment this reluctance to put anything in writing was because Mr Fortier knew that Hilton could not defend having promised exclusivity to GTD while also having succumbed to Mr Aughtry’s demand to let him offer a full service Hilton It is clear to me that Hilton, under pressure from Mr Aughtry, was attempting to avoid saying anything that Aughtry could construe as failing to capitulate to his demand—or that GTD could construe as a threat to its exclusive rights

27 Unknown to me at the time, in evident contradiction to Mr Fortier s stated intent to ‘set the City straight on Bo” but not to put anything in writing, Mr Fortier wrote a very short letter to the City on May 26, 2004, stating “It is our position that the letter from Hilton to Mr Aughtry on May 21, 2004, and Mr Aughtry’s letter to Hilton on May 25, 2004, are both correct’ I have attached Mr Fortier s May 26th letter hereto as Exhibit FF In this letter, Mr Fortier offered absolutely no explanation as to how both the May 21st and May 25th letters could be “correct.” I believe Mr Fortier’s statement that ‘both are correct’ was written in response to pressure from Mr Aughtry, either as already described or as further applied after Mr Fortier’s May 25th internal e mail described in the preceding paragraph

28 In my judgment, the reason for the brevity of Mr Fortier’s May 26th letter was that any explanation of his “both are correct” assertion would have required him to expose as

misleading and deceitful the language of Brian Fry's May 21st letter. To make the May 21st letter "correct," if Aughtry's May 25th letter were also 'correct,' would require straining to interpret the words "Hilton[-]managed full service Hilton" in the Fry letter as a qualifier permitting Aughtry to offer the City a *franchised* Hilton flagship-brand hotel, or a hotel under a non-flagship brand, at any level of service (including full service) regardless of the exclusivity agreement with GTD. Fortier knew that Aughtry had induced Hilton into a commitment that breached that agreement. He and Aughtry jointly intended to induce the City into handing GTD's project to Aughtry by a two-step ruse: first, by submitting a written bid for a project that would not broadcast a violation of Hilton GTD exclusivity, but that all parties knew the City would not approve; and second, by varying the terms of that written bid orally, without GTD's knowledge, with the aid of the deliberate 'misstatement' Aughtry had induced Hilton officials to make concerning their commitment to GTD. In other words, Aughtry's and Fortier's joint intent was to bid a Hilton Garden Inn publicly, offer the City a Hilton branded hotel privately, mollifying GTD in the meantime with deceptive assurances that its agreement was intact, and then, after the City signed with Aughtry, announce the swap of brands to the one GTD had been given the exclusive right to build.

29 I believe that any reasonable person would read Brian Fry's May 21st letter to mean that Hilton could support Aughtry only for a Garden Inn, and could not allow him to build a full service Hilton, whether franchised or corporate-owned, because of the company's commitment to GTD. If Fry had intended to communicate to the City that Hilton's commitment to GTD did not prevent the company from permitting Aughtry to offer the City a *franchised* full-service Hilton hotel, then Mr. Fry could and would have stated this in the letter in a clear and concise manner. Because all parties knew Aughtry to be in the business of developing

franchised and not corporate owned hotels, GTD never had any concern that Aughtry was offering the City a *Hilton-managed* full service Hilton hotel. Rather, the concern was that he was offering a full-service hotel bearing the flagship Hilton brand regardless of the form of ownership or management. If Fry and Aughtry wanted the letter's recipients to understand that Aughtry was allowed to offer a *franchised* full-service Hilton hotel, then Fry would have simply stated this. The fact that they did not indicates that they wished the letter to be construed differently.

30 I feel confident that Mr. Aughtry was well aware, as the experienced hotel developer he claims to be, that an exclusivity agreement, like the one between Hilton and GTD, would have no need to distinguish between a franchised and Hilton-operated Hilton Hotel. Accordingly, I have no doubt that Mr. Aughtry well knew that Hilton would be violating its exclusive obligation to the GTD Team if Aughtry were allowed to build a franchised Hilton. I am convinced that Aughtry was dishonest in his contention to the contrary, and that he made efforts to hide this fact from the City and conceal his intentions from the GTD Team. The evidence plainly shows that the deceptively written letters of May 21st, May 25th and May 26th contained the precise wording they did because Hilton and Aughtry were acting in concert to deceive the City into believing it could select Aughtry's bid without violating the Hilton-GTD exclusivity agreement, and, at the same time, deceive the GTD Team into believing Hilton was honoring the agreement when in fact it had secretly given Aughtry permission to offer and build a full service Hilton-branded hotel.

31 From the express terms of the April 2004 RFP, as well as conversations I had with City representatives, I absolutely understood that the City viewed full-service and a brand name associated with being full-service (such as Hilton) to be essential elements of any hotel proposal.

the City would consider Aughtry's bid submission as written, was non-responsive to the RFP. However, had the Aughtry team's April 30, 2004 bid documents contained the all-important information the team members secretly conveyed to the City—that they would offer a hotel on terms that contravened the Plaintiffs' explicit agreement with Hilton—I would have been able to expose the Aughtry Defendants' bid as a sham at that time. I would have been able to reveal to the City that Hilton's agreement with the GTD prevented Aughtry from offering a full-service Hilton-branded hotel, regardless of whether it was franchised or corporately operated, and the Aughtry team's proposal would have been disqualified in favor of the GTD Team's proposal.

32 The City demanded a full service hotel, a requirement that was explicitly stated in both the January 15, 2001 RFQ (Exhibit A) and subsequent April 2, 2004 RFP (Exhibit R). I am fully convinced that Aughtry was fully aware that a Hilton Garden Inn (or Marriott Courtyard) would not be responsive to the City's request. I am further convinced that, Mr. Aughtry knew that his offer of a full-service Hilton would trigger a reaction from the GTD Team and allow us the opportunity to alert the City that Hilton had a commitment to GTD that prevented him from offering a full-service Hilton hotel. I am convinced that, for these reasons, Mr. Aughtry cooperated with Hilton to make a formal proposal of a non-full-service Garden Inn with the intention and plan that a full-service Hilton Hotel would later be swapped in its place. At the very time that Aughtry was submitting an extensive proposal for a Hilton Garden Inn, his stratagem was to deceive the GTD team with a bait and switch. That is to say, he intended to promise the City they could swap out the Garden Inn for a full service Hilton hotel, but because of the exclusive agreement with us, he could not do it overtly in his written, public bid. He also deceived the City by telling the City that he could deliver the hotel they wanted when in fact the GTD deal stood as an obstacle. He knew that he had to first have the GTD Team out of the

picture (i.e. have GTD lose the second bidding process) in order to be able to openly offer the City a full service Hilton hotel which I believe is why he did not include a Hilton-brand hotel in his written bid to the City even though that is what he intended all along to build

33 In my professional judgment, the Hilton Columbia Convention Center Hotel constructed by Mr. Aughtry looks very similar to the building my team proposed, designed, planned, and obtained City approval to construct. I note that during the City's Rule 30(b)(6) deposition, even the City agreed that the two hotels look very similar (*see* Exhibit GG). I believe that this surprising similarity in appearance creates an inference that Aughtry gained access to the GTD Team's proprietary work product material either through Defendant Hilton or Steven Benjamin, both of whom were participants on the GTD Team and then later members of Aughtry's team. I believe these GTD proprietary materials include but are not limited to concepts, plans, designs, drawings, financing models, and terms of various agreements and contracts that GTD had negotiated. That material was intended for use—and all GTD Team members and participants agreed it would be used—only in connection with the Team's work under the MOU. I would also note that during the City's Rule 30(b)(6) deposition, the City readily admitted that it provided Mr. Aughtry a copy of my Team's architectural renderings (*see* Exhibit HH).

34 Having read Exhibit II, a letter from Mr. Aughtry to Mayor Coble dated August 8, 2003, stating "I would require no concession, subsidy or guarantees from the city, initial or in the future," I believe that Mr. Aughtry represented to the City that he could build the hotel without government subsidies. It is my belief that Aughtry knew that this representation was false when made and that at no point in time did he ever intend to build his proposed hotel without subsidy from the City. The proposal that Aughtry submitted to the City's selection

committee (contained in part, in Exhibit BB), provided for zero City subsidy (other than reduced parking). However, it is my understanding, as evidenced by Exhibit JJ, that when Aughtry changed from a Hilton Garden Inn to a full-service Hilton Hotel, he then demanded a \$3 million cash subsidy from the City. I also understand that Mr. Aughtry requested and received a tremendously reduced rate for the purchase of the land on which the hotel was built (he paid only \$250,000 for land worth several million dollars). Having read the City of Columbia's Rule 30(b)(6) deposition (Exhibit JJ), I now know that, on top of his initial subsidy and concession on the price of the land, Mr. Aughtry again went to the City, this time during the actual construction of the hotel, and demanded an additional \$1.5 million cash subsidy in order to complete the project. From my experience in the hotel industry, I believe that Aughtry had no basis for his initial representations to the City that he would not require a subsidy or that his subsidy would be limited to \$3 million (i.e., that all along he was aware that a seven-figure subsidy would be required). I believe that he knew such statements to be false when he made them, and that he knowingly made this disingenuous offer for the purpose of inducing the City to abandon the GTD Team. I am convinced that all along he planned to demand a subsidy once he had the City committed to his project and in a position where it had no reasonable alternative but to submit to his demands.

35 I believe that Aughtry's written proposal to the City was itself a fraud. The proposal was supposed to represent Aughtry's offer to the City. However, what Aughtry intended to build was a Hilton, not a Garden Inn or a Courtyard as his proposal specified. As I understood it then and as corroborated in the City's Rule 30(b)(6) deposition, "the requirements of the RFQ were that if [a bidding team] wanted more than the ground lease and the parking [the team] should put that in [its] proposal." (See Exhibit KK). The Aughtry team did not ask for any

subsidies in its proposal, but specifically declares ' [O]ur proposal requires no subsidy or long term support from the city (See Exhibit BB) However, Mr Aughtry ultimately requested and was given over \$4 5 million dollars in subsidies It is my belief that Mr Aughtry had no intention of ever building the hotel contained in his proposal As a hotel developer, Mr Aughtry should have been well aware that his proposed hotel did meet the minimum criteria set forth by the City However, for all of the reasons discussed above, Mr Aughtry did not want his written documentation to state that he was proposing a Hilton that would require large amounts of subsidies It is clear to me that Mr Aughtry was planning on changing his bid after it was submitted As shown in Exhibit DD, Mr Aughtry s letter of May 25, 2004 to Hilton's Brian Fry states ' Brian, you understand that it is untenable for me to be perceived as having represented a proposal to the city of Columbia without Hilton's blessing You, Steve and I know that our Hilton alternative was well discussed among the three of us and that fact needs to be affirmatively conveyed to the city of Columbia so that credibility does not come into question ' Furthermore, it is my understanding that after the Aughtry team's May 20, 2004 presentation, Mr Aughtry was quick to let the City know how much of a subsidy he would require to build the City a full-service Hilton hotel The promptness with which Aughtry was able to supply this information creates an inference that he had been planning on building a full-service Hilton all along In my mind, this and the May 25, 2004 letter creates a strong inference that Aughtry s written bid was a sham, and that all along he had planned to build a Hilton with the help of City subsidies The manner in which Hilton permitted, and even assisted Mr Aughtry in swapping out the offer of a Garden Inn in the place of a Hilton suggests a conspiracy between Aughtry and Hilton to see that the Aughtry bid was selected by the City

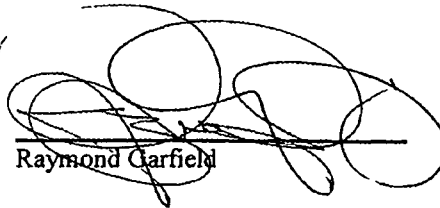
36 As discussed above and evidenced in Exhibit II, Aughtry represented to the City that he could complete his proposed hotel 'at the outside, 18 months from a green light" I understand that on May 28, 2004, Aughtry was notified that he had been selected to build the hotel, however, it was not until August 2007 that his hotel opened. Thus it took Aughtry three years and three months to complete his hotel—he was never even remotely close to the 18 month timetable he told the City he could deliver. From my experience of over three decades in hotel development, I know such a feat (concluding an entire hotel development project from design to opening) to be extremely difficult, indeed nearly impossible. I have never known a convention center headquarters hotel to go from 'green light' to completion in such a short time frame. It is my professional opinion that the only way Aughtry could possibly believe he could actualize such an accomplishment would be if he intended to use or take advantage of the concepts, plans, designs, drawings, financing models, terms of already negotiated agreements and contracts, and other work-product documents of the GTD Team. Thus, it is my testimony that either Aughtry was lying to the City when he claimed he could build the Convention Center Hotel within 18 months, or that, at the time he made this statement, he intended to make improper use of the GTD Team's work product without informing the City or GTD.

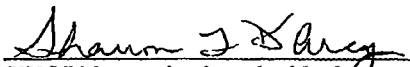
37 I believe that the testimony, discovery documents, and facts of this case, at a minimum, raise factual questions going to the heart of the matter, as to whether Defendant Aughtry employed fraud and deceit to effectuate the City's abandonment of the GTD Team's hotel project and to win the bid for himself. At a minimum, factual questions persist as to whether Defendant Aughtry resorted to fraud in order to misrepresent Hilton's position to the City and induce the betrayal of the hotel company's allegiance to the GTD Team that Hilton was contractually bound to maintain, misrepresented the conditions and needs of the downtown

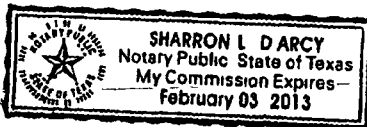
Columbia hotel market and/or fraudulently misrepresented the government subsidy and time requirements to complete his hotel project

38 I also believe that the aforementioned behavior of Mr Benjamin and Mr Jeter creates the inference of a conspiracy, between these individuals and Aughtry, for the purpose of convincing the City to abandon my Team s project issue a new RFP and select the fraudulent Aughtry proposal

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief


Raymond Garfield


SWORN to and subscribed before me
this 24th day of June, 2009
My commission expires _____
Notary Public for _____



STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Realty Company, Inc , and)
Garfield Traub Development, LLC,)

CONSOLIDATED CIVIL ACTION
NO 2007-CP-40-1252

Plaintiffs,)

vs)

City of Columbia, South Carolina,)

Defendant)

(2005-CP-40-1014))

Stevens & Wilkinson of South)
Carolina, Inc ,)

Plaintiff,)

vs)

City of Columbia, South Carolina,)

Defendant)

(2005-CP-40-3361))

Stevens & Wilkinson of South)
Carolina, Inc ,)

Plaintiff,)

vs)

Paul C "Bo" Aughtry, III,)
Windsor/Aughtry Co , Inc , and)
Vista Hotel Partners, LLC,)

Defendants)

2006-CP-40-5092)

Gary Realty Company, Inc and)
Garfield Traub Development, LLC,)

Plaintiff,)

vs)

AFFIDAVIT OF ERIKA SALLEY

FILED
2009 AUG 11 PM 2 51
JEANETTE M. McBRIDE
CLERK OF COURT
FIFTH JUDICIAL CIRCUIT
SOUTH CAROLINA

Paul C "Bo" Aughtry, III,)
Windsor/Aughtry Co, Inc,)
Vista Hotel Partners LLC, and)
Hilton Hotels Corporation,)
Defendants)
(2006-CP-40-6488))

Turner Construction Company,)
Plaintiff,)
vs)
City of Columbia,)
Defendant)
(2007-CP-40-1252))

PERSONALLY APPEARED BEFORE ME, Erika Salley who being duly sworn
testifies

1 The statements in this Affidavit are based upon my personal knowledge, unless
otherwise stated

2 I am competent to testify to the details related in this affidavit

3 My title is City Clerk for the City of Columbia, South Carolina

4 I have held this position from July 28, 2003 until current

5 During my tenure as City Clerk, I have also used the name Erika D Moore, which
was my maiden name

6 My duties as City Clerk include, without limitation, the following

a Attending all meetings of Columbia City Council,

b Recording official actions of Columbia City Council, including the enactment
of ordinances and the passage of resolutions,

c Attesting to and certifying to the correctness of documents executed by
Columbia City Council, and

d Preparing distributing, and publishing Columbia City Council agenda
materials, action reports, schedule of meetings, and approved minutes

7 I was City Clerk during the time that the City of Columbia had under
consideration the publicly-funded convention center hotel proposed by the Plaintiffs (the "Hotel
Project")

8 The Columbia City Council never enacted an ordinance or passed a resolution
committing the City of Columbia to issue bonds to fund the Hotel Project

9 The Columbia City Council never enacted an ordinance or passed a resolution
committing the City of Columbia to provide, subject to annual appropriation, any amount of City
Credit Support to the Hotel Project

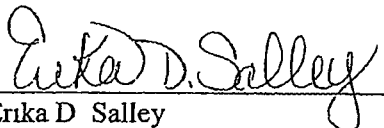
10 The Columbia City Council never enacted an ordinance or passed a resolution
conveying or leasing any real property to the Columbia Convention Center Hotel Corporation for
the Hotel Project

The information in this affidavit is true and correct to the best of my knowledge and
belief

Executed on August 6, 2009

FURTHER AFFLIANT SAYETH NOT

Signature on following page


Erika D Salley

Richland County, South Carolina

Sworn and subscribed before me
this 6 day of August, 2009

Valerie R. Smith

Notary Public for South Carolina

My Commission Expires 12/15/10

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Civil Action No 2005 CP-40-1014

Gary Realty Company, Inc and
Garfield Traub Development, LLC,

Plaintiffs,

vs

City of Columbia, South Carolina

Defendant

Civil Action No 2006-CP-40-6488

Gary Realty Company Inc and
Garfield Traub Development LLC,

Plaintiffs,

vs

Paul C "Bo" Aughtry III, Windsor/Aughtry
Co, Inc, Vista Hotel Partners LLC, and
Hilton Hotels Corporation

Defendants

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

(For Discovery Purposes, Part of Consolidated
Civil Action No 2007 CP 40 1252)

**AFFIDAVIT OF
ERIC ANTHONY TRAUB**

I, Eric Anthony "Tony" Traub, being duly sworn under oath, declare under penalty of perjury as provided by law, that I am an adult person over the age of 18 years and that if I were called as a witness in this matter, I would competently testify to the following

1 I am currently a principal, managing officer, and founding member of Garfield Traub Development, LLC ("GTD")

2 I have over 30 years of real estate development leadership experience, ranging from deal structuring and capitalization through design, construction and operations. My current responsibilities focus primarily on the leadership of design-builder relationships and the design and construction process, including design programming and value engineering input and

oversight, as well as negotiation of project documents and agreements. I have great understanding and familiarity with the customs and practices of the hotel development industry.

3 Prior to the formation of GTD from 1991 to 1999, I served as President and CEO of American Nevada Corporation, Nevada's largest developer. Working in some of the fastest-growing communities in the country, I led the development of hotels and recreational facilities, office buildings, medical facilities, retail centers, and thousands of residential lots. I was employed as vice president and general manager for the Perini Corporation's western division, from the mid 1980s to 1991, where, among other signature projects, I developed the Resort at Squaw Creek, a premier ski and golf conference resort, and Rincon Centre, a one million square-foot, mixed use office/retail condominium project in downtown San Francisco, California. From 1976 to the mid 1980s as President of the Resorts and Commercial Divisions of General Development Corporation, then Florida's largest developer, my divisions developed countless commercial properties including conference resorts, country clubs, marinas and other recreational facilities. From approximately 1971 to 1976, I worked for various companies owned or controlled by the Pritzker family (of Chicago), which owned and operated Hyatt Hotels and various real estate development companies. In that capacity, I was extensively involved in transactions throughout the United States. Five years ago, I formed Gotham Real Estate Corporation, a hotel Real Estate Investment Trust (REIT). Concurrently with my responsibilities with Garfield Traub, I also serve as President and CEO of Gotham, which has investments in hotels throughout the United States.

4 I have read the June 24, 2009 affidavit of Ray Garfield. My memory and opinions are in complete accord with all that Ray Garfield's affidavit contains. I would, however, make the following clarifications/qualifications:

a Regarding Paragraph 6 of Ray's affidavit, I was not involved in the initial outreach to Hilton Hotels Corporation. John Weeman and Gary Mills did not offer to put me in touch with Hilton executives Steve Crabill and Brian Fry—that first contact rested solely with Ray. After Ray Garfield reached an agreement with Mr. Crabill and Mr. Fry, I did, however, have direct dialogue with Hilton employees regarding their company's commitment of exclusivity to the GTD team. Specifically, I recall attending a meeting concerning the City's convention center hotel project, held in Columbia sometime in early 2003, during which time I spoke with Brian Fry. In addition to what Mr. Fry had previously said to Ray Garfield, he also provided me oral assurances that Hilton was giving the GTD team the exclusive right to offer a full-service Hilton to the City of Columbia. While I do not recall our conversation ever making specific mention of operating arrangements for the Hotel, it was absolutely without question that our exclusivity agreement covered any Hilton-brand hotel regardless of whether it was managed/operated by the Hilton Corporation or run by a franchisee. To make a distinction between a corporately managed and a franchised hotel in an initial development exclusivity agreement would be unheard of in the hotel development industry.

b Regarding Paragraph 23 of Ray's affidavit, although the contents of the conversation were reported to me shortly after it took place, the May 20, 2004 telephone call that Ray Garfield and Greg Garfield made to Chris Pfohl was not something with which I was personally involved.

[signature and notarization on page following]

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief


Eric Anthony Traub

Aletta K. Cam
SWORN to and subscribed before me
this 26 day of June 2009
My commission expires 6/27/10
Notary Public for SOUTH CAROLINA

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Gary Realty Company, Inc and
Garfield Traub Development, LLC,

Plaintiffs,

vs

Paul C "Bo" Aughtry III,
Windsor/Aughtry Co , Inc ,
Vista Hotel Partners, and
Hilton Hotels Corporation

Defendants

IN THE COURT OF COMMON PLEAS

Civil Action No 2006-CP-40-6488

(For Discovery Purposes Only, Now a Part of
Consolidated Action No 2007-CP-40-1252)

**PLAINTIFFS' RESPONSES TO
DEFENDANT HILTON HOTELS
CORPORATION'S SECOND
REQUEST FOR ADMISSIONS**

TO ROBERT W FOSTER, JR , WILLIAM P SIMPSON, AND, JAY T THOMPSON,
ATTORNEYS FOR DEFENDANT HILTON HOTELS CORPORATION

GENERAL OBJECTION AND QUALIFICATION

The following responses are given without prejudice to responding party's right to produce evidence of any subsequently discovered fact or facts, which this responding party may later recall. Responding party accordingly reserves the right to change any and all answers herein as additional facts are ascertained, analyses are made, legal research is completed, and contentions are made. The responses contained herein are made in a good faith effort to supply as much factual information and as much specification of legal contentions as are presently known, but in no way should be to the prejudice of Plaintiff in relation to further discovery, research or analysis. The aforementioned statement pertains to and should be incorporated by reference in each and every response following.

RESPONSES TO SECOND REQUEST FOR ADMISSIONS

REQUEST NO 1 Admit that under Section X of the Memorandum of Understanding, captioned "ROLE OF THE OPERATOR," Hilton was to manage the convention center hotel under a Qualified Management Agreement that had not been executed at the time the MOU was signed.

RESPONSE Admitted

REQUEST NO 2 Admit that no Qualified Management Agreement or other agreement under which Hilton was to manage the convention center hotel was ever executed

RESPONSE Admitted

REQUEST NO 3 Admit that Hilton did not directly or indirectly operate, franchise, brand or manage another full service Hilton Hotel within a five (5) mile radius of the convention center hotel at any time during which Hilton managed the convention center hotel

RESPONSE Plaintiffs have insufficient knowledge of Hilton's business, business activities and precise hotel locations required in order answer this request

REQUEST NO 4 Admit that the MOU ceased to be effective at the time the City of Columbia issued a new Request for Proposals in April 2004

RESPONSE Plaintiffs object to the form of this question on the grounds that the term "effective" is vague and ambiguous The City's of Columbia's April 2004 issuance of a new Request for Proposals was an action counter to the MOU, however, this is not to say that such actions invalidated or otherwise nullified the validity and efficacy of the MOU Without having further explanation, description, and understanding as to what is meant by the Request, Plaintiffs must DENY

By



Francis M Hinson, IV, Esquire
Janet, Jenner & Suggs, LLC
500 Taylor Street, Suite 301
Post Office Box 927
Columbia, South Carolina 29202
(803) 726-0050
(803) 727-1059 FAX
ATTORNEY FOR PLAINTIFFS

Columbia, South Carolina
October 29, 2007

LEXINGTON - RICHLAND - COLUMBIA REGIONAL CONVENTION CENTER COMMISSION

Request For Qualifications Regional Convention Center Hotel January 15, 2001

The two South Carolina counties of Lexington and Richland (the Counties) and the City of Columbia (the City), are working together with the Columbia Metropolitan Convention and Visitor's Bureau (the CVB) and the Greater Columbia Chamber of Commerce (the Chamber) to establish a regional convention center and hotel in the City of Columbia. They are seeking an experienced convention center hotel developer/operator to begin discussions concerning the possibility of working together in a public/private partnership to develop and operate a proposed full service, convention hotel of approximately 250 rooms with expansion possibilities.

Background -- For many years there have been numerous discussions and proposals to develop and construct a convention center for the Columbia market. The CVB has supported these efforts in the past and recently led an effort to make this dream come true using a feasibility study conducted by KPMG -- Peat Marwick to generate further action. This study and an up date study will be made available to respondents upon written request.

During this same period time the University of South Carolina (the University) was also considering the development of a new sports arena to replace the existing Carolina Coliseum. The University desires a modern, up-to-date sports and general purpose indoor athletic event facility with approximately 20,000 seats for basketball, including a number of executive skyboxes for corporate sponsors. Community leaders saw an opportunity to work together to achieve the greatest degree of efficiency possible for each project. It was felt that if the two projects were developed in close proximity, there would likely be significant savings in

development and operation Costs, which would benefit the community and those who would be using the facilities in the future

Working with the Chamber and a group of committed business leaders the CVR, the Counties, the City and the University held a series of meetings which culminated in an Intergovernmental Agreement (the Agreement) to move forward together with the two projects. The underlying premise of the Agreement calls for the parties to collaborate in the development of the Arena and the Convention Center in such a manner as to maximize the advantages of being located in close proximity and to share, where possible the infrastructure that will be required to support both facilities

The first challenge for the City and the Counties was to develop a financial scenario for the Convention Center that would assure the necessary funding for the project without placing an additional financial burden on the taxpayers of the area. The three governments agreed to a plan, and ordinances were passed, establishing a three percent (3%) Tourism Development Fee. The use of the revenue generated by this new fee is dedicated to the development and operation of the new Convention Center. The City and the Counties have been collecting revenue from the increased Tourism Development Fee since January 1 1998 and the estimated \$35 million development cost of the Convention Center can be supported by the current revenue stream

In 1998, the Committee commissioned a site selection analysis by a consultant team consisting of The Rosser Architectural Group (the Arena architect), TVS and Associates (the Convention Center architect), Stevens & Wilkinson of South Carolina (the local architect for both projects), IDR International of Columbia, Maryland, and Wilbur Smith Associates of Columbia, South Carolina. This team recommended locations for the Arena and Convention Center in the heart of Columbia's Congaree Vista Redevelopment Area (see Exhibit A) —The property along with adjacent parking to serve both facilities, has now been acquired by the City and the University and the Arena is currently under construction with an expected completion date of September 30, 2002

The Congaree Vista Development Area (The Vista) is in the heart of Columbia's City Center and has experienced a tremendous amount of growth in the past several years. Strategically located between Columbia's Main Street, and the Congaree River and adjacent to the University of South Carolina's main campus

with a population of over 25 000 the Vista is a popular location for a wide variety of entertainment and shopping venues that attract many visitors. The City is also emphasizing residential development in the Vista and City Center which is expanding the market potential for businesses in the area. The investments in the Arena and the Regional Convention Center are exciting additions to the millions that have already been invested in the Vista by both the public and private sectors.

The City and Counties have organized a Regional Convention Center Commission (the Commission) to coordinate planning with the University of South Carolina in the development of the Arena, and to be responsible to the three governments for the development and operation of the Convention Center, including the development of an adjacent convention center hotel. It is their intent to work with an experienced developer who will design and construct a convention center hotel of approximately 200 rooms. The developer will be expected to own and manage the day-to-day operations of the hotel, including the marketing and coordination with the convention center that will be required to the maximize the use of both facilities to the greatest possible extent.

Recently the City adopted a Columbia City Center Master Plan. The purpose of the Master Plan is to guide future public and private development in "Downtown Columbia, in an area known as City Center. This area includes the site where the Arena and Convention Center are being built. A major element of the Master Plan is a focus on tourism and the visitor economy in the Columbia area, which is deemed to be underutilized. The plan recommends a focus on the potential of the visitor and tourism market, and information from the Master Plan is included in attached Exhibits B and C.

Interested hotel developers and their teams, should submit their qualifications (10 sets) to the Regional Convention Center Commission, in care of the City of Columbia, Office of Economic Development, 1201 Main Street, Suite 250, Columbia, South Carolina 29201, prior to the close of business on February 28, 2001. Qualification submittals should include, but not be limited to, the following information:

- Developer's (Organization's) history
- Development experience - including specific projects similar to the one being proposed
- Financial position and resources including letters of reference and financial capabilities from banks and/or financial institutions
- Examples of how have you structured deals similar to this in the past?
- Hotel affiliation(s) - include specifics about projects, locations and descriptions of management/ownership structure(s)
- Describe, in as much detail as you feel necessary, the Development Team you would propose for this project - including the architect, engineer and other "consultants" you typically use in a project of this magnitude
- Current projects under development - how does this project affect your ability to take on additional work?
- What is your preferred project organizational structure? How do you like to work?
- Describe your firm and the specific qualifications/experience of your top managers, specifically, who would be involved in this project?
- What is your operating philosophy? How do you like to do business?
- How would you propose we do this deal?

It is anticipated that the Commission will review all respondent's submittals and choose a maximum of three (3) developers with which to have formal interviews. The interview process will result in a ranking of preferred developers and negotiations will begin to select a development partner. If the Authority cannot come to an agreement with the highest ranked developer negotiations will begin with the second ranked, and so on.

The Commission reserves the right to reject any and all of the qualification packages submitted and to begin another selection process if necessary.

The Commission is an equal opportunity organization and encourages the inclusion of minority and female firms on development teams.

Important Commission members are not to be contacted by developers during this qualification and selection process. Any questions should be addressed in writing to Jim Gambrell at The City of Columbia, Office of Economic Development, 1201 Main Street, Suite 250, Columbia, SC 29201. Responses will be made in writing to all developers.

COLUMBIA

MOU

FINAL COPY

4/17/03

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (the "MOU") by and between the CITY OF COLUMBIA ("City") and the PROJECT TEAM ("Project Team") defined below, for the development of a 300-room convention center hotel and ancillary uses (hereafter the "Hotel") in response to the City's solicitation for development teams to construct and operate the Hotel

WHEREAS, Project Team intends to construct a three hundred (300) guestroom, full service Hilton Hotel with approximately twelve thousand (12,000) square feet of meeting space in downtown Columbia adjacent to the new Midlands Regional Convention Center (the "MRCC") to satisfy the needs of conventiongoers and visitors to Columbia, and

WHEREAS, the City has determined that the Hotel is required to maximize the utilization and the economic benefits of the MRCC, and

WHEREAS, the City's support of the development of the Hotel helps to achieve this goal and understands a public-private partnership will be required to create a financially viable Hotel, and

WHEREAS, it was determined that it would be in the best interest of the City for a Non-Profit Corporation ("NPC") of the City to be the owner of the Hotel, and

WHEREAS, the Project Team submitted a proposal to finance, develop and operate the Hotel in response to the City's solicitation, and

WHEREAS, the City and the Project Team desire to document the understandings reached with respect to the financing, development and operation of the Hotel

NOW THEREFORE, in consideration of the foregoing and the mutual promises contained herein, and other valuable consideration the sufficiency and receipt of which are hereby acknowledged, the parties agree as follows

I. GENERAL CONDITIONS

- 1 This MOU reflects the intent to proceed in good faith to execute definitive written agreements with respect to the business terms and conditions herein contained. Notwithstanding anything herein to the contrary, if the City determines that it is not feasible to proceed with the Hotel project it shall have no liability under this MOU
- 2 Unless superseded by an amendment to this MOU or the final Development Management Agreement, this MOU identifies the understanding of the parties

II PURPOSE

This MOU is entered into with the understanding by all parties that the primary reason for the City's participation in the Hotel is to maximize the impact the MRCC has on the community by developing an adjacent headquarters hotel. Accordingly, it is understood that the MRCC impact is of the highest priority

III PARTIES TO THIS MEMORANDUM OF UNDERSTANDING

- 1 City – City of Columbia ("City"),
- 2 Project Team
 - 2.1 Developer – Edens & Avant Real Estate Services LLC, Garfield Traub Development; and Gary Realty, Inc
 - 2.2 Design/Builder – Turner Construction Company in association with Construction Dynamics and DESA, Inc The A/E part of their Team is - Thompson, Ventulett, Stainback & Associates, Inc Architects, Stevens & Wilkinson, and ENVIRO AgScience
 - 2.3 Operator – Hilton Corporation.
 - 2.4 Underwriter – Salomon Smith Barney, Inc

IV Hotel Description

- 1 Hotel Site – The anticipated site is located near the new MRCC and is approximately 60,000 square feet.
- 2 Parking Facility Site – The anticipated site is located near new MRCC and is approximately 80,000 square feet.
- 3 Brand – The Hotel is to be branded as a "Hilton" hotel and named by the NPC in accordance with the Operator's brand requirements
- 4 Hotel Program – The Hotel is to include 300 rentable guestrooms, including ten 10 suites The Hotel is to also include approximately 12,000 square feet of ballroom and breakout meeting space In addition, the Hotel is to include a casual restaurant and lobby bar that collectively is to provide table seating adequate to serve Hotel guests as well as those utilizing meeting space in the Hotel
- 5 Parking – The Hotel is to have access to adequate parking spaces in a larger public parking garage adjacent to the Hotel for Hotel patrons and guests
- 6 Project Quality - The construction quality and level of amenities is to be similar in all material respects to the Sheraton Overland Park Hotel and/or The Radisson Convention Center Hotel in Myrtle Beach
- 7 Development Budget - A detailed development budget will be prepared by Developer but shall be subject to the review and approval of the City

V ROLE OF THE CITY

- 1 Hotel Site Assembly -- The City agrees to acquire the Hotel Site, satisfy any environmental issues, demolish any existing structures, rezone the land for the Hotel (if required) and convey it to the NPC at cost, funded by Hotel Revenue Bond proceeds. The Developer will provide an amount satisfactory to the City in Hotel Revenue Bond proceeds for acquisition of land and site development costs associated with the Hotel.
- 2 Parking Facility -- The City is to develop a nearby Parking Facility of approximately 800 spaces. 300 parking spaces will be made available in the public parking garage for Hotel patrons and guests. The NPC is to work with the City to formulate a joint use agreement related to the Hotel parking spaces during periods of low demand.
- 3 Establish NPC -- The City is to establish a NPC to issue bonds to finance the Hotel, own the Hotel developed by the Project Team, and retain the Operator for the operation of the Hotel consistent with the terms and conditions of this MOU. The NPC articles of incorporation, bylaws and Board of Directors are to be established by the City.
- 4 NPC Financing -- The NPC is to retain the Underwriter and legal counsel to structure and issue approximately \$60 million in tax-exempt hotel revenue bonds in amounts acceptable to the City ("the Bonds") supported by Hotel revenues and the City Financial Participation. The Bonds will be issued either in one series—"Hotel Bonds" or two series—"Senior Bonds" and "Subordinate Bonds". The City shall use its best efforts to approve the issuance of a series of tax-exempt Hotel revenue bonds. The proceeds of the Bonds will be sufficient to (i) pay the development and construction costs of the project, (ii) pay 100% of debt service on the Bonds during the construction period and pay a portion of debt service during the first two operating years, (iii) fund debt service reserve funds for the Bonds, (iv) pay the fees of the Underwriter as described below, and (v) pay other financing costs including the costs of bond and underwriter's counsel, rating agency fees, trustee fees, financial advisory fees, printing costs and costs of the feasibility report, in amounts satisfactory to the City.
- 5 City Credit Support -- The City is willing to provide a credit enhancement to support an amount acceptable to the City which would be utilized for any debt service shortfall on the Subordinate Bonds or Hotel Bonds (as the case may be), if project revenues net of expenses are insufficient to provide for the debt service on the Subordinate Bonds or on the Hotel Bonds.

VI. ROLE OF THE DEVELOPER

- 1 Development of the Hotel -- The Developer will coordinate design, development, construction and delivery of the Hotel in accordance with the terms of the Development Management Agreement to be finalized between the City or NPC and the Developer.

- 2 **Development Fee** – The Developer is to be paid a development fee of 4.75% of the project budget, exclusive of land and any financing related fees, to ensure the coordination and delivery of the Hotel on time and on budget. A preliminary scope of services is presented in Attachment 1. The fee is intended to include all fees and costs associated with personnel, administrative, travel and any other expenses. The Development Fee is to be paid as follows: 33 1/3% upon closing the bond sale, 57 2/3% on a pro rata basis over the construction period based on percentage of completion of the Hotel and the balance of 10% at the issuance of a Certificate of Occupancy for the Hotel.
- 3 **Pre-Development Funding** – The Project Team will be responsible for the costs incurred prior to closing the financing. These costs include, but are not limited to, design, testing, bid packages, legal, underwriting, travel, etc. If the Hotel financing fails to close as a result of the City not meeting its obligations outlined in the Development Agreement, or as a result of an unforeseen catastrophic event not caused by any of the Project Team, the City will reimburse the Project Team for actual, documented costs incurred to that point in time up to an amount to be agreed upon. All studies, tests, plans and the like prepared or obtained by the Project Team will be assigned to and become the property of the City.
- 4 **Project Oversight** – During the design and construction phases of the Hotel, the Developer shall furnish to the City and the City's consultants all information reasonably requested concerning the designing, planning, construction and development of the Hotel. The Developer is to provide the City with the opportunity for timely review and approval of construction plans for the Hotel. The Developer acknowledges that the City may have its own construction monitor, which could also be the construction monitor for the bondholders, on the Hotel site and that Construction Oversight costs are to be paid from the Hotel budget.
- 5 **Zoning** - The City and the Developer will work together on zoning matters including those related to the height of the Hotel building setbacks and design review issues.
- 6 **Commercial Non-Discrimination Policy and Subcontracting Outreach Program** – The Developer and Operator agree to fully implement the City's Commercial Non-Discrimination Policy and Subcontracting Outreach Program and to execute any amendments covering matters as reasonably determined by the City as necessary to evidence compliance with the City's policies. In addition, it will be the goal of the Developer to have twenty-five percent (25%) of the work associated with the construction of the Hotel handled by MBE/WBE firms and fifteen percent (15%) of the development and related fees generated by this project paid to the MBE/WBE firms associated with the project.

VII ROLE OF THE CONTRACTOR

- 1 **Fee** – The Design/Builder is to be paid 8% of Design/Build costs for general conditions and a 5% fee based on the Design/Build costs for the Design/Builder's overhead and profit. The fees are intended to include all fees and costs associated with personnel, administrative, travel and any other expenses. The fee is to be paid

per a schedule to be outlined in the Design/Build Agreement. If the Underwriter does not close the financing the City will not be responsible for reimbursing for any costs incurred except as provided in Section VI, 3 herein above

- 2 Development Guarantee – Upon the execution of the Design/Build Agreement, Turner Construction guarantees that the Hotel budget, including all costs related to designing, constructing, finishing and equipping the hotel will not exceed an amount to be agreed upon between the City, the Developer and Turner Construction. At the time of the issuance of any bonds, Turner Construction is to guarantee delivery of the Hotel on a date certain for the budgeted amount. The guarantee is to be supported by a payment and performance bond acceptable to the City and in an amount acceptable to the City that names the City as dual obligee. The guarantee is to also provide the City with liquidated damages on a schedule and in amounts sufficient to equal the interest on any bonds as it becomes due. The guarantee must be acceptable to the bond underwriter and to the bondholders.
- 3 Design/Build Cost Savings – Fifty-percent (50%) of the construction cost savings realized during the construction of the Hotel will accrue to the NPC. Program/budget changes prior to the commencement of construction shall not be considered construction cost savings.

VIII. ROLE OF THE ARCHITECT

- 1 Fee – The Architect is to be paid a fee of 7.25% by the Design/Builder based on hard construction costs together with the Design/Builder's general expenses and fees. This fee is comprised of a 6% basic services fee and 1.25% for special consultants to be retained by the Architect for the project. The fee is to be paid consistent with the normal A.I.A. contractual provisions in terms of timing and amount of payments. If the Underwriter does not close the financing, the City will not be responsible for reimbursing any costs incurred except as provided in VI, 3 herein above. The fee includes all fees and costs associated with personnel, administrative, travel and any other expenses for the defined scope. The Architect will be reimbursed for any additional services or expenses as requested by the City.
- 2 Design Review – The Architect shall develop and implement a design review process that is to provide the City, neighborhood and professional staff input into the design of the Hotel. All parties pledge to use their best efforts to maintain the integrity of the Hotel and to be conscious of the time and cost of changes made during the review process.

IX. ROLE OF THE UNDERWRITER

- 1 Services Provided – Underwriter as the NPC's senior managing underwriter is to be responsible for analyzing and structuring the project, development of the financing plan, development of the supporting financial documents, and marketing the bonds.
- 2 Fee – The Underwriter fee, contingent upon a successful transaction closing, is to be either 1.5% of the total par amount of the Bonds for the Senior Bonds and 1.25% of

the total par amount of the Bonds for the Subordinate Bonds or 1 375% of the total par amount of the Hotel Bonds

X. ROLE OF THE OPERATOR

- 1 Operator Contribution -- Subject to the provisions under this Section X, the Operator will contribute \$1 5 million in the form of an interest free, self-amortizing loan whose initial principal balance, after the opening, is to automatically reduce, without payment, by 1/180th per month as long as the QMA (defined below) is in effect. If the QMA is terminated before such loan is fully amortized, Operator shall be repaid the unamortized portion of such loan. The exact amount and terms will be subject to the approval of senior management of the Operator
- 2 Qualified Management Agreement -- The Hotel is to be managed by the Operator under a 15-year Qualified Management Agreement ("QMA") that complies with Operating Guidelines for Management Contracts as set forth in the IRS Revenue Procedure 97-13 and the Internal Revenue Code of 1986, as amended, and as interpreted by the City's or NPC's Bond Counsel, as appropriate. The City has the right to approve the final form of the QMA.
- 3 Base Management Fee -- The Operator will be paid a fixed base management fee for the first four years, calculated based on 2 0% during the first year, 2 5% during the second year, 2 5% during the third year and 2 75% during the fourth year, of the projected gross operating revenues of the Hotel, and adjusted annually to reflect changes in a Market RevPar index for the remaining term. The fee structure assumes that the QMA would include a performance test that would allow for the earliest termination date to be at a time to be determined
- 4 Subordinated Base Management Fee -- The Operator will be paid a fixed subordinate management fee for the first three years, calculated based on 1 0% of the projected gross operating revenues of the Hotel, and 1 25% annually thereafter. This fee would be subordinate to either the senior project revenue bonds and the City enhanced project revenue bonds or the Hotel Bonds as applicable
- 5 Centralized Services Costs -- If required by Bond Counsel, the Operator agrees to be paid a fixed amount for centralized services allocation for the first four years, based on the Operator's current formulas and the projected gross operating revenues, and adjusted annually by CPI for the remaining term
- 6 Technical Services Fee -- The Operator is to be paid \$315,000 for technical services related to Hotel development. The fee is intended to include all fees and costs associated with personnel, administrative, travel and miscellaneous expenses. The fee is to be paid pro rata over the design and construction period based on percentage of completion of the Hotel.
- 7 Pre-Opening Marketing -- The Operator is to outline its plan for directing the pre-opening marketing activities of the Hotel in an attachment to the QMA, subject to approval by the NPC. Pre opening costs are estimated to be \$1,500,000

- 8 Non-Compete Area – For a period of time, not to exceed the time the Operator manages the Hotel, Operator agrees not to directly or indirectly operate, franchise, brand or manage another full service Hilton Hotel within a five (5) mile radius of the Hotel
 - 9 Employees – All employees of the Hotel are to be employees of the Operator who shall be solely responsible for complying with all employment laws
 - 10 City Policies – The Operator agrees that the QMA will include certain requirements by the City relating to policies including but not limited to Commercial Non-Discrimination Policy and Subcontracting Outreach Program, Equal Employment Opportunity, Drug Policy, etc
 - 11 Procurement – The Operator is to use reasonable efforts to make all purchases for the best commercial terms available. Any rebate received by the Operator related to a purchase for Hotel is applied to reduce the cost of Operator's purchasing operations and such reduction in cost (or, if any, the purchasing operation's profit) will be allocated to Hotel in the same manner as allocated to other Operator-managed hotels. Payments received from vendors for services rendered by Operator to such vendors, including market research, collection of purchasing data and participation in co-marketing or advertising programs, are not considered rebates and will be retained by Operator
 - 12 HQ Hotel Room Block Commitment – The Operator is to enter into an agreement with the Convention Center Authority that is to make available 250 of the Hotel's standard rooms and an applicable percentage of the Hotel's suites for a to-be-determined number of event nights each month for city-wide events booking the MRCC for a mutually agreeable number of months in advance. The number of rooms required to be made available can be reduced to 200 at a mutually agreeable point in time. The City is to retain the right to impose a room block rate cap on each type of room tied to the average daily group rate for such type of room, if the City determines it is required to book the event. The Operator can reasonably request release of dates beyond a to-be-agreed-upon date for certain high-impact in-house group events
-
- 13 MRCC Meeting Space Rental and Catering Policy - Subject to availability, Operator agrees to pay normal and customary rental rates for use of MRCC facilities and services and to use MRCC catering services for such functions
 - 14 Flag Approval – Hilton Corporation will need to formally approve the use of its flag, which approval is expected.

XI. ATTACHMENTS

- 1 Preliminary Development Management Scope of Services

SIGNATURES

CITY OF COLUMBIA


Print Name _____
Title _____

EDENS & AVANT REAL ESTATE
SERVICES, LLC

John H. Lumpkin, Jr President

GARFIELD TRAUB DEVELOPMENT,
LLC
By Garfield Corporation, Member

Raymond Garfield, Jr , President

GARY REALTY, INC

Charles B Gary, President

THOMPSON, VENTULETT,
STAINBACK & ASSOCIATES, INC
ARCHITECTS

Roger Neuenchwander, President

STEVENS & WILKINSON

Robert T Lyles, Chairman

ENVIRO AgSCIENCE

Louis B Lynn, President

TURNER CONSTRUCTION
COMPANY

Paul D Little, Vice President

CONSTRUCTION DYNAMICS, INC

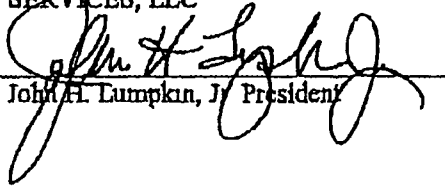
Nathaniel Spells, Sr President

SIGNATURES

CITY OF COLUMBIA

Print Name _____
Title _____

**EDENS & AVANT REAL ESTATE
SERVICES, LLC**


John H. Lumpkin, Jr, President

**GARFIELD TRAUB DEVELOPMENT,
LLC**

By Garfield Corporation, Member

Raymond Garfield, Jr , President

GARY REALTY, INC

Charles B Gary, President

**THOMPSON, VENTULETT,
STAINBACK & ASSOCIATES, INC
ARCHITECTS**

Roger Neuenschwander, President

STEVENS & WILKINSON

Robert T Lyles, Chairman

ENVIRO AgSCIENCE

Louis B Lynn, President

**TURNER CONSTRUCTION
COMPANY**

Paul D Little, Vice President

CONSTRUCTION DYNAMICS, INC

Nathaniel Spells, Sr President

SIGNATURES

CITY OF COLUMBIA

Print Name _____
Title _____

**EDENS & AVANT REAL ESTATE
SERVICES, LLC**

John H. Lumpkin, Jr President

**GARFIELD TRAUB DEVELOPMENT,
LLC**
By Garfield Corporation, Member

Raymond Garfield, Jr, President

GARY REALTY, INC



Charles B Gary, President

**THOMPSON, VENTULETT,
STAINBACK & ASSOCIATES, INC**
ARCHITECTS

Roger Neuenschwander, President

STEVENS & WILKINSON

Robert T Lyles, Chairman

ENVIRO AgSCIENCE

Lous B Lynn, President

**TURNER CONSTRUCTION
COMPANY**

Paul D Little, Vice President

CONSTRUCTION DYNAMICS, INC

Nathaniel Spells, Sr President

SIGNATURES

CITY OF COLUMBIA

Print Name _____
Title _____

EDENS & AVANT REAL ESTATE
SERVICES, LLC

John H Lumpkin, Jr President

GARY REALTY, INC

Charles B Gary, President

Prime Architect
STEVENS & WILKINSON *OF*
South Carolina, Inc
Robert T Lyles, Chairman

GARFIELD TRAUB DEVELOPMENT,
LLC
By Garfield Corporation, Member

Raymond Garfield, Jr, President

Design Architect
THOMPSON, VENTULETT,
STAINBACK & ASSOCIATES, INC ,
ARCHITECTS

Roger Neuenschwander, President

ENVIRO AgSCIENCE

Louis B Lynn, President

TURNER CONSTRUCTION
COMPANY

Paul D Little, Vice President

CONSTRUCTION DYNAMICS, INC

Nathaniel Spells, Sr President

SIGNATURES

CITY OF COLUMBIA

Print Name _____
Title _____

EDENS & AVANT REAL ESTATE
SERVICES, LLC

John H Lumpkin, Jr President

GARFIELD TRAUB DEVELOPMENT,
LLC
By Garfield Corporation, Member

Raymond Garfield, Jr , President

GARY REALTY, INC

Charles B Gary, President

THOMPSON, VENTULETT,
STAINBACK & ASSOCIATES INC
ARCHITECTS

Roger Neuenschwander, President

STEVENS & WILKINSON

Robert T Lyles, Chairman

ENVIRO AgSCIENCE

Louis B Lynn, President

TURNER CONSTRUCTION
COMPANY



Paul D Little, Vice President

CONSTRUCTION DYNAMICS, INC

Nathaniel Spells, Sr President

SIGNATURES

CITY OF COLUMBIA

Print Name _____
Title _____

**EDENS & AVANT REAL ESTATE
SERVICES, LLC**

John H. Lumpkin, Jr President

**GARFIELD TRAUB DEVELOPMENT
LLC**

By Garfield Corporation, Member

Raymond Garfield, Jr, President

GARY REALTY, INC

Charles B Gary, President

**THOMPSON, VENTULETT,
STAINBACK & ASSOCIATES, INC
ARCHITECTS**

Roger Neuschwander, President

STEVENS & WILKINSON

Robert T Lyles, Chairman

ENVIRO AgSCIENCE

Louis B Lynn, President

**TURNER CONSTRUCTION
COMPANY**

Paul D Little, Vice President

CONSTRUCTION DYNAMICS, INC

Nathaniel Spells, Sr President

SIGNATURES

CITY OF COLUMBIA

Print Name _____
Title _____

**EDENS & AVANT REAL ESTATE
SERVICES, LLC**

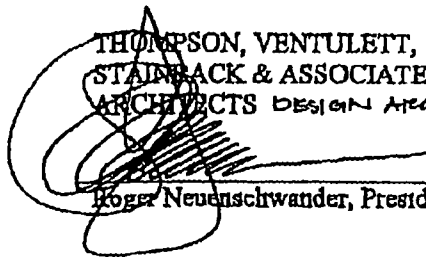
John H Lumpkin, Jr President

**GARFIELD TRAUB DEVELOPMENT,
LLC**
By Garfield Corporation, Member

Raymond Garfield, Jr, President

GARY REALTY, INC

Charles B Gary, President


THOMPSON, VENTULETT,
STAINBACK & ASSOCIATES, INC
ARCHITECTS DESIGN ARCHITECT

Roger Neuenschwander, President

STEVENS & WILKINSON
PRIME / ARCHITECT of RECORD

Robert T Lyles, Chairman

ENVIRO AgSCIENCE

Louis B Lynn, President

**TURNER CONSTRUCTION
COMPANY**

Paul D Little, Vice President

CONSTRUCTION DYNAMICS, INC

Nathaniel Spells, Sr President

SIGNATURES

CITY OF COLUMBIA

Print Name _____
Title _____

**EDENS & AVANT REAL ESTATE
SERVICES, LLC**

John H Lumpkin, Jr President

**GARFIELD TRAUB DEVELOPMENT,
LLC**
By Garfield Corporation, Member

Raymond Garfield, Jr, President

GARY REALTY, INC

Charles B Gary President

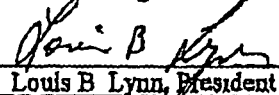
**THOMPSON, VENTULETT,
STAINBACK & ASSOCIATES, INC**
ARCHITECTS

Roger Neuenschwander, President

STEVENS & WILKINSON

Robert T Lyles, Chairman

ENVIRO AgSCIENCE


Louis B Lynn, President

**TURNER CONSTRUCTION
COMPANY**

Paul D Little, Vice President

CONSTRUCTION DYNAMICS, INC

Nathaniel Spells, Sr President

SIGNATURES

CITY OF COLUMBIA

Print Name _____
Title _____

**EDENS & AVANT REAL ESTATE
SERVICES, LLC**

John H Lumpkin, Jr President

**GARFIELD TRAUB DEVELOPMENT,
LLC**
By Garfield Corporation, Member

Raymond Garfield, Jr, President

GARY REALTY, INC

Charles B Gary President

**THOMPSON, VENTULETT,
STAINBACK & ASSOCIATES, INC**
ARCHITECTS

Roger Neuenschwander, President

STEVENS & WILKINSON

Robert T Lyles, Chairman

ENVIRO AgSCIENCE

Louis B Lynn, President

**TURNER CONSTRUCTION
COMPANY**

Paul D Little, Vice President

CONSTRUCTION DYNAMICS, INC

Nathaniel Spells, Sr President

DESA, INC

Diane E. Sumpter
Diane E. Sumpter, President & CEO

HILTON CORPORATION

Stephen H. Crabill, Vice President,
Southeast Region

SALOMON SMITH BARNEY, INC

William M. Corrado, Director

DESA, INC

Diane B Sumpter, President & CEO

HILTON CORPORATION

Stephen H. Crabill, Vice President,
Southeast Region

CITIGROUP GLOBAL MARKETS
INC


William M. Corrado, Director

DESA, INC

Diane B Sumpter, President & CEO

HILTON HOTELS CORPORATION


Greg S Dickens, Vice President
South Central Region

SALOMON SMITH BARNEY, INC

William M Corrado, Director

Exhibit A - Page 9

DATE RECEIVED

ATTACHMENT 1

PRELIMINARY DEVELOPMENT MANAGEMENT SCOPE OF SERVICES

I. PRE-CONSTRUCTION SERVICES

- 1 Identify and quantify the Owner's goals for the Project so that these goals can be communicated clearly to the entire Project team
- 2 Identify for the Owner a list of required consultants and other professionals required to develop the Project that have not already been envisioned.
- 3 Develop an initial Project development schedule describing the steps and duration of the major tasks required to develop the Project.
- 4 Identify other parameters, such as code, zoning, land use or other such restrictions, which have a potential impact of the design development or construction of the Project.
- 5 Work with architect and operator to refine the current Project program and master plan
- 6 Review and refine the preliminary Project budget outlining the expected costs to develop the Project.
- 7 Develop a bid packaging plan.

II. DESIGN COMPLETION PHASE (AFTER FINANCING PLAN APPROVAL)

- 1 Manage the design and development team throughout the entire documentation process to ensure adherence to the approved program, budget and schedule
- 2 Develop the organizational structure of the development team, establish responsibilities and line of authority and establish communication procedures to be used throughout the development process.
- 3 Provide periodic review of design documents for completeness, feasibility, constructability and appropriateness of building systems and materials
- 4 Provide periodic budget checks throughout the design process and propose and review value engineering alternates required to maintain Project budget.
- 5 Implement any design changes required to maintain the Project budget.
- 6 Identify and coordinate required site studies, such as soil and environmental reports necessary to design and obtain construction permits for the Project.

- 7 Assist the Owner, architect and/or general contractor in the review of the Project with code officials and submission of the Project to obtain required building permits
- 8 Work with the architect to prepare bid packages
- 9 Review contractor submittals and make recommendations
- 10 Assist the City with negotiating the contractor contracts
- 11 Develop and manage the entire accounting and funding process to include receipt and review of all Project related invoices and payment applications and assembly of such documents into a monthly draw package. Submit this package to the City with recommendation for payment and manage and/or monitor payment by the City
- 12 Establish and monitor the FF&E procurement process for adherence to the approved Project budget and schedule.
- 13 Maintain Project records and Project communication procedures throughout the development process

III. CONSTRUCTION PHASE

- 1 Provide on-site representation throughout the entire construction process as the City's representative.
- 2 Monitor the development and maintenance of the construction schedule by the general contractor(s)
- 3 Conduct regular on-site meetings with the general contractor(s), architect, operator and other appropriate development team members to coordinate and maintain the construction process
- 4 Review and coordinate all requests for information from the general contractor(s) for timely response by the architect. Review and monitor all supplemental instructions and directives for potential impact on the Project budget and schedule
- 5 Review all invoices and applications for payment from the general contractor(s) and design team and include all approved requests in the monthly draw package to be submitted to the City for payment.
- 6 Provide a monthly report to the City that summarizes the status of the Project cost and schedule
- 7 Review change proposals submitted by the general contractor(s) for appropriateness and accuracy and recommend acceptance and/or payment of such changes to the City
- 8 Monitor the submission of shop drawings and product samples by the general contractor(s) and response and review by the architect for timeliness and appropriateness

- 9 Monitor the procurement, warehousing, delivery and installation of all FF&E with the purchasing agent and associated vendors and contractors to ensure timeliness.
- 10 Develop with the design team and general contractor the construction punch lists for all areas of the Project. Monitor implementation and completion of all punch list items
- 11 Assist the general contractor(s) with acquisition of all government approvals required to receive a certificate of occupancy
- 12 Maintain all Project records throughout the construction process

IV POST-CONSTRUCTION PHASE

- 1 Assist the general contractor(s) and operator in conducting all move-in operations, system start-ups and other transitional requirements
- 2 Manage the closeout of the construction contract, punch list completion and receipt and documentation of all final lien waivers
- 3 Close out the Project accounting and provide the final status of the Project budget.
- 4 Obtain and turnover to operations and/or the Owner all product and warranty information pertaining to the Project.

Request for Proposals



Convention Center Hotel

**CITY OF COLUMBIA, SOUTH CAROLINA
REQUEST FOR PROPOSALS
CONVENTION CENTER HOTEL**

I OVERVIEW The City of Columbia, South Carolina ('City') is issuing this request for proposals ("RFP") for the development and operation of a full service convention center hotel to support the Columbia Metropolitan Convention Center ("Convention Center") The Convention Center is currently under construction and is scheduled to be completed in September 2004 The completion of this facility will represent a substantial investment and the culmination of unprecedented cooperation between many organizations in the area An important factor in the success of convention centers nationwide is the affiliation of the convention center with a hotel For this reason, the City is seeking proposals for the construction ownership, and operation of a convention center hotel ('Hotel')

II GENERAL INFORMATION AND INSTRUCTIONS

A PROCUREMENT PROCESS The RFP is not a bid In the event the City elects to negotiate a contract with the successful proposer such contract shall contain terms and conditions consistent herewith The City reserves the right, in its sole discretion, to reject all submissions reissue a subsequent RFP terminate, restructure or amend this procurement process at any time The final selection and contract negotiation rests solely with the City The City shall establish a special committee ('Committee') for the purpose of reviewing the proposals and making appropriate recommendations to City Council Where the context permits the term 'City' shall include the Committee and City Council

B QUESTIONS Questions are allowed and encouraged to clarify this RFP All questions or requests for information shall be in writing and addressed to City of Columbia, Attn Steven A Gantt PO Box 147 Columbia, SC 29217 Such written questions may also be transmitted by facsimile to (803) 255 8922 or e-mail to sagantt@columbiasc.net Upon request the City shall provide a copy of its market study prepared by PKF Consulting

Proposers shall not lobby or otherwise contact members of City Council or the Committee with respect to this RFP Such contact shall constitute grounds for rejection of a proposal

C PRE-RESPONSE MEETING A pre-response meeting will be held on Monday, April 19, 2004, at 2 00 p m at the City Council Chambers City Hall 1737 Main Street, Columbia, SC Proposers are not required to attend but are encouraged to do so

D REJECTION OF PROPOSALS The City may reject any proposals which do not conform to the essential requirements of the RFP

E CONFIDENTIALITY All information materials or other documents submitted by a proposer shall not be released or made otherwise available to any person or entity except the City's representatives assisting in this procurement process, until public opening of the proposals, unless required by law or judicial process. Proprietary or financial information submitted to the City by a proposer will not be disclosed if proposer visibly marks each part of the proposal which proposer considers to be confidential financial or proprietary information with the word "Confidential" unless required by law or judicial process.

F EVALUATION CRITERIA The following shall be used in evaluating proposals and the proposals should include information necessary for such evaluation:

1 Past Performance - The proposer's satisfactory past experience in developing and operating hotels.

2 Proposed Investment /Financial Ability - The total capital investment proposed to be made in the Hotel and the financial ability of the proposer.

3 Performance of Requested Services - Demonstration that proposer currently has the capability, qualifications, and experience to develop and operate the Hotel.

4 Exceeding Minimum - Greater consideration will be given to proposals exceeding the Minimum Hotel Specifications.

5 Maximization of City Incentives - The City has outlined the incentives it is willing to grant for this project below, and greater consideration will be given to proposals exceeding Minimum Hotel Specifications and/or requiring less City incentives.

G PROPOSALS, FORMAT

1 All proposals must be clearly marked "Proposal for Development and Operation of Columbia Convention Center Hotel".

2 Proposals must be signed by an authorized person and submitted in sealed envelopes and shall include at least ten (10) copies.

3 Proposals must be submitted by hand delivery (including delivery by recognized courier) to Steven A. Gantt, City of Columbia, City Hall, 1737 Main Street, Columbia, SC 29201, or mailed to City of Columbia, Attn: Steven A. Gantt, PO Box 147, Columbia, SC 29217.

4 Proposals must be received on or before May 4, 2004.

H INTERVIEWS/CONTRACT NEGOTIATIONS The City will evaluate

the proposals and may in its discretion elect to interview meet with and/or require public presentations from one or more of the proposers before making final selection. Once final selection is made a contract will be negotiated with the selected proposer which may include a security deposit requirement. The City intends to make a final selection prior to July 1 2004.

III TERMS AND CONDITIONS The physical characteristics of the Hotel enumerated herein are minimum requirements. The goal of the City is to obtain the largest number of guest accommodations at the highest possible quality as a result of this RFP. Proposers are therefore encouraged to enhance their submissions with respect to all elements of the Hotel, including but not limited to numbers of guests rooms, size of meeting areas restaurant lounge/bar, kitchen, facilities and other guest amenities. Preference will be given to size of facility quality of finishes design features including expansion capability and guest services to be provided.

A MINIMUM HOTEL SPECIFICATIONS

- 1 200 guest rooms of not less than 350 square feet / room
- 2 5 000 square feet of meeting space
- 3 Kitchen facility capable of providing service to a restaurant lounge/bar, room service catering to meeting space
- 4 Restaurant facilities of not less than 100 seats offering three meals per day seven days per week
- 5 Lounge/bar facility with not less than 50 seats. A lobby bar may be substituted in lieu of dedicated lounge bar
- 6 Swimming pool of sufficient size to provide a pleasing recreational experience for guests
- 7 Fitness room or facility appropriately equipped
- 8 Business center equipped with appropriate modern business equipment and technology
- 9 The building exterior shall be constructed with long lasting aesthetically pleasing materials (e.g., masonry brick precast). Interiors finishes shall be of first class quality
- 10 Mechanical systems shall be designed to maximize efficiency guest comfort, and aesthetics

11 The Hotel must be branded or flagged by a nationally known hotel operator with a nationwide reservation system. Significant weight and preference will be afforded to proposals which offer a "First-Class" nationally known hotelier it being the intent of the City to attract visitors and groups from across the United States

B ROOM BLOCK AGREEMENT

1 The primary mission of the Hotel will be to provide support for the convention activities of the Convention Center. Consequently, the proposers must be willing to enter into a satisfactory long term room block agreement that would generally require committing at least 200 rooms and appropriate hotel meeting space for qualified (city-wide) events held at the Convention Center up to 14 nights per month for events that book the Convention Center three years or more in advance. The requirements of the room block agreement would decrease as the booking horizon shortens.

2 All reasonable efforts shall be made to allow the Hotel to charge the prevailing room rates to a qualified event. However, if a room rate cannot be successfully negotiated between the Hotel and the qualified event, the City may, at its sole discretion, require the Hotel to charge a predetermined rate that would be mutually agreed upon between the City and the Hotel as part of the room block agreement.

3 The details of the room block agreement are subject to negotiation between the City and the Hotel and are an integral part of the City offering the incentives outlined below.

C HOTEL SITE(S) The Hotel shall be constructed on one of two City owned parcels generally shown or described on the attached Exhibits "A" and "B" respectively. The parcel described on Exhibit "A" is bounded on the north by Senate Street and is called "Parcel A" and the parcel described on Exhibit "B" is bounded on the south by Senate Street and is called "Parcel B". The City intends to construct a public parking garage either along Pendleton Street on property currently owned by the City and on property not yet acquired by the City or on property currently owned by the City which includes Parcel A. If the garage is constructed on Pendleton Street, Parcel A will be the preferred Hotel site. If the garage is constructed on land which includes Parcel A then Parcel B will be the Hotel site.

D CITY INCENTIVES

1 **GROUND LEASE** The City will ground lease the site for a 50 year term for a rental of One Dollar (\$1.00) per year paid in advance. The ground lease shall not be subordinated to liens.

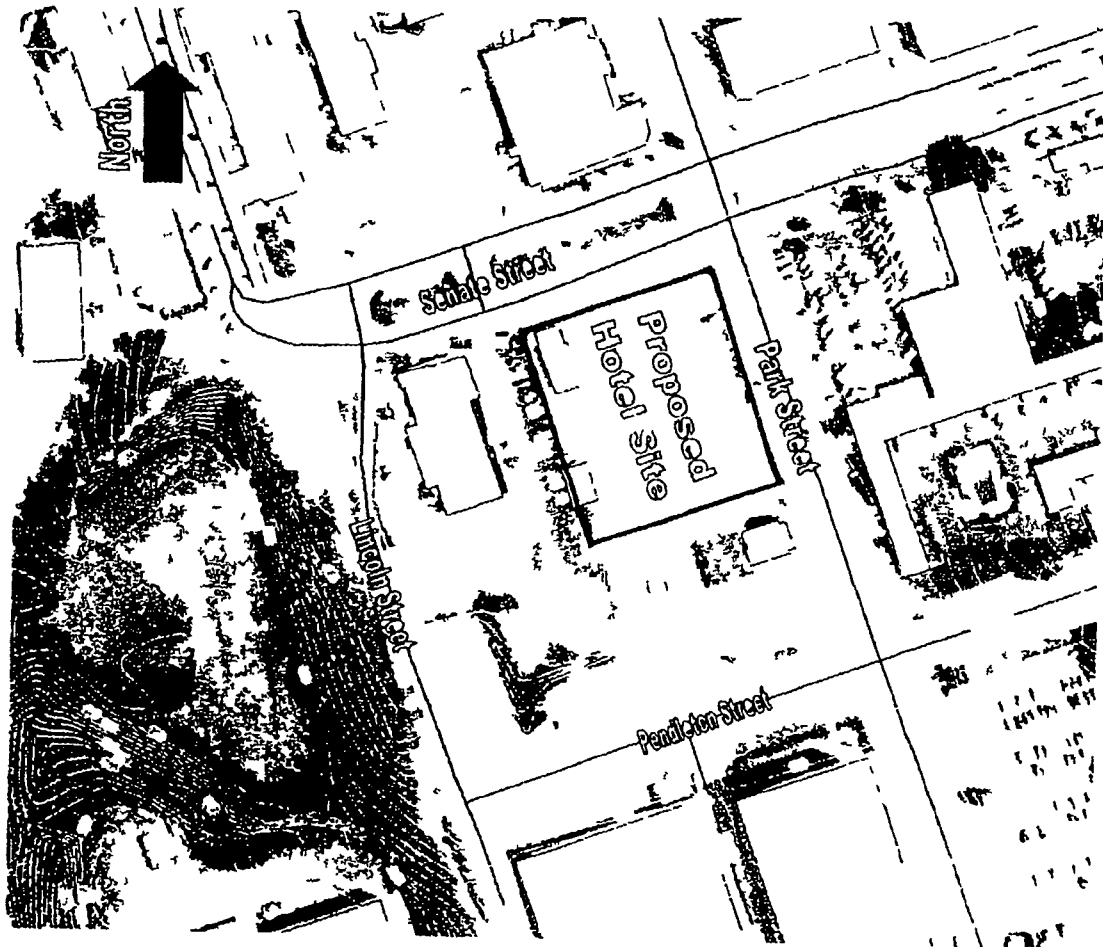
2 **PARKING** The City will provide one parking space per sleeping room in a City parking facility to be constructed nearby to the Hotel site and managed and maintained by the City. These parking spaces will be made available to the Hotel at 50% of the

prevailing market rates (the current daily market rate is \$10.00). The City anticipates entering into a joint use parking agreement related to the parking facility that will allow the City to rent as many spaces as possible to daily visitors. As such, the City envisions working with the Hotel to determine the reasonable number of spaces that will be required for the Hotel on a daily basis and the Hotel will be charged only for the spaces it utilizes. In this way, the Hotel can minimize its parking costs and the City can maximize its parking revenues.

3. The City reserves the right but not the obligation to consider additional incentives to induce a higher quality product. If additional incentives are required, please specify and explain.

E. NON-DISCRIMINATION Proposer will take affirmative action in complying with all federal, state, and local requirements concerning fair employment and employment of the handicapped and concerning the treatment of all employees without regard or discrimination on the basis of race, color, religion, sex, national origin, or physical handicap. Any contract extended subsequent to this RFP shall require proposers to comply with the City's Commercial Non-Discrimination Policy and Sub-Contractor Outreach Program.

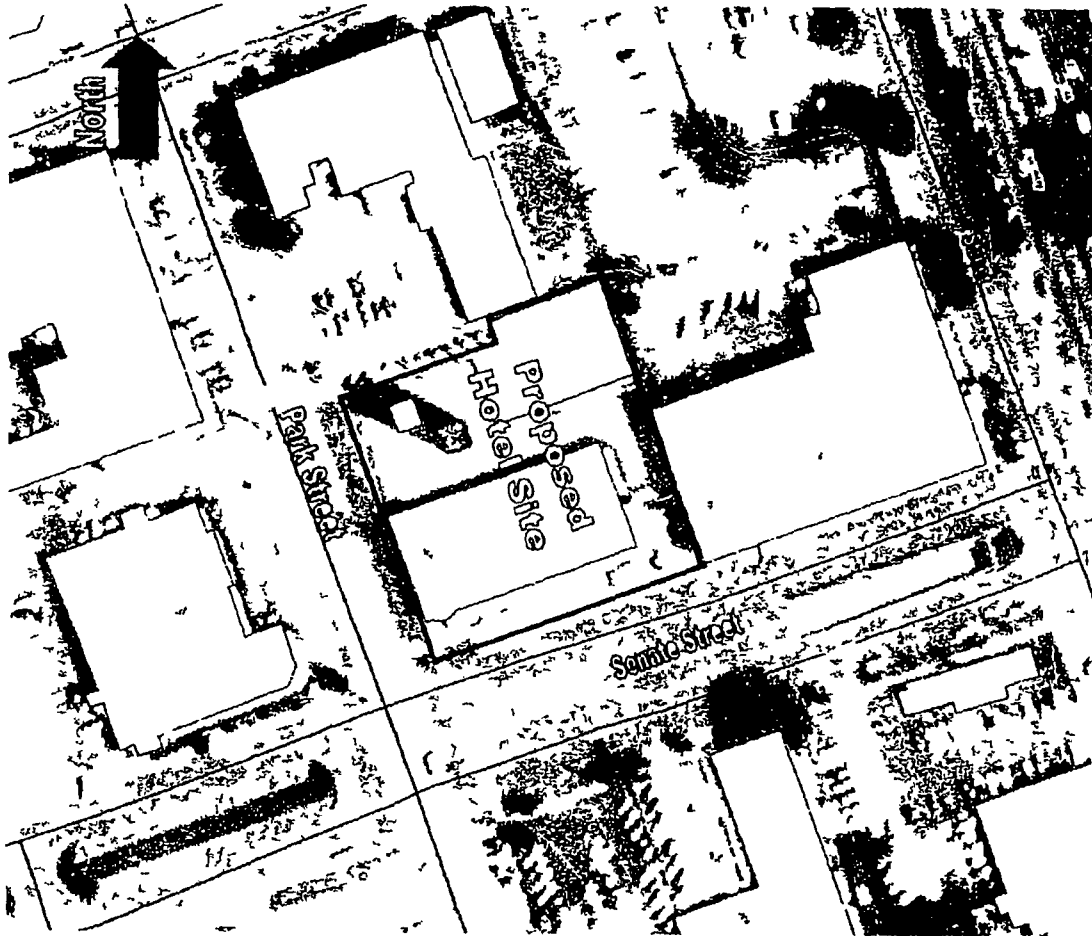
Exhibit "A"



Description of Site

The proposed Hotel site is located at the southwest corner of Senate and Park Streets. The approximate boundaries of the property are as follows: northern boundary (Senate Street) - 207 feet, eastern boundary (Park Street) - 243 feet, western boundary - 243 feet, southern boundary - 210 feet.

Exhibit "B"



Description of Site

The proposed Hotel site is located at the northeast corner of Senate and Park Streets. The approximate boundaries of the property are as follows: southern boundary (Senate Street) - 206 feet; western boundary (Park Street) - 186 feet; northern boundary (irregular line) - 206 feet; eastern boundary - 208 feet.

ADDENDUM #1

April 13, 2004

CITY OF COLUMBIA, SOUTH CAROLINA REQUEST FOR PROPOSALS CONVENTION CENTER HOTEL

- 1 Delete the "Room Block Agreement" section of the RFP (Subsection B" of Section III) submitted on or about April 2 2004
- 2 Insert the following Room Block Agreement section (Subsection "B" of Section III) into the RFP

B ROOM BLOCK AGREEMENT

1 The primary mission of the Hotel will be to provide support for the convention activities of the Convention Center. Consequently the proposers must be willing to enter into a satisfactory long-term room block agreement that would generally require committing at least 200 rooms and appropriate hotel meeting space for qualified (city-wide) events held at the Convention Center up to 14 nights per month for events that book the Convention Center one year or more in advance. The requirements of the room block agreement would be eliminated within the one year period.

2 All reasonable efforts shall be made to allow the Hotel to charge the prevailing room rates to a qualified event. However, if a room rate cannot be successfully negotiated between the Hotel and the qualified event, the City may, at its sole discretion, require the Hotel to charge a predetermined rate that would be mutually agreed upon between the City and the Hotel as part of the room block agreement.

3 The details of the room block agreement are subject to negotiation between the City and the Hotel and are an integral part of the City offering the incentives outlined below.

ADDENDUM #2

April 15, 2004

**CITY OF COLUMBIA, SOUTH CAROLINA
REQUEST FOR PROPOSALS
CONVENTION CENTER HOTEL**

Due to the number of people on the selection committee for the convention center hotel,
please submit 15 copies of your proposal instead of 10

**MARKET STUDY, FINANCIAL PROJECTIONS AND
ECONOMIC RETURN ANALYSIS
FOR THE
PROPOSED HILTON HOTEL
TO BE LOCATED IN
DOWNTOWN COLUMBIA, SOUTH CAROLINA**

Prepared For
Mr. Steven Gantt
Assistant City Manager for Development
1737 Main Street
Columbia South Carolina 29217

Prepared By
PKF Consulting
Atlanta Georgia
3340 Peachtree Road
Suite 580
Atlanta GA 30326

Date of the Report
October 2003

GARFIELD000395

October 15 2003

Mr. Steven Gantt
Assistant City Manager for Development
1737 Main Street
Columbia South Carolina 29217

RE Proposed Hilton Hotel, Columbia, South Carolina

Dear Mr. Gantt:

The accompanying report entitled 'Market Study Financial Projections and Economic Return Analysis for the Proposed Hilton Hotel to be Located in Downtown Columbia, South Carolina' is a modified version of a same-titled report that was issued on June 20, 2003 in accordance with the terms and conditions of our engagement letter dated March 27, 2003.

In accordance with the requests from you and Citigroup Global Markets Inc., we have revised certain sections of the report dated June 20, 2003 to reflect changes in the capital structure that have occurred subsequent to that report.

As in all studies of this type, the estimated results are based upon our assumption that competent and efficient management would operate the facility.

The conclusions reached are based upon our current knowledge of the City of Columbia and the Greater Columbia area and surrounding lodging submarkets as of the completion of our fieldwork in May and June 2003.

The terms of our engagement are such that we have no obligation to revise this report to reflect events or conditions that occur subsequent to the date of the completion of our fieldwork. However, we are available to discuss the necessity for revision in view of changes in the economic or market factors affecting the proposed project.

The estimated operating results contained herein are based on estimates and assumptions that are inherently subject to uncertainty and variation. Some assumptions inevitably will not materialize, and unanticipated events and circumstances may occur. Therefore, the actual operating results achieved during the period covered by the analysis will vary from the estimates contained herein, and the variations may be material. It should also be noted that this report has been prepared for your use and guidance in determining the feasibility of the project.

GARFIELD000396

We would be pleased to hear from you if we can be of further assistance in the interpretation and application of our findings and conclusions. We express our appreciation to you for the opportunity to assist you with this project.

Thank you for selecting PKF Consulting for professional services.

Sincerely,

PKF Consulting

Peter D. Keim, ISHC
Vice President

Adam D. Valente
Senior Consultant

/adv

Table of Contents

SECTION I INTRODUCTION

INTRODUCTION	1
METHODOLOGY	2
MAJOR ASSUMPTIONS	4

SECTION II SUMMARY OF IMPORTANT FACTS AND CONCLUSIONS

EXECUTIVE SUMMARY	1

SECTION III SITE AND LOCATION ANALYSIS

LOCATION ANALYSIS	1
SITE LOCATION	1
ACCESS AND VISIBILITY	4
ACCESS	4
VISIBILITY	5

SECTION IV MARKET AREA OVERVIEW

INTRODUCTION	1
U S ECONOMIC REVIEW	1
SOUTH REGION ECONOMIC REVIEW	3
INTRODUCTION	5
ECONOMIC AND DEMOGRAPHIC INDICATORS	6
<i>Population</i>	6
<i>Employment, Unemployment and Earnings</i>	6
<i>Retail Sales</i>	9
STATE CAPITAL	10
NATIONAL ADVOCACY CENTER	10
FORT JACKSON	11
UNIVERSITY OF SOUTH CAROLINA	11
<i>Academic Programs and Enrollment</i>	12
<i>Moore School of Business and Daniel Management Center</i>	15
<i>Proposed USC Research Campus</i>	16
LEISURE TOURISM AND CONVENTION BASE	17
<i>Carolina Center</i>	18

Table of Contents

<i>Edventure Children's Museum</i>	19
<i>Columbia Metropolitan Convention Center</i>	19
<i>Vista District</i>	24
TRANSPORTATION NETWORK	25
<i>Surface Transit</i>	25
<i>Air Transit</i>	26
CONCLUSION	27

SECTION V COMPETITIVE MARKET ANALYSIS

NATIONAL AND REGIONAL OVERVIEW	1
NATIONAL OVERVIEW	1
REGIONAL OVERVIEW	2
COMPETITIVE HOTEL SUPPLY	2
INTRODUCTION	2
REVIEW OF THE PRIMARY COMPETITIVE SET	3
HISTORICAL MARKET PERFORMANCE	11
COMPETITIVE SUPPLY OF ROOMS	12
COMPETITIVE MARKET LODGING DEMAND	12
OCCUPANCY	14
AVERAGE RATES PER OCCUPIED ROOM	16
DEMAND SEGMENTATION	20
TRANSIENT CORPORATE DEMAND	20
GROUP MEETING DEMAND	20
UNIVERSITY-RELATED DEMAND	21
OTHER DEMAND	22
FUTURE HOTEL SUPPLY ADDITIONS	23
PROJECTED FUTURE LEVELS OF DEMAND	25

SECTION VI MEETING PLANNER SURVEY RESULTS

INTRODUCTION	1
SURVEY SECTIONS, QUESTIONS & RESULTS	2
GENERAL LODGING PATTERNS	3
<i>Geographic Preference</i>	3
<i>Seasonality</i>	3
<i>Lodging Selection Criteria</i>	4
<i>Number of Room Nights Required</i>	4

Table of Contents

<i>Average Length of Stay Per Guest and Room Type Desired</i>	5
<i>Sampling of Hotels Used and Typical Rates Paid</i>	5
GENERAL MEETING PATTERNS	6
<i>Frequency of Off-Site Meetings</i>	6
<i>Meeting Space Selection Criteria</i>	6
<i>The Number of Attendees Per Event</i>	6
<i>Number of Guests at a Sit-Down Banquet</i>	7
<i>Preferred Hotel for Meetings</i>	7
QUESTIONS SPECIFIC ABOUT THE PROJECT	7
<i>Hotel Size in Guestrooms</i>	7
<i>Quality Level Preference</i>	8
<i>Amenities and Facilities</i>	8
<i>Room Rate Expectation</i>	9
CONCLUSION	9

SECTION VII RECOMMENDED FACILITIES

OVERVIEW OF A CONVENTION CENTER HOTEL	1
CONVENTION CITY ATTRIBUTES	2
CONVENTION CENTER ATTRIBUTES	2
CONVENTION CENTER HOTEL ATTRIBUTES	2
RECOMMENDED FACILITIES	3
MARKET POSITION	3
COMPETITIVE CONVENTION CENTER HOTEL ANALYSIS	4
FACILITIES PROGRAM FOR THE PROJECT	5
<i>Guestrooms</i>	5
<i>Meeting and Function Space</i>	6
<i>Other Facilities</i>	8
<i>Guestroom Amenities</i>	9
SUMMARY	11

SECTION VIII ESTIMATED UTILIZATION AND FINANCIAL ANALYSIS

MARKET POSITION AND UTILIZATION	1
DEMAND GROWTH	2
PROJECTED MARKET PENETRATION OF THE PROJECT	4
AVERAGE RATE PER OCCUPIED ROOM	7
FISCAL YEAR CONVERSION	9
STABILIZED YEAR ESTIMATE	10
FINANCIAL PROJECTIONS	12

Table of Contents

BASES FOR CASH FLOW PROJECTIONS	12
DEPARTMENTAL REVENUES AND EXPENSES	12
ROOMS REVENUES AND EXPENSES	16
FOOD AND BEVERAGE REVENUE AND EXPENSES	17
TELECOMMUNICATIONS REVENUES AND EXPENSES	18
PARKING DEPARTMENT REVENUES AND EXPENSES	19
OTHER OPERATED DEPARTMENTS REVENUES AND EXPENSES	20
RENTALS AND OTHER INCOME	21
UNDISTRIBUTED OPERATING EXPENSES	22
ADMINISTRATIVE AND GENERAL	22
FRANCHISE FEES	23
MARKETING	23
PROPERTY OPERATIONS AND MAINTENANCE	24
UTILITY COSTS	25
MANAGEMENT FEES AND FIXED CHARGES	25
MANAGEMENT FEES	25
REAL ESTATE AND PROPERTY TAXES	26
INSURANCE	26
RESERVE FOR REPLACEMENT	27
ESTIMATED ANNUAL OPERATING RESULTS	28
HOLDING PERIOD	28
INFLATION	29
OPERATING REVENUES AND EXPENSES DURING THE HOLDING PERIOD	29
 <u>SECTION IX ECONOMIC RETURN ANALYSIS</u>	
ECONOMIC RETURN ANALYSIS	2
CONCLUSION	5

Section I: Introduction

UNFILED000402

INTRODUCTION

In May 2003 the City of Columbia engaged PKF Consulting to conduct a market study and prepare financial projections to assess the market and operating potential of a proposed hotel (the Project) to be located next to the convention center under construction adjacent to the Vista District in Downtown Columbia South Carolina This report presents a narrative of the study's findings conclusions and recommendations

The study focused on the determination of current and potential future demand for hotel facilities in the market area an assessment of the area's existing and potential future competitive supply of lodging facilities the share of the market the subject hotel could reasonably attain after the Project is constructed and the prospective cash flow from operations available for debt service, taxes on income and a return on invested capital

This report presents a(n)

- ❖ Summary of salient facts and conclusions
- ❖ Current economic and demographic overview of the U S the South Region and the Columbia MSA
- ❖ Description of the subject site and its environs and an opinion of its suitability for the Project
- ❖ Overview of the major lodging demand generators that provide the majority of accommodated and under accommodated demand to the market

October 2003

GARFIELD000403

Descriptive analyses of the lodging properties expected to be competitive with the Project including their identities facilities and approximate level of performance

- ❖ Description of the proposed hotel additions that potentially will increase the Project's competition
- ❖ Summary of a survey of meeting planners and potential users of the Project conducted to qualify and quantify the current lodging and meeting patterns of each organization surveyed and provide an opinion of the appeal of the Project
- ❖ Recommendations of the size of the Project appropriate quality level brand and a detailed facilities program,
- ❖ Estimate of revenue potential for the project expressed through the primary indicators used throughout the lodging industry occupancy average daily rate (ADR) and revenue per available room (RevPAR)
- ❖ Estimate of operating cash flow potential for the Project and
- ❖ Economic return analysis

METHODOLOGY

The study methodology consisted of the following components

An evaluation of the suitability of the subject hotel's location with regard to the following factors

- ❖ Location and ambience of the immediate vicinity both present and future

- ⋮ Accessibility for both vehicles and pedestrians
- ❖ Visibility of the hotel,
- ❖ Proximity to area amenities and services
- ❖ Relationship to area demand generators
- ❖ Advantages and disadvantages relative to competitive hotels and
- ❖ Relationship to area development projects

An analysis of relevant data regarding the market area determined whether the overall economic environment appears suitable for the development of the Project

Primary market research in the area consisted of interviews with representatives of the University of South Carolina (USC), Palmetto Health Alliance the Columbia Chamber of Commerce Midlands Regional Convention Authority the Columbia Convention & Visitors Bureau, Edens & Avant Hilton Hotels Corporation the Columbia Hotel and Lodging Association the Carolina Center the National Advocacy Center, the Columbia Sports Council and the local hotel and business community

A meeting planner survey focused on understanding the lodging and meeting needs of state professional and trade associations and aided in determining the level of appeal the Project would have for potential users of the proposed hotel

Another analysis looked at the historical growth of demand for lodging accommodations within a defined competitive set of hotels This analysis

estimated future growth in demand in the market area for the principal segments of demand which are transient commercial group meetings and conferences university-related and other. A comparison to the Project of the current supply of competitive hotels catering to these demand segments and estimates of their recent performance led to conclusions about the market potential for the Project.

The completion of projections of future market area supply and demand facilitated an estimate of the share of the market the subject facility should be able to capture by demand segment for the first ten years of its operation beginning May 2005, the projected opening date for the Project. This market share estimate translated into projected performance in terms of occupancy, average rate per occupied room, and cash flow from operations available for debt service, income taxes, and a return on investment. An economic return analysis determined the feasibility of the Project based upon the expected costs of the Project, defined investment criteria, and several key assumptions.

Note: There were instances when specific individuals chose not to meet or discuss the Project or the local hotel market. Furthermore, while the number of meeting planner surveys returned was higher than average, not all individuals surveyed responded.

MAJOR ASSUMPTIONS

The findings, conclusions, and recommendations in this report are based in part on the following major assumptions:

- ❖ The hotel will open as a Hilton Hotel on or about September 1, 2005.
- ❖ Competent professional management will operate the Project, and
- ❖ The hotel will offer facilities, guest services, and amenities consistent with those described or recommended in this report.

October 2003

GARFIELD000406

Section II:

Executive Summary

GAAP FILED 0000407

EXECUTIVE SUMMARY

The following paragraphs summarize the principal findings conclusions and recommendations concerning the Project

- 1 The Project site is in the southeast quadrant of Downtown Columbia South Carolina in the Congaree Vista Redevelopment Project Area (the 'Vista") The site encompasses the block bounded by Senate Park Pendleton and Lincoln Streets
- 2 The redevelopment of the Vista commenced in the middle 1980s and has resulted in a dramatic upgrade enhancement and beautification of the west end of Gervais Street and has provided exceptional dining and entertainment options The Projects proximity to Gervais Street in the Vista is very positive
- 3 Construction of the Columbia Metropolitan Convention Center is underway This facility is expected to open in October 2004 and will comprise 15 145 square feet of meeting space a 17 135 square-foot ballroom and a 24 700-square-foot exhibit hall The convention center will be adjacent to the western border of the Project site and a short distance from the east bank of the Congaree River It is expected to generate approximately 50 000 to 60 000 hotel room nights in the Columbia MSA in a normal year of operations based on a review of studies prepared for it for the City of Columbia
- 4 The Project site is proximate to the new Carolina Center, an 18 000-seat arena the Koger Center for the Arts, and the future home of the USC Research Campus The Research Campus will initially include a few hundred thousand square feet of space dedicated to public and private research and development initiatives to enhance USC's research

October 2003

GARFIELD000408

capabilities and marketability to prospective resident companies and clients. The new research campus, when developed, should generate approximately 5,000 to 10,000 additional hotel room nights on an annual basis.

5. Vehicular access into Columbia is excellent because the city is situated in the center of the state. There are three major interstates that intersect and form a belt around the city: I-20, I-26, and I-77.
6. The subject hotel will not be visible from the aforementioned interstates - all of which extend several miles outside of Downtown Columbia - due to the hotel's urban location. However, the lack of highway visibility will not be a detriment to the Project because there is relatively easy and quick access to the site from the interstates via local roads and streets.
7. The U.S. economy has been in a recession since March 2001; however, prospects for an economic recovery are good because the conflict in Iraq is over, SARS is reportedly a conquerable epidemic, and the stock market has risen consistently since late March 2003.
8. The University of South Carolina (USC) has a large influence on the City of Columbia through community involvement, economic impact, international notoriety, collegiate athletics, and visitation and tourism to the area.
9. USC is initiating the development of the USC Research Campus in proximity to the subject site. There are two primary components to this initiative: a campus dedicated to public/private research and development (R&D) in four or five specialized fields and a campus dedicated to public health. This research facility will enhance the university's image and attract private companies to the area. The Research Campus

October 2003

GARFIELD000409

development will commence in 2004 and is projected to ultimately include over five million (5 000,000) square feet of facilities (mix of academics research and development office and related retail) to be developed over 10 to 20 years

10 Recent trends in lodging demand have followed the direction of the economy overall, resulting in depressed occupancies and rates in 2001 and 2002 for the nation as a whole. The Columbia lodging market, however, has experienced an increase in demand and revenue per available room (RevPAR')

11 The Project will compete primarily with six hotels located in the Columbia MSA. These hotels are listed in the two tables below.

Competitive Hotel Supply Columbia MSA		
Property	Location	Area
Adam's Mark	1200 Hampton Street	Downtown
Clanion Town House	1615 Gervais Street	Downtown - Capitol Building
Embassy Suites	200 Stoneridge Drive	Northwest Columbia
Hampton Inn	822 Gervais Street	Downtown - Vista
Holiday Inn @ USC	630 Assembly Street	Downtown - USC
Sheraton	2100 Bush River Road	Northwest Columbia
Source: PKF Consulting. Properties concerned.		

Section II Executive Summary

II-4

Competitive Set Profile Proposed Hotel - Downtown Columbia							
Facility	Adams Mark	Clanon Town House	Embassy Suites	Hampton Inn	Holiday Inn	Sheraton	Market Averages
Rooms	301	163	214	122	175	237	202
Food & Beverage Outlets	1	1	1	0	1	1	1
Meeting Space (ft ²)	16,000	9,300	12,000	600	9,100	21,000	11,333
Meeting Space/Guest Room (ft ²)	53	57	56	5	52	89	52
Grand Ballroom	6,683	5,616	8,780	N/A	4,788	11,000	7,373
Junior Ballroom	6,360	N/A	3,456	N/A	N/A	3,720	4,512
Number of Meeting Rooms	3	4	1	2	6	3	3
Fitness Center	✓	✓	✓	✓	✓	✓	
Swimming Pool	✓	✓	✓	✓	✓	✓	
Business Center			✓	✓		✓	
Retail Store	✓		✓			✓	
Performance Range (2002)							
Occupancy	60-65%	60-65%	75-80%	75-80%	75-80%	55-60%	63-60%
ADR	\$80-\$85	\$70-\$75	\$110-\$115	\$105-\$110	\$55-\$60	\$80-\$85	\$85-\$45
Estimated Market Mix							
Transient Corporate	20%	15%	25%	70%	20%	35%	29%
Group Meeting	40%	20%	45%	15%	20%	45%	33%
USC Related	25%	30%	15%	10%	30%	5%	19%
Other	15%	35%	15%	5%	30%	15%	19%

*Enclosed space not including pr. function

Source: PKF Consulting, Property Management/Website

12 The historical performance of the competitive hotel supply is shown in the table below

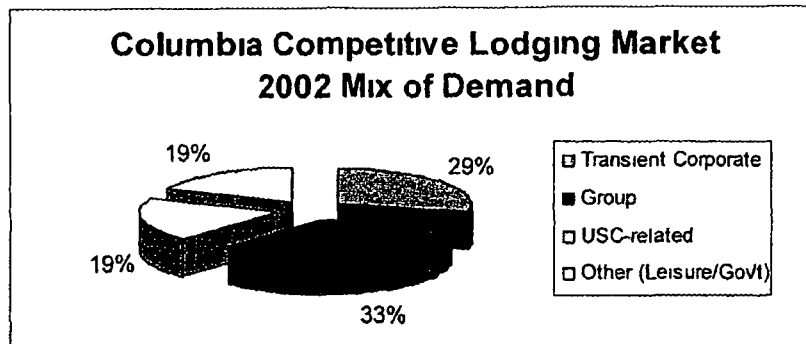
Historical Market Performance of the Competitive Supply									
Year	Annual Supply	Percent Change	Occupied Rooms	Percent Change	Market Occupancy	Average Daily Rate	Percent Change	REVPAR	Percent Change
1998	397,850	N/A	269,344	N/A	67.7%	\$82.10	N/A	\$55.58	N/A
1999	397,850	0.0%	260,990	3.1%	65.6%	84.93	3.4%	55.71	0.2%
2000	397,850	0.0%	264,172	1.2%	66.4%	87.21	2.7%	57.91	3.9%
2001	434,958	9.3%	284,028	7.5%	65.3%	86.29	1.1%	56.35	2.7%
2002	442,380	1.7%	297,707	4.8%	67.3%	85.43	1.0%	57.49	2.0%
CAAG	2.7%		2.5%			1.0%		0.8%	
March '02 YTD	258,055	N/A	162,059	N/A	62.8%	\$86.50	N/A	\$54.32	N/A
March '03 YTD	258,055	0.0%	162,575	0.3%	63.0%	91.34	5.6%	57.54	5.9%

Source: PKF Consulting

13 Demand in the market emanates from four distinct demand segments as illustrated in the graph below

October 2003

GARFIELD000411



14 A competitive 118 room limited-service hotel similar in quality to a Courtyard by Marriott is assumed to be developed in mid-2005 thus 118-rooms weighted for a partial year opening have been added to the competitive market supply for projection purposes. Recently the owner of the Hampton Inn proposed such a project however the proposed Courtyard by Marriott deal was suspended indefinitely.

15 Total lodging demand for the competitive set will grow through 2009 as illustrated below. Occupancy and ADR should increase simultaneously because hotels in the market are expected to accommodate more higher-rated guests affiliated with meetings and events at the Columbia Metropolitan Convention Center. New lodging demand in the market as a result of the convention center will displace lower-rated business that is currently being accommodated during off-peak times.

Projected Market Performance of the Competitive Supply									
Year	Annual Supply	Percent Change	Occupied Rooms	Percent Change	Market Occupancy	Average Daily Rate	Percent Change	REVPAR	Percent Change
2003	442,380	0.0%	299,000	0.6%	68%	\$88.01	3.0%	\$59.49	3.6%
2004	443,592	0.3%	310,500	3.8%	70%	\$90.65	3.0%	63.45	6.7%
2005	504,004	13.6%	336,100	8.2%	67%	\$95.25	5.1%	63.52	0.1%
2006	594,950	18.0%	383,300	14.0%	64%	\$99.00	3.9%	63.78	0.4%
2007	594,950	0.0%	396,200	3.4%	67%	\$102.00	3.0%	67.93	6.5%
2008	596,580	0.3%	406,200	2.5%	68%	\$105.00	2.9%	71.49	5.3%
2009	594,950	0.3%	416,200	2.5%	70%	\$108.00	2.8%	75.55	5.7%
CAAG	5.1%		5.7%			3.5%		4.1%	
Source: PKF Consulting									

October 2003

GARFIELD000412

16 Below is a list that summarizes the results from a survey of meeting planners for state professional and trade associations in South Carolina

- ❖ Associations conduct business throughout the year
- ❖ The Project's location adjacent to the Columbia Metropolitan Convention Center the Vista and the Carolina Center and its proposed quality level are its preeminent competitive advantages
- ❖ Typically associations require market wide blocks of 300 to 1 000 rooms per night The addition of the Project will enable Columbia to attract groups at the upper-end of this size spectrum While the Project will be the main benefactor of smaller groups i.e. those with a 300 or fewer room block most groups require more rooms which will result in hotels nearby benefiting from the overflow
- ❖ Most associations meet 10 or fewer times annually and they typically require lodging for two to three nights per event
- ❖ Most groups need banquet space for up to 300 people
- ❖ Respondents believe a hotel with 175 to 350 hotel rooms is appropriate and this hotel should be commensurate to 3 5-Star or 4-Star quality
- ❖ Room rates for accommodations at the Project should range from between \$96 and \$125 per room per night

17 The Project will be a 300-room full-service hotel commensurate in quality to a Hilton Hotel Furthermore the developer's design program of approximately 12 500 square feet of meeting space a restaurant lounge

and coffee shop appears appropriate and is consistent with the recommendations within this report

18 The Project should achieve above-market performance in occupancy ADR and RevPAR because of the hotel's location adjacent to the convention center and within the Vista brand and quality level. The expected utilization of the Project on a calendar year basis is shown in the table below

Projected Market Performance of the Subject Hotel											
Year	Annual Supply	Percent Change	Occupied Rooms	Percent Change	Occupancy Percentage	Average Daily Rate	Percent Change	REVPAR	Percent Change	Market Penetration	Revenue Yield
2005	36 500	N/A	19 200	N/A	53 /	114 75	N/A	60 36	N/A	79%	95 %
2006	109 500	200 0%	72 900	279 7%	67%	119 25	3 9%	79 39	31 5 /	103 /	124 %
2007	109 500	0 0 %	76 200	4 5%	70%	124 00	4 0 %	86 29	8 7%	104%	127 /
2008	109 500	0 0 /	77 900	2 2%	71%	127 75	3 0 %	80 88	5 3%	104 /	127 %
2009	109 500	0 0 %	77 900	0 0 /	71%	131 50	2 9 /	93 55	2 9 %	102 /	124%
CAAG	31 6%		41 9 %			3 5 %		11 6%			
Source: PKF Consulting											

19 The Project is expected to generate approximately \$13 674 million in total revenue in its first full year of operations which is expected to be September 2005 through August 2006. Furthermore, the hotel is expected to generate cash flow equal to approximately 30 percent of total revenue upon stabilization.

Summary of Estimated Annual Operating Results			
Year	Total Revenue	Net Operating Income	Ratio to Total Revenues
2005/06	\$13 674 000	\$3 922 000	29%
2006/07	15 209 000	4 705 000	31%
2007/08	16 022 000	4 965 000	31%
2008/09	16 502 000	5 073 000	31%
2009/10	17 002 000	5 216 000	31%
2010/11	17 512 000	5 358 000	31%
2011/12	18 025 000	5 490 000	30%
2012/13	18 563 000	5 635 000	30%
2013/14	19 130 000	5 797 000	30%
2014/15	19 702 000	5 753 000	29%

20 The net present value method (NPV[®]) of analyzing the potential investment in the Project produced a positive NPV of \$4 166 975. Based

upon the analyses and assumptions described herein the Project is considered to be a feasible venture

Section III:

Site and Location Analysis

CHARFIELD000410

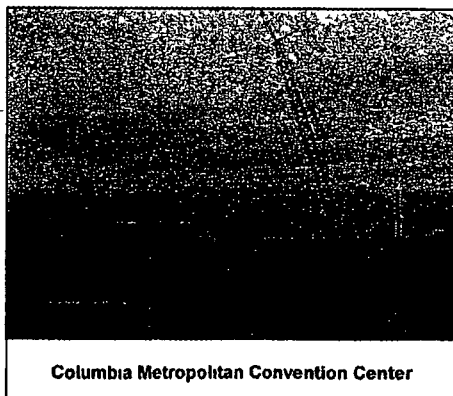
LOCATION ANALYSIS

This section reviews the Project's location characteristics, the general environment of its downtown Columbia neighborhood, and transportation access for this hotel location.

SITE LOCATION

The Project site is in the southeast quadrant of the Congaree River and Gervais Street, in Downtown Columbia, South Carolina. The site encompasses the block bounded by Senate Park, Pendleton, and Lincoln Streets. The Project would be the southernmost development proximate to the Vista District, which is currently the most desirable area in Columbia for dining and entertainment, and continues to be an area of revitalization and growth.

The site proposed for development of the subject property is used by the South Carolina Department of Transportation ("SCDOT"). The SCDOT area occupies the eastern portion of the block, while Damon's restaurant is situated on the western side.



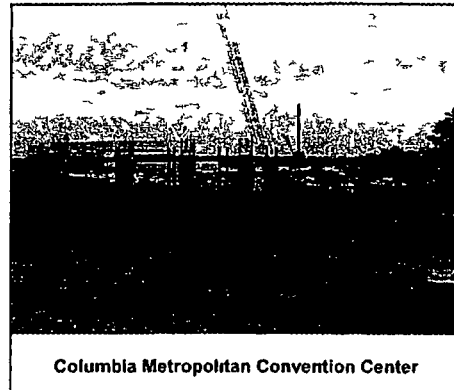
As shown in the accompanying pictures, construction of the Columbia Metropolitan Convention Center is underway. This facility is expected to open in October 2004 and will comprise 15,145 square feet of meeting space, a 17,135-square-foot ballroom, and a 24,700-square-foot exhibit hall. The convention center will be adjacent to the western border of the

Project site. The architectural plans for the hotel include an eventual direct connection to the convention center, which, to most conventioners, is a very important feature in the selection of a meeting and/or lodging facility.

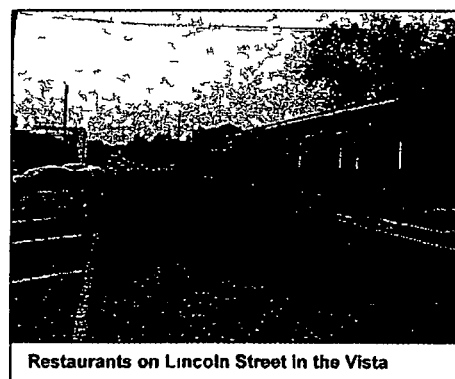
October 2003

GARFIELD000417

A 300-space parking deck to be constructed on the south side of the convention center and Project sites will accommodate parking for both the convention center and the subject hotel. According to a City of Columbia official, the number of parking spaces reserved for hotel guests would be equal to the number of guestrooms in the hotel. In addition, there is considerable on-street surface parking along neighboring thoroughfares. Currently, parking spaces are limited in the immediate vicinity, particularly on Friday and Saturday nights, because several restaurants, including Palmetto's Bull Market Grill & Tavern, Fat Buddies, Sundance Grill, and Longhorn Steakhouse, generate a substantial amount of local business. The addition of the 800-space parking deck, however, should provide adequate parking for the lodging needs of visitors and the leisure needs of residents.



The Vista has been transformed over the past several years from a less desirable neighborhood to one of vibrant social gatherings and chic urban living. The area's current appeal and notoriety throughout the state is a very positive feature in the prospects of success for the Project, as this area is the anchor for tourism in the community. The Columbia Metropolitan Convention Center and nearby Edventure Children's Museum, in addition to numerous dining and nightlife establishments in the Vista and surrounding neighborhoods, enhance the overall appeal of the Project to its expected constituency, particularly state professional and trade association group meetings.



The main campus of the University of South Carolina is located immediately south and east of the subject site. Most notable is proximity of the new 18 000-seat Carolina Center, the Koger Center for the Arts and the USC Research Campus. This campus will initially include several hundred thousand square feet of space dedicated to public and private research and development initiatives to enhance USC's research capabilities and marketability to prospective resident companies and clients.

The state capitol building and the main campus of Palmetto Health Baptist Medical Center are located approximately one mile east of the subject site in the heart of Downtown Columbia. The Project's location proximate to these facilities is positive. Legislators during the legislative session and legal and medical professionals will generate lodging demand at the subject hotel.

October 2003

GARFIELD000419