

RICHARD SHOFR

VS

STUART HACK ET AL.

CASE #: 88102069B/CL79993

VOL. 6 OF 6

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IN THE CIRCUIT COURT FOR BALTIMORE CITY

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BALTIMORE CITY

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CIVIL DIVISION

CASE NO. 88102069/CL79993

RICHARD SHOFER

Plaintiff

v.

THE STUART HACK COMPANY

and

STUART HACK

Defendants

-----  
THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

**PLAINTIFF'S RESPONSE TO DEFENDANT'S OPPOSITION TO  
PLAINTIFF'S MOTION TO COMPEL**

Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, in response to Defendant's Opposition To Plaintiff's Motion To Compel respectfully states as follows:

1. Since March of this year, when the above captioned matter was remanded to this Court for trial by the Court of Special Appeals, Plaintiff has been attempting to set dates on which to depose the Defendant Stuart Hack. Correspondence, attached hereto and marked Exhibits #1, #2 and #3 record the efforts of Plaintiff's counsel to schedule the Defendant Stuart Hack's deposition. Up until he filed his Opposition to Plaintiff's Motion to Compel, Defendant Hack had not objected to Plaintiff's efforts to establish a deposition schedule so that discovery in this matter could be completed.

2. This case has been pending in, and out of this Court for eight years. Not one witness has yet testified and not one piece of evidence has yet been introduced. Defendants have

112 ?

filed every motion, raised every defense and interposed any legal argument to prevent Plaintiff from having his day in Court. Fortunately, in the interests of justice, the Court of Appeals and the Court of Special Appeals have ruled in two separate reported divisions on two separate issues, that Plaintiff's case is going to trial.

3. That in order to present his claims against Defendants thoroughly and completely, Plaintiff needs to conduct discovery, including the taking of depositions. Defendant Stuart Hack has not been deposed for nearly six years, and the last two deposition sessions were at the request of, and for the benefit of, the Third Party Defendant whom Hack himself impleaded in this case. Plaintiff lost noted Hack's deposition on August 18, 1989, almost seven years ago.

4. Since the last depositions, both the Court of Appeals and the Court of Special Appeals have issued decisions which have further refined the issues and provided a framework for the trial of this case. Earlier deposition of Mr. Hack focused on potential claims under the ERISA statute. Whereas the case is now a professional malpractice action against a non-fiduciary pension plan administrator and advisor.

5. Additionally, since Mr. Hack's last deposition, Plaintiff's complaint has been amended three times. The final amended complaint, the Fifth Amended Complaint, has added a new count, Count III, which alleges fraud and deceit on the part of the Defendants and is based, to a great extent, on a letter written to the Plaintiff by Attorney Barry Berman which does not corroborate Defendant's Hack testimony concerning the "research" he did in this case. This is new evidence not previously available at the time of the earlier depositions and presents an entirely new area of inquiry with respect to trial preparation regarding this count.

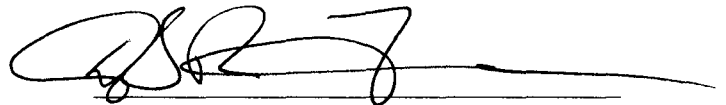
6. Furthermore, Plaintiff's present complaint includes allegations involving the Defendant's conduct after the initial advice was given and Plaintiff believes that such conduct establishes a basis for the award of primitive damages. The area of Defendant Hack's past advice conduct was not the subject of any more than a passing reference in prior depositions, and this is an area in which Plaintiff wishes to cover thoroughly.

7. Additionally, issues of ethics and the violation of codes of professional responsibility of professional organizations to which Defendant Stuart Hack holds membership are also areas in which Plaintiff desires to conduct discovery. These areas were never the subject of any prior depositions.

8. The rules regarding discovery have been liberally construed to permit a party wide leeway in obtaining information and evidence necessary for the full and completion presentation of a party's case. All parties are required to cooperate in order that both sides will have the opportunity to present their respective cases. Plaintiff is available for depositions and will cooperate fully in completing the discovery phase of this case. He expects Defendants should cooperate to the same extent. The fact that Defendant Stuart Hack has sold his business and moved to Florida should not in any way affect Plaintiff's rights to prepare his case for trial. Because Defendant might make an advantageous move for himself should not in any way prejudice Plaintiff in his efforts to obtain compensation from the same Defendant for acts he committed while he operated his business here in Maryland.

9. Because Mr. Hack now works and resides in Florida, he should be required to appear in Maryland for a sufficient period of time in order that Plaintiff might depose him on the issues relevant to a proper disposition of the claims set forth in this lawsuit. That Plaintiff believes that a minimum period of time to cover these issues is 20 hours, and seeks an order of Court directing that Defendant Stuart Hack appear on a stated date at a stated time for his deposition.

WHEREFORE, Plaintiff moves that this Honorable Court order Defendant Stuart Hack appear for at least 20 hours of deposition time on or before September 1, 1996.



DOUGLAS R. TAYLOR  
Attorney for Plaintiff  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209



Points and Authorities

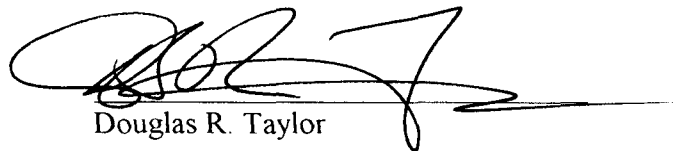
1. As stated above.
2. Maryland Rules 2-432 and 2-411.

Certificate of Service

I hereby certify that on this 8<sup>th</sup> day of July, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Motion To Compel to the following:

Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204  
Attorney for Defendants, Hack and  
The Stuart Hack Company

John Tremain May, Esquire  
Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036

  
Douglas R. Taylor

Douglas R. Taylor  
Attorney at Law  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

April 30, 1996

Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204

RE: Shofer v. Hack, et al.  
Cases No. 88102069/CL79993

Dear Janet:

I want to establish a schedule for commencing depositions which I believe need to be taken if I am to complete trial preparation in the above matter. I fully expect that you will want to schedule depositions of your own, and I am perfectly agreeable to work out a schedule for those depositions with you.

This letter is in accord with our telephone conversation of April 23, 1996 where we agreed that I would suggest dates for the initial depositions. I have been anxious to commence depositions, and since I had not had a response to my letter of April 12, I wanted to contact you to arrange a deposition schedule. The urgency in this matter relates to the fact that we have many depositions that we want to take, and I need information from these depositions, to incorporate into my responses to pleadings which you have recently filed. Therefore, delay in the deposition process will delay our responses to the pleadings you have filed.

I would like to begin the depositions with those of Barry Berman, Esquire and with Stuart Hack, Esquire. In reviewing my calendar, I note that I am available for depositions beginning Monday, May 6, 1996 and every day until July 30, with exception of May 8, 15, 22, 24 and 29; June 5, 12, 17, 19 and 26; and July 3, 10, 17 and 24.

Please review your calendar and let me know when we might depose Mr. Berman and Mr. Hack. Once we have cleared dates, I will issue the appropriate notices.

I would envision Mr. Hack's deposition extending for more than one day, and that he plan to be in Baltimore for several days so that this phase of the case can be completed all at one time.

I realize that our schedules need to be coordinated with other counsel and with Mr. Shofer, and I concur in your suggestion that we arrange a conference call to clear dates for these two depositions. Perhaps at the time we have such a call, I will have some other potential deponents I would like to schedule for deposition and we can develop a complete calendar for all of this discovery.

I would appreciate your letting me know if the proposed dates are acceptable to you and Mr. Hack. Then perhaps we can confer with Ms. Whelihan and Mr. May concerning their availability.

Your cooperation in this matter is appreciated.

Very truly yours,

Douglas R. Taylor

CC: John May, Esquire  
Deborah Whelihan, Esquire

**Douglas R. Taylor**  
**Attorney at Law**  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

June 4, 1996

Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204

RE: Shofer v. Hack

Dear Janet:

I am writing as a follow up to our telephone conversation of last week wherein you advised me that Mr. Hack was checking his vacation schedule prior to our scheduling his deposition here in Maryland. I appreciate your efforts in reminding Mr. Hack of our right to discovery under the rules, and of the importance of his cooperation if we are to complete all of the discovery necessary for an efficient and orderly disposition of this case.

However, I also note, in reviewing my own file of correspondence and memoranda, that we have been vigorously attempting to arrange depositions generally, and of Mr. Hack in particular, for the past ten weeks. Since the first available dates for depositions occur in the latter part of August, it will be almost twenty-six weeks from the time we began to arrange for depositions until we actually begin the process. I also observed that Mr. Hack has not been deposed for almost six years, and I am sure that you will agree that much has happened in this case since Mr. Hack's last deposition. Indeed, the nature and character of the case has changed, and I am sure that we will need in excess of twenty hours of deposition time with Mr. Hack in order to cover the important issues currently pending in the lawsuit. As I am sure that you will also agree, the case requires a great effort in trial preparation, and discovery is the heart of such preparation.

Mr. Shofer has expressed concern that I will not have adequate time to complete our discovery by the end of the present calendar year (it will be half over by the end of next month), and he has asked

me to obtain as quickly as possible a firm date on which we can commence Mr. Hack's deposition. As you are aware, perhaps more than anyone, it does not normally require a great effort to depose the principals in a lawsuit, and this task can normally be accomplished in a few weeks. In our case, we have now gone two and one half months and have not yet scheduled Mr. Hack's deposition. My client is the injured party, and he does not understand why the process of preparing for, and completing, this litigation cannot go forward immediately.

I hope to talk to you before the end of this week with the expectation that we will have a date on which to begin Mr. Hack's deposition.

Your cooperation in this matter, as always, is appreciated.

Very truly yours,

Douglas R. Taylor

CC: Deborah Whelihan, Esquire  
John May, Esquire

EXHIBIT # 3

Douglas R. Taylor  
Attorney at Law  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

June 10, 1996

Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204

RE: Shofer v. Hack, et al.  
Case No. 88102069/CL79993

Dear Janet:

My client, Mr. Richard Shofer, contacted me this morning and reminded me that we still do not have a date on which to commence Mr. Hack's deposition. Mr. Shofer expressed to me his concerns that there would not be sufficient time in which to prepare this case for trial if Mr. Hack's depositions do not commence in August. Mr. Hack's deposition is quite important, and, because he is in Florida, we are reluctant to schedule any other depositions until we lock in Mr. Hack for a minimum of 20 hours of August deposition time.

Accordingly, if we do not have confirmation of his availability for that period of time in August (excluding Wednesdays) by Wednesday, June 12, I am instructed by Mr. Shofer to file immediately a Motion To Compel. Since we have much material to review in deposition with Mr. Hack, and since he is in Florida, I would ask that we set aside three days in mid August in which to complete these depositions. We certainly want to avoid requesting Mr. Hack's presence again if we can complete the discovery in August.

Your cooperation and assistance in this matter is appreciated.

Very truly yours,

Douglas R. Taylor

CC: Deborah Whelihan, Esquire  
John May, Esquire

RICHARD SHOFER  
Plaintiff

v.

STUART HACK  
and  
THE STUART HACK CO.  
Defendants

\* IN THE  
\* CIRCUIT COURT  
\* FOR  
\* BALTIMORE CITY  
\*  
\* Case No. 88102069/CL79999

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BALTIMORE CITY  
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CIVIL DIVISION

\* \* \* \* \*

**NOTICE OF SERVICE**

I HEREBY CERTIFY that on this 12<sup>th</sup> day of July, 1996, copies of Defendant Stuart Hack's Answers to Interrogatories along with a copy of this Notice were mailed by first class mail, postage prepaid, to:

Douglas R. Taylor, Esquire  
P.O. Box 4566  
Rockville, Maryland 20850; and to

John T. May, Esquire  
Jordan Coyne & Savits  
1100 Connecticut Avenue, N.W., Suite 600  
Washington, D.C. 20036.

*Janet M. Truhe*  
\_\_\_\_\_  
Janet M. Truhe  
JANOFKY & TRUHE, P.A.  
Court Towers - Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204  
(410) 321-4890

Attorneys for Defendants

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CIVIL DIVISION

RICHARD SHOFR \* IN THE  
Plaintiff \* CIRCUIT COURT  
v. \* FOR  
THE STUART HACK CO., \* BALTIMORE CITY  
et al. \*  
Defendants \* Case No. 88102069/CL7993

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**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION  
FOR LEAVE TO DEPOSE DEFENDANT STUART HACK**

Defendants, Stuart Hack and the Stuart Hack Company, by their attorneys, Janet M. Truhe and Janofsky and Truhe, P.A., adamantly oppose Plaintiff's Motion for Leave to Depose Defendant Stuart Hack.

In support of his Motion for Leave, Plaintiff cites numerous aspects of Defendant Stuart Hack's deposition testimony which he claims are incomplete or unexplored. What he does not mention, however, is that he was prepared to go to trial less than a year and a half ago without the very information he claims is crucial to his case.<sup>1</sup> If Plaintiff's discovery was really as deficient as he now claims, he surely would not have been willing to go to trial on February 27, 1995.<sup>2</sup> Moreover, the court would

<sup>1</sup> That Plaintiff was prepared for trial is evidenced by the fact that counsel for both parties attended a pre-trial conference before Judge Andre Davis on February 13, 1995, a mere two weeks before the scheduled trial date.

<sup>2</sup> Although Plaintiff's case did not go to trial as scheduled, the delay had nothing to do with deficiencies in discovery. As noted on pages eight through nine in Defendants' Opposition to Plaintiff's Motion for Reconsideration, the trial was delayed because Plaintiff took an interlocutory appeal from previous trial court rulings which limited the scope of



not have scheduled this case for trial on February 27, 1995 if there had been reason to believe that Plaintiff's discovery was incomplete.

As much as Plaintiff now insists otherwise, the reality is that he addressed virtually every aspect of this case when he deposed Mr. Hack seven years ago.<sup>3</sup> Of the sixteen and one half hours that Mr. Hack was deposed, more than ten and a half were conducted by Plaintiff's counsel.<sup>4</sup> During that time, Plaintiff's counsel questioned Mr. Hack relentlessly about his alleged negligence, as well as the facts which now form the basis of his recent fraud claim. In fact, nearly all of the "new" issues Plaintiff raises in his motion, including Mr. Hack's research techniques (see ¶ 5e of Plaintiff's Motion), his position with respect to the propriety of advising clients to do acts prohibited by law (¶ 5d),<sup>5</sup> his responses to admissions of fact<sup>6</sup>

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his damages.

<sup>3</sup> The only area of this case that could be considered open is the sale of Mr. Hack's business. Because the sale occurred after Mr. Hack's deposition, defense counsel agreed that, if Mr. Hack happened to be travelling through Baltimore, Plaintiff could depose him on this issue. Defense counsel never agreed that Plaintiff could redepose Mr. Hack about his alleged negligence, nor did she agree to have Mr. Hack travel to Baltimore for the purpose of attending a deposition. Plaintiff's assertions to the contrary misrepresent the agreement between counsel.

<sup>4</sup> Third-party defendant Grabush, Newman deposed Plaintiff for the remaining six hours.

<sup>5</sup> Plaintiff's reference to Mr. Hack's position on the propriety of advising clients to do acts prohibited by law concerns Mr. Hack's recommendation that Plaintiff refrain from filing an amended tax return. Like Mr. Hack, defense experts have been deposed at length on the propriety of advising a client not to amend a tax return. All agreed that, since there is no duty to

(¶ 5b) and the extent to which he is guided by codes of professional responsibility (¶ 5g), were already covered in the previous depositions.

In addition, the issue of whether Mr. Hack had knowledge of the foreseeability of Plaintiff's damages (¶ 5c) is no longer even relevant, given Judge Hollander's dismissal of Plaintiff's claims for lost salary, lost business profits and damages related to his inability to refinance his Virgin Island properties.<sup>7</sup> Similarly, the defenses which Defendants asserted in response to Plaintiff's Fifth Amended Complaint (¶ 5a), raise no new issues and have been discussed repeatedly in the course of responding to Plaintiff's countless motions and pleadings.

Contrary to Plaintiff's assertion, then, there is nothing "new" about this case. As much as Plaintiff would like to believe that the "posture" of this case has changed from an

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file an amended return, Mr. Hack's advice was lawful. See e.g., Broadhead v. Commissioner, 14 T.C.M. (CCH) 1284 (1955).

Aside from being totally lawful, Mr. Hack's advice is also no longer relevant to this case. As indicated in his Response to Defendants' Opposition to Plaintiff's Motion to Compel, Plaintiff seeks to depose Mr. Hack about his advice because he believes Mr. Hack's advice establishes a basis for a punitive damages award. On February 17, 1993, however, Judge Ward dismissed Plaintiff's claim for punitive damages. With the punitive damage claim eliminated, the issue of Mr. Hack's advice becomes irrelevant. Accordingly, there is no need to depose Mr. Hack any further on this issue.

<sup>6</sup> Besides having been the subject of previous depositions, Defendants' responses to Plaintiff's requests for admission speak for themselves. To reopen Mr. Hack's deposition on this basis, after having asked about them in the prior depositions, would be absurd.

<sup>7</sup> With respect to Plaintiff's remaining damages, the issue of foreseeability is irrelevant.

ERISA case to a professional malpractice case, the reality is that this case has been about professional malpractice since day one. Proof of this reality lies in the fact that Plaintiff did not even add the "several" ERISA counts to his complaint until August 9, 1990, almost a year after he initially finished deposing Mr. Hack.<sup>8</sup>

With nothing new to be gained from another twenty-five hours of deposition, there is simply no reason to force Mr. Hack to return to Baltimore at this time. All the information Plaintiff needs to prepare his case can be found in the 700 pages of deposition testimony already at his disposal. If Plaintiff's latest counsel would simply read Mr. Hack's deposition transcript,<sup>9</sup> this fact would become apparent.<sup>10</sup>

For the reasons stated above, Defendants, Stuart Hack and the Stuart Hack Company, respectfully request that

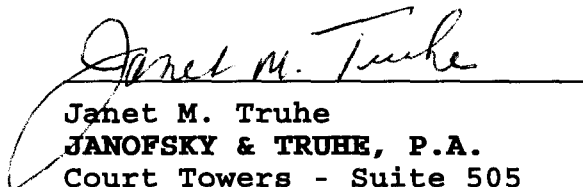
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<sup>8</sup> Plaintiff's counsel initially finished deposing Mr. Hack on August 18, 1989. The third-party defendant then proceeded to depose Mr. Hack on August 30, 1990 and September 20, 1990. After the third-party defendant had finished deposing Mr. Hack, Plaintiff was permitted to question Mr. Hack again. Because Plaintiff took advantage of this second opportunity, his questioning of Mr. Hack actually concluded on September 20, 1990, rather than August 18, 1989.

<sup>9</sup> As noted in Defendants' Opposition to Plaintiff's Motion to Compel, Plaintiff's current counsel is the third attorney to enter this case since the date of Mr. Hack's last deposition.

<sup>10</sup> Counsel's apparent unwillingness to familiarize himself with the record is evidenced in his motion for partial summary judgment on the issue of liability, wherein he claimed that Defendants had failed to produce any evidence demonstrating that they were not negligent. In fact, Defendants' liability experts had already been noted and deposed.

Plaintiff's Motion for Leave to Depose Defendant Stuart Hack be denied.

  
Janet M. Truhe  
JANOFSKY & TRUHE, P.A.  
Court Towers - Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204  
(410) 321-4890

9/10/93

Attorney for Defendants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 23rd day of July, 1996, copies of Defendants' Opposition to Plaintiff's Motion for Leave to Depose Defendant Stuart Hack were mailed by first class mail, postage prepaid, to Douglas R. Taylor, Esquire, P.O. Box 4566, Rockville, Maryland 20850 and John Tremain May, Esquire and Deborah M. Whelihan, Esquire, Jordon, Coyne & Savits, Suite 600, 1100 Connecticut Avenue, N.W., Washington, D.C. 20036.

  
Janet M. Truhe

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JB  
JB

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER

Plaintiff

v.

CASE NO. 88102069/CL79993

THE STUART HACK COMPANY

and

STUART HACK

Defendants

-----  
THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

**PLAINTIFF'S RESPONSE TO DEFENDANTS' OPPOSITION  
TO PLAINTIFF'S MOTION FOR REVISION OF THIS  
COURT'S PRIOR ORDERS OF FEBRUARY 17, 1993,  
JULY 11, 1994, JANUARY 31, 1995, AND FEBRUARY 23, 1995**

The Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, for response to Defendants' Opposition to Plaintiff's Motion for Revision of this Court's Prior Orders of February 17, 1993, July 11, 1994, January 31, 1995, and February 23, 1995, respectfully states as follows:

**I. PRELIMINARY COMMENTS**

Defendants' in this opposition, as they have done on other occasions in other pleadings, take the opportunity to accuse Plaintiff of refusing to accept prior rulings of the courts and of filing pleadings which "waste" the court's time and put the Defendants to the expense of opposing such pleadings.

The motions and pleadings which Plaintiff has filed in this lawsuit are not frivolous or meritless, but rather represent an effort on the part of Plaintiff to seek justice in this matter. Plaintiff will not be intimidated by Defendants' tactics into simply going away. Plaintiff has been seriously damaged by Defendants' negligence, and Plaintiff will continue to seek redress for those wrongs in every way the law allows.

In the instant matter, Plaintiff has sought to revise interlocutory orders entered by this court prior to the last appeal to the Court of Special Appeals. Pursuant to the authorities cited in Plaintiff's Motion for Revision, and authorities set forth herein, Plaintiff has the right to do so, and this court has full authority to reconsider those orders which have the effect of limiting the damages which Plaintiff can seek in this action. Indeed, in light of the Court of Special Appeals opinion which dealt with the last appeal, Plaintiff would appear to have a duty to file these motions if the "yo-yo" effect of motions and appeals which Judge Fischer warned about are to be avoided. Shofer v. Hack, 105 Md. App. 585 (1996). Therefore, notwithstanding the Defendants' views on these efforts to achieve justice, Plaintiff believes that there is ample legal support for the relief which he has requested in this motion.

The background of this litigation has been set forth in detail by the Court of Appeals in its decision in this case [Shofer v. Hack, 324 Md. 92, 595 A.2d 1078 (1991)(Shofer I)] and by the Court of Special Appeals in its decision [Shofer v. Hack, 107 Md. App. 585, 669 A.2d 201 (1995) (Shofer II)]. Reference is made to those decisions for an accurate summary of the history of this dispute to the present time.

## **II. THE AUTHORITY OF THE COURT TO REVISE**

### **PRIOR ORDERS ENTERED HEREIN**

Plaintiff has specifically requested that this court revise (specifically rescind) four prior orders entered in this proceeding prior to the appeal of this matter to the Court of Special Appeals. In the motion itself, Plaintiff has set forth the substantive legal basis for the relief requested. Prior to responding to the specific points made by Defendants in their opposition to his motion, Plaintiff wishes to set forth the basis on which the court may exercise its power in this matter and grant the relief requested.

In their opposition to this motion, Defendants are silent with respect to the court's authority to revise the four orders in question by rescinding them and allowing Plaintiff to present his case involving the items of damage which are the subject of the orders. However, it is very

clear that the court does retain jurisdiction over these orders and has full authority to modify them as justice may require. In the instant, justice indeed requires that plaintiff have the opportunity to present his case to the trier of fact, and he should not be constrained by orders which prevent him from proving the damages he has sustained as a proximate result of the Defendants' wrongdoing.

The four orders entered herein following remand of this case by the Court of Appeals in Shofer I are all interlocutory orders. These orders are subject to modification pursuant to Rule 2-602 which governs the court's authority over judgments and orders which are not final judgments.

The rule states as follows:

**"Rule 2-602. JUDGMENTS NOT DISPOSING OF ENTIRE ACTION**

**"(a) Generally.** - Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action ... or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:

- (1) is not a final judgment;
- (2) does not terminate the action as to any of the claims or any of the parties; and
- (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

**"(B) When Allowed.** - If the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment:

- (1) as to one or more but fewer than all of the claims or parties...."

None of the orders entered herein is a "final judgment" nor do any terminate all of the claims of Plaintiff in this action. The orders are clearly subject to modification and revision by the court in its discretion. The Court of Appeals has recently interpreted this rule in such a way as to reaffirm the revisory power of the trial court in orders of the type entered in this matter.

Quartertime Video v. Hanna, 321 Md. 59, 580 A.2d 1073 (1990).

### **III ARGUMENT**

#### **A. EXCISE TAXES AND PROHIBITED TRANSACTION PENALTIES ARE NOT PREEMPTED ERISA**

Defendants' contend that Plaintiff may not seek recovery for excise taxes and prohibited transaction penalties because those claims are preempted by the ERISA statute. 29 U.S.C.

Section 1144(a). The key phrase in deciding whether state law claims were preempted was whether or not the claims "related to" an employee benefit plan. The Court of Appeals in Shofer I did cite Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), a case relied on by Defendants', but the court quoted approvingly that language in Shaw which stated that "some state actions may affect employee benefit plans in too tenuous remote or peripheral a manner to warrant that the law 'relates to' the plan." Shaw, 463 U.S. 85, at 100, N.21. (1983).

Developing case law since the decision in Shofer I has more clearly defined what the phrase "relates to" mean, and it is clear that traditional state law claims, such as malpractice and breach of contract, are not preempted, even if the negligence deals with the subject of an ERISA governed plan.

In a case decided after Shofer I, the Supreme Court had occasion to revisit the subject of ERISA preemption and specifically looked at the meaning of the phrase "relate to" as it is used in the ERISA statute.

In New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., \_\_\_\_\_ U.S. \_\_\_\_\_, 113 S. Ct. 1671, 19 EBC 1187 (1995), the court was called upon to decide whether ERISA preempts state law provisions for surcharges on bills of patients whose commercial insurance coverage is purchased by employee healthcare plans governed, and for surcharges on Health Maintenance Organizations (HMOs) insofar as membership fees are paid by an ERISA plan.

The U.S. Court of Appeals for the Second Circuit held in this case that ERISA preempts the New York statute so that hospitals may not levy a surcharge on commercial insurers. The Second Circuit cited the Supreme Court's decision in Shaw and in District of Columbia v. Greater Washington Board of Trade, 506 U.S. \_\_\_\_\_, 16 EBC 1001 (1992), stating that "ERISA's preemption clause must be read broadly to reach any state law having a connection with, or reference to, covered employee benefit plans" 14 F. 3d 708, 718 (1994). Equally interesting in this case is the fact that the Second Circuit refused to follow one of its earlier decisions (Rebaldo v. Cuomo, 749 F. 2d 133, 137 (1984), relying on the Supreme Court's decision in Ingersoll - Rand Co. v. McClendon, 498 U.S. 133, 141 (1990) as the basis for such decision. The Supreme Court granted certiorari in the Travelers, supra, case because this decision was in conflict with a decision by the U.S. Court of Appeals for the Third Circuit which held that a similar rate setting statute in New Jersey did not "relate to" ERISA in such a way as to invoke the preemption



provisions of that statute. United Wire, Metal and Machine Health and Welfare Fund v. Morristown Memorial Hospital, 995 F. 2d 1179, 1191 [16 EBC 2182], cert. Denied, 510 U.S. \_\_\_\_\_ [18 EBC 1224] (1993).

In Travelers, supra, the Supreme Court made several important points. First, as a rule of interpretation, the court noted that it has always approached the question of preemption with a “starting presumption that Congress does not intend to supplant state law. See Maryland v. Louisiana, 451 U.S. 725, 746 (1981) (at page 1676).”

Secondly, the court surveyed some of its recent decisions (Ingersoll - Rand, supra; Shaw v. Delta Airlines, Inc., supra; Cipallone v. Liggett Group, Inc., 505 \_\_\_\_\_ U.S. \_\_\_\_\_, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)), and concluded that “our prior attempt to construe the phrase “relate to” does not give us much help drawing the line here.” (at page 1677).

Finally, the court concluded that it would be difficult to define terms such as “connection with” or “relate to” in attempting to determine if a particular state law was preempted. Rather the court stated that “[w]e simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.” (at page 1677).

The court then reviewed Section 514 of the ERISA statute and found that the purpose of preemption was “to permit the nationally uniform administration of employee benefit plans.” (at pages 1677-1678). The court went on to recount several different types of actions which might “indirectly” affect an ERISA benefit plan, but which would not trigger preemption. Such things as cost variations, quality control and workplace regulation might affect plans differently but such affects would not operate to preempt such state laws and regulations.

The court cited with approval its decision in Mackey v. Lanier, supra, which held that a general state garnishment statute was not preempted by ERISA, even when the object of the garnishment action are participants’ benefits under an ERISA plan.

The test adopted by the Supreme Court in Travelers, supra, appears similar to that standard used by the Ninth Circuit in General American Life Insurance Co. V. Castonguay, 984 F. 2d 1518, 16 EBC 2013 (9th Cir. 1993).

In Castonguay, supra, an insurance company sought to hold health plan fiduciaries liable under state trust law for alleged fraudulent misrepresentation regarding the plan’s financial condition resulting in substantial losses to the insurer. The court set forth a practical standard for

determining whether or not a state law claim was preempted by ERISA. Its conclusion was that ERISA preempts claims as to those relationships it regulates comprehensively (e.g., between plan and plan member; between plan and employer; between plan and trustee), but not as to relationships which ERISA does not purport to regulate--those relationships where a plan operates just like any other commercial entity (e.g., between the plan and its own employees, or the plan and its creditors).

As noted previously, the Court of Appeals of Maryland was absolutely correct in its decision on the issue of preemption with respect to Shofer's claims based on negligence and breach of contract. The Mertens decision establishes clearly that nonfiduciaries are not subject to suit in federal courts, and in Travelers, supra, the Supreme Court revisited the troublesome terms of "relates to" and "connection with" and adopted another approach in attempting to ascertain whether a particular state law claim was preempted. The court concluded that the purpose of the preemption clause "was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." (at pages 1677-1678).

While the rationale of this decision clearly supports the Court of Appeals' decision that Shofer's malpractice claims were not preempted, the same logic should be applied to the damages he seeks.

The Court of Appeals in Shofer I did not specifically determine whether or not Shofer's so-called "contingent liabilities" were preempted, relying on counsel's statement that such damages were not in the case (at page 111). But these damages should not be adjudged "preempted," and Shofer should be permitted to pursue them. Shofer's claims against Hack are certainly what one could call "traditional state law" claims. One federal court, facing the issue of ERISA preemption, reached a decision that neither the claims nor damages attributable thereto were preempted and stated as follows:

This Court concludes that the plaintiff's claims are not preempted and should be remanded to state court for resolution. Plaintiff is asserting no claims under ERISA, and all parties concede that plaintiff has no standing to do so. Plaintiff has brought this action in her own behalf, not on behalf of the Plan, and any damages received will go to plaintiff and not the Plan. The outcome of the lawsuit would not affect the Plan, as the Plan would not be liable for any damages and could not have its administration in any way burdened by any possible outcome. The plaintiff will clearly not be subject to any conflicting obligations, and there will be no determination of whether any benefits are due to any party. Further, the plaintiff's claims, which amount to professional malpractice, are claims that are traditionally covered by state law. The nature of the plaintiff's claims are not different than they would be if based

on poor professional advice given in any other business context. See, Silvia 806 F. Supp at 798-799, n.3 (no link between injury to trustee and nature of the trust); Pacific Airmotive, 224 Col. Rptr. at 238 (plaintiff's action for misrepresentation regarding plan funding no different than any other action for misrepresentation). Redressing professional malpractice claims in no way conflicts with the provisions and policies of ERISA. Horton v. Cigna Individual Financial Services Co., 825 F. Supp 852 (N.D.IIL. 1993), at page 859.

The facts in Horton are particularly helpful since it involved an action by an ERISA employer against two plan advisors, who were not plan fiduciaries. The defendants informed the plaintiff that a change in the law required an amendment to the Plan, which amendment was made. The advice was incorrect, and the Plan became underfunded, and the plaintiff personally paid \$205,000 to remedy the deficiency and to ensure the financial integrity of the Plan.

This situation is similar to the case at bar. Here, Shofer has been assessed the excise taxes which resulted from the loans he made, and he has also incurred the costs and expenses necessary to correct the problems occasioned by Hack's negligent advice. These are damages personal to Shofer and do not involve damages to his pension plan. Shofer was the borrower of funds which triggered adverse tax consequences and required the expenditure of funds to repair any potential damage to the Plan. But the Plan is intact, and the damages Shofer seeks are his losses and will not inure to the benefit of the Plan or be paid by the Plan. Damages which fall into the category of personal damages should not be deemed preempted and Shofer should be allowed to assert them at the trial of his claims. [See also Airports Co. v. Custom Ben Services of Austin, 28 F. 3d 1012 (10th Cir. 1994); Isaacs v. Group Health, Inc., 668 F. Supp 306 (S.D.N.Y. 1987); Richards v. Union Labor Life Ins. Co., 804 F. Supp 1101 (D. Minn. 1992)].

## **B. PUNITIVE DAMAGES AND ATTORNEYS FEES**

Plaintiff has previously set forth his position with respect to the issue of punitive damages. It is Plaintiff's position that Defendants' conduct meets the test set forth in Owens Illinois v. Zenobia, 325 Md. 420, 601 A 2d 633 (1992), and he should be permitted to present evidence on this issue. The underlying fraud in this case supports an award of punitive damages, as Judge Kaplan of this court has stated:

Punitive damages may be awarded in an action for deceit "where the wrong involved some violation of duty springing from a relationship of trust or confidence, or where the fraud is gross, or the case presents other extraordinary or exceptional circumstances clearly indicating malice and willfulness." Loyola Federal Savings & Loan Association v. Trenchcraft, 17 Md. App. 646, 663, 303 A.2d 432 (1973),

quoting *Fowler v. Benton*, 245 Md. at 552 [185 A.2d 344]. The Court believes that an award of punitive damages against Mr. Finch is appropriate in this case. Mr. Finch, an attorney, violated his fiduciary duty to Hughes, his client, by submitting to Hughes false and fraudulent bills for professional services. His fraud was gross: it resulted in payment for services not rendered; it resulted in payment for costs incurred by Mr. Finch and Dr. McLean before Mr. Finch was retained by Hughes; it resulted in grossly inflated bills for services rendered by foreign counsel, billed to Mr. Finch at a relatively low rate and then billed to Hughes at a much higher rate. The Court believes that an award of \$10,000.00 in punitive damages is justified and will, as additional relief to Hughes, enter judgment accordingly. *Finch v. Hughes Aircraft Co.*, 57 Md. App 190, 469 A.2d 867 (1984), cert den. 298 Md. 31 and 300 Md. 88, 469 A. 2d 864 and 475 A. 2d 1200; reconsideration den. 301 Md. 41, 481 A. 2d 801; cert. den. 469 U.S. 1215, 105 S. Ct. 1190, 84 L.Ed 2d 336, ren. den. 471 U.S. 1049, 105 S. Ct. 2043, 85 L.Ed 2d 341.

While the amount involved in the instant case is not the same as in the Finch case, the principle is identical. Fraud should be punished.

Furthermore, Defendants' past negligent conduct in advising Plaintiff to violate the law by not filing amended returns is an intentional act, not governed by Zenobia which relates to negligent conduct. Intentional acts, done without regard for the Plaintiff's welfare, but designed to protect Defendants, clearly give rise to punitive damages. Plaintiff should be permitted to present his case on this issue to the trier of fact.

### C. REMAINING DAMAGES

Plaintiff has previously set forth his position with respect to the remaining categories of damages. Plaintiff should be permitted to offer proof of his damages which have been proximately caused by Defendants. The damages sought by Plaintiff are all proximately and directly related to the negligent acts of the Defendants. Plaintiff's proffers in this regard require that the court permit him to put on his case and allow the trier of fact determine whether or not he has met the burden of proof. *Shofer v. Hack*, 107 Md. App. 585, 669 A. 2d 201 (1995).

### CONCLUSION

For all of the reasons assigned in the Motion for Revision of this court's prior orders of February 17, 1993, July 11, 1994, January 31, 1995 and February 23, 1995 and as set forth herein, Plaintiff requests that the court rescind the prior orders and deny Defendants' motions with respect thereto.

Respectfully submitted,



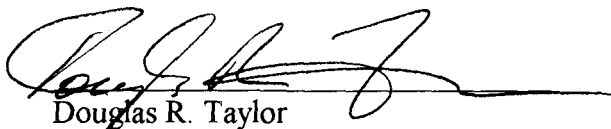
DOUGLAS R. TAYLOR  
Attorney for Plaintiff  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

**Certificate of Service**

I hereby certify that on this 15<sup>th</sup> August day of July, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Response to the following:

Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204  
Attorney for Defendants, Hack and  
The Stuart Hack Company

Deborah M. Whelihan, Esquire  
John Tremain May, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036



Douglas R. Taylor

126

IN THE CIRCUIT COURT FOR BALTIMORE CITY

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CIRCUIT COURT  
BALTIMORE CITY  
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CIVIL DIVISION

RICHARD SHOFER

Plaintiff

v.

CASE NO. 88102069/CL79993

THE STUART HACK COMPANY

and

STUART HACK

Defendants

-----  
THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

**MEMORANDUM IN SUPPORT  
OF PLAINTIFF'S JURY DEMAND**

In its Fourth and Fifth Amended Complaints filed herein, Plaintiff has requested a trial by jury on all issues raised in the complaints. These complaints, including the jury demand, have been filed since the remand of the case by the Court of Special Appeals pursuant to its opinion issued on January 2, 1996.

The right to a jury trial in civil actions is guaranteed by both the United States Constitution and the Constitution of Maryland. That right, however, is subject to reasonable regulation, and the administration of the right to a trial by jury in civil cases is controlled by Maryland Rule 2-325.

Rule 2-325(a) gives "any party" the right to demand a trial by jury by "filing a demand therefore in writing either as a separate paper or separately titled at the conclusion of the pleading..."

111

In the instant case, no jury demand accompanied the initial complaint filed in this case. It was not until Plaintiff filed his Fourth and Fifth Amended Complaints did he request a trial by jury. On his Fifth Amended Complaint, Plaintiff has added a new count (Count III - Fraud and Deceit), predicated on newly discovered evidence.

Plaintiff suggests that the recent decision of the Court of Special Appeals in Hawes v. Liberty Homes Inc., 100 Md. App 222, 640A2d 743, cert. den., 336 Md. 300, 648A2d 203 (1994) is dispositive of the issue here.

In Hawes, as in the case at bar, none of the parties had sought a jury trial at the time the Plaintiff filed the initial and first amended complaints. A second amended complaint was subsequently filed which added a new claim and the second amended complaint requested a jury trial. The lower court apparently did not grant the parties a trial by jury and proceeded to conduct a bench trial, entering judgment in favor of the contractor who had requested a jury trial in the second amended complaint. On appeal, the contractor did not raise the issue of its failure to have the jury trial it requested. However, the purchasers did raise the issue, arguing that once the request was made for a jury trial, all issues properly triable to a jury must be submitted to a jury for determination.

The Court of Special Appeals held that a jury demand was properly made by including a request for a jury trial in the second amended complaint, even though no request for a jury trial had been made in the original and amended complaints. The Court of Special Appeals, citing Rule 2-325(e), noted that, "when a trial by jury has been elected by any party, the action, including all claims whether asserted by way of counterclaim, cross-claim or third party claim, as to all parties, and as to all issues triable of right by a jury, shall be designated upon the docket as a jury trial" (emphasis supplied).

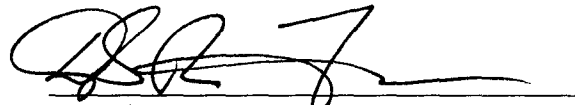
The Court went on to cite with approval the commentary on this rule offered by Judge Niemeyer and Ms. Schuett that once the jury trial has been properly demanded, all parties to the case are bound by that election, and it is not necessary for any other party to otherwise request a jury trial. Conversely, a proper jury demand may only be withdrawn with the consent of all the parties. (See subsection e) P. Niemeyer and L. Schuett, Maryland Rules Commentary, pp. 160-161.

In conclusion, it is clear that the Maryland rule favors the right to trial by jury. Here, the jury demand was properly made as a part of the Fourth and Fifth Amended Complaints. As in

Hawes, Plaintiff's Fifth Amended Complaint adds a new claim based on fraud and deceit. A right to a jury trial on that issue gives Plaintiff a right to a jury trial on all the issues in this case.

For these reasons, Plaintiff prays that this Honorable Court honor Plaintiff's election and docket this case as a trial by jury.

Respectfully submitted,



DOUGLAS R. TAYLOR  
Attorney for Plaintiff  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

11/15/01

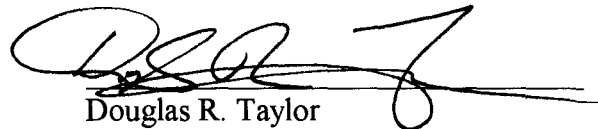


Certificate of Service

I hereby certify that on this <sup>5<sup>th</sup></sup> ~~7<sup>th</sup>~~ day of <sup>August</sup> ~~July~~, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Memorandum In Support of Plaintiff's Jury Demand to the following:

Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204  
Attorney for Defendants, Hack and  
The Stuart Hack Company

Deborah M. Whelihan, Esquire  
John Tremain May, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036

  
Douglas R. Taylor

RICHARD SHOFR  
Plaintiff

v.

STUART HACK  
and  
THE STUART HACK CO.  
Defendants

\* \* \* \* \*

RICHARD SHOFR  
Plaintiff

v.

STUART HACK  
and  
THE STUART HACK CO.  
Defendants

\* \* \* \* \*

\* IN THE  
\* CIRCUIT COURT  
\* FOR  
\* BALTIMORE CITY  
\*  
\* Case No. 88102069/CL79993 ✓

\* IN THE  
\* CIRCUIT COURT  
\* FOR  
\* BALTIMORE CITY  
\*  
\* Case No.  
\* 96135027/CL212124

ORDER

By consent of all parties, it is this 5th day of August, 1996, hereby

ORDERED that the above-captioned cases are consolidated for the purpose of motions only.

*Albert J. Matricianni, Jr.*  
Albert J. Matricianni, Jr., Judge

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER, :  
 :  
 Plaintiff, :  
 :  
 v. :  
 :  
 STUART HACK COMPANY, :  
 et al., :  
 :  
 Defendants. :  
----- :  
 :  
 THE STUART HACK COMPANY, :  
 et al., :  
 :  
 Third-Party Plaintiff, :  
 :  
 v. :  
 :  
 GRABUSH, NEWMAN & CO., P.A., :  
 :  
 Third-Party Defendants. :

Case No. 88101069/CL79993

DEFENDANTS' AND THIRD-PARTY DEFENDANT'S MOTION TO STRIKE  
PLAINTIFF'S FIFTH AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

The defendants, Stuart Hack and The Stuart Hack Company (hereinafter "the Hack defendants"), and the third-party defendant, Grabush, Newman & Co., P.A. (hereinafter "Grabush"), by their respective and undersigned counsel, move to strike the plaintiff's Fifth Amended Complaint and belated demand for jury trial of plaintiff's Fifth Amended Complaint pursuant to Maryland Rule 2-322 (e) and Maryland Rule 2-341(a). As grounds therefor, the defendants Hack and the third-party defendant Grabush state as follows:

A. BACKGROUND

1. The Plaintiff initiated this litigation on or about April 11, 1988 when he filed his original Complaint against the Hack defendants.

2. After filing a Second Amended Complaint and taking his first appeal of two of this Court's Orders limiting his claims and his damages, the plaintiff filed his Third Amended Complaint on or about December 8, 1992.

3. In his Third Amended Complaint, the plaintiff sued the Hack defendants for negligence (Count 1) and breach of contract (Count 2). The Third Amended Complaint derived from the allegation that the Hack defendants gave the plaintiff negligent advice that he could borrow up to 100% from his voluntary account of his pension plan without mentioning any adverse tax consequences of such transactions (see, ¶s 9-11 of the Third Amended Complaint) and the allegation that the Hack defendants continued to render incorrect advice concerning the loan transactions in December of 1986 when the Hack defendants issued a memorandum to persuade the third-party defendant Grabush that the risk of tax liability to the plaintiff was very low (see, ¶14 of the Third Amended Complaint).

4. Trial on the Third Amended Complaint was previously scheduled for February 27, 1995 when, as a result of a series of this Court's Orders reducing the plaintiff's damages, the plaintiff requested that this Court allow him to appeal those certain Court Orders.

5. After his unsuccessful appeal, and nearly eight years later, the plaintiff filed his Fourth Amended Complaint in which he demanded a jury trial for the first time. Although the Fourth Amended Complaint increased the ad damnum clauses of the negligence and breach of contract counts, the Fourth Amended Complaint contained the same claims as the Third Amended Complaint and the same factual allegations underpinning those claims.

6. In response to the Fourth Amended Complaint, the Hack defendants and the third-party defendant Grabush moved to strike the Fourth Amended Complaint on the grounds that the plaintiff was not entitled to file an amended pleading without leave of court and that the plaintiff was not entitled to make a jury demand where that amended complaint simply reformulated the claims of the original Complaint.

7. Presumably educated by the motion to strike filed by the Hack defendants and the third party defendant Grabush, the plaintiff opposed the motion and on the same date then filed a Fifth Amended Complaint that mirrored the Fourth Amended Complaint but included a new claim of fraud and deceit (Count III).

8. Unlike Counts I and II of the Fifth Amended Complaint, Count III derived not from the alleged negligent advice regarding the loans made by the plaintiff from his pension plan, but instead originated from an allegedly fraudulent entry on an invoice that indicated that the Hack defendants had researched

the question of whether the plaintiff could borrow from his pension plan in connection with the advice given to the plaintiff in 1984.

B. ARGUMENT

1. Under Maryland Rule 2-341(b), the plaintiff cannot file his Fourth Amended Complaint without leave of Court. Upon remand, this matter returns to its earlier status. See, Maryland Rule 8-604(d); see also, Schneider v. Davis, 194 Md. 316, 71 A.2d 32 (1950); Dennis v. Dennis, 15 Md. 73 (1960). When the plaintiff stated his intention to appeal, trial was to take place in fourteen (14) days. It is patently unfair to allow the plaintiff to take advantage of a situation that he created to the detriment of the Hack defendants and the third-party defendant Grabush. Because the plaintiff unsuccessfully took an interlocutory appeal within fourteen days of the trial for which the Hack defendants and the third-party defendant Grabush had prepared, the plaintiff now has the ability to avoid the more stringent requirements of Maryland Rule 2-341(b) upon remand.

2. Maryland Rule 2-341 allows amended pleadings, "when justice so permits." In instant case, justice does not allow plaintiff to increase the defense costs to all the parties by belatedly requesting a jury trial when the plaintiff only has the opportunity to file an amended pleading because he chose to appeal and that appeal was rejected. Similarly, justice is not served by allowing the plaintiff to file an amended pleading that ignores the history of this case and this Court's earlier rulings

and more than doubles the damages that the plaintiff seeks. It is well established that an amendment should never be allowed if prejudice to the opposing party or undue delay results. See, Rock v. Danly, 98 Md. App. 411, 633 A.2d 485 (1993); Robertson v. Davis, 271 Md. 708, 319 A. 2d 816 (1974); Accord, Mattvidi v. Nations Bank, 100 Md. App. 71, 639 A. 2d 228, cert. denied, 336 Md. 277, 647 A.2d 1216 (1994)(trial court found not to have abused its discretion in refusing to permit amendment). To avoid prejudice to the Hack defendants and to the third-party defendant Grabush, the plaintiff should not be permitted to amend his Complaint in order to have a new opportunity to conduct discovery and to circumvent the earlier rulings of this Court. Consequently, the Fifth Amended Complaint should be stricken in its entirety.

3. Most importantly, when the plaintiff filed his original complaint, his Second Amended Complaint, and his Third Amended Complaint, the plaintiff did not request a jury trial. Thus, the plaintiff waived his right to any jury demand nearly eight years ago. See, Maryland Rule 2-325. Counts I and II of the Fifth Amended Complaint merely refines the same facts and causes of action originally pleaded, and the plaintiff is not entitled to demand a jury as a result. See, Luppino v. Gray, 336 Md. 194, 647 A.2d 429 (1994) (if an Amended Complaint simply reformulates or restates a count contained in the original Complaint, a jury trial will not be granted when demanded for the first time in

connection with the Amended Complaint). Therefore, the plaintiff's jury demand should be stricken.

4. With respect to Count III of the Fifth Amended Complaint, Count III is barred by the three year statute of limitations because it asserts a new cause of action and does not relate back to the filing of the original Complaint. See, Maryland Cts. & Jud. Proc. Code Ann. §5-101 (1991); see also, Kirgan v. Parks, 60 Md. App. 1, 478 A.2d 713, cert denied, 301 Md. 639, 484 A.2d 274 (1984). Accordingly, Count III should be dismissed as barred by limitations.<sup>1</sup>

WHEREFORE, for the above reasons, the Hack defendants and third-party defendant Grabush request that the plaintiff's Fifth Amended Complaint be stricken.

JANOFSKY & TRUHE, P.C.

Janet M. Truhe, P.C.  
Janet M. Truhe  
Court Towers, Suite 505  
210 W. Pennsylvania Ave.  
Towson, Maryland 21294  
(410) 321-4890

Attorney for Defendants  
Stuart Hack and the Stuart  
Hack Company

Respectfully submitted,

JORDAN COYNE & SAVITS

By Deborah M. Whelihan  
Deborah M. Whelihan  
33 Wood Lane  
Rockville, Maryland 20850  
(301) 424-4161

Mailing Address:

1100 Connecticut Ave., N.W.  
Suite 600  
Washington, D.C. 20036

Attorneys for Defendant  
Grabush, Newman & Co., P.A.

---

<sup>1</sup>The plaintiff cannot claim that Count III is a new claim and avoid limitations, or, alternatively, claim that Count III arises from the same operative factual situation as Counts I and II and be entitled to a jury trial.



GROUNDS AND AUTHORITIES

1. Md. R. Civ. P. 2-325;.
2. Md. R. Civ. P. 2-341;
3. Md. R. Civ. P. 2-322(e); and
4. Cases cited herein.

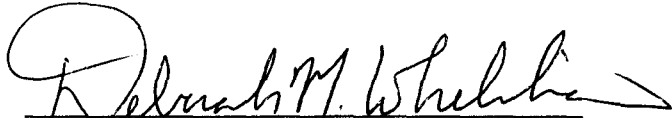
  
Deborah M. Whelihan  
Deborah M. Whelihan

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DEFENDANTS' AND THIRD-PARTY DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S FIFTH AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL was mailed, postage prepaid, this 29th day of July, 1996, to:

Janet Truhe, Esquire  
Ward, Janofsky & Truhe, P.C.  
Court Towers, Suite 505  
210 W. Pennsylvania Ave.  
Towson, MD 21204

Douglas Taylor, Esquire  
P.O. Box 4556  
Rockville, MD 20850

  
Deborah M. Whelan

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFR,  
Plaintiff,

v.

STUART HACK COMPANY,  
et al.,

Defendants.

Case No. 88101069/CL79993

-----  
THE STUART HACK COMPANY,  
et al.,

Third-Party Plaintiff,

v.

GRABUSH, NEWMAN & CO., P.A.,

Third-Party Defendants.

ORDER

Upon consideration of the Defendants' and the Third-party Defendant's Motion to Strike Plaintiff's Fifth Amended Complaint and Demand for Jury Trial, any Opposition by the Plaintiff thereto, and the entire record herein, it is this \_\_\_\_\_ day of \_\_\_\_\_, 1996, by the Circuit Court for Baltimore City, Maryland,

ORDERED, that the Plaintiff's Fifth Amended Complaint and Fourth Amended Complaint are stricken; and it is further,

ORDERED, that the Plaintiff's jury demand is stricken.

\_\_\_\_\_  
Albert J. Matricciani, Jr.  
Circuit Court Judge

115

copies to:

Deborah M. Whelihan  
Jordan Coyne & Savits  
1100 Connecticut Ave.  
Suite 600  
Washington, D.C. 20036

Janet Truhe, Esquire  
Ward, Janofsky & Truhe, P.C.  
Court Towers, Suite 505  
210 W. Pennsylvania Ave.  
Towson, MD 21204

Douglas Taylor, Esquire  
P.O. Box 4556  
Rockville, MD 20850

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER

Plaintiff

v.

CASE NO. 88102069/CL79993

RECEIVED FOR  
CIRCUIT COURT  
BALTIMORE CITY  
1996 SEP 16 A 9 27  
CIVIL DIVISION

THE STUART HACK COMPANY

and

STUART HACK

Defendants

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THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

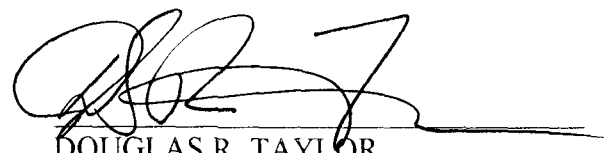
v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

CERTIFICATE REGARDING DISCOVERY

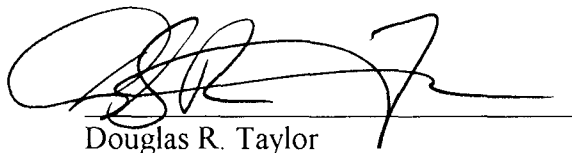
I HEREBY CERTIFY that on this 9th day of September, 1996, copies of the Subpoena and Notices of Deposition of Chester J. Salkind, Executive Director of the American Society of Pension Actuaries was mailed, postage prepaid, to Janet M. Truhe, Esquire, Janofsky & Truhe, P.A., Court Towers, Suite 505, 210 W. Pennsylvania Avenue, Towson, Maryland 21204 and Deborah M. Whelihan, Esquire, Jordon, Coyne & Mays, Suite 600, 1100 Connecticut Avenue, N.W. Washington, D.C. 20030, and I will retain the originals of those documents in my possession, without alteration, until the captioned matter is concluded in this Court, the time for noting an appeal or any appeal has been decided.



DOUGLAS R. TAYLOR  
Attorney for Plaintiff  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

Certificate of Service

I hereby certify a copy of the foregoing Certificate Regarding Discovery was mailed first class, postage prepaid, this 9th day of September 1996 to Janet M. Truhe, Esquire, Janofsky & Truhe, P.A., Court Towers, Suite 505, 210 W. Pennsylvania Avenue, Towson, Maryland 21204, and Deborah M. Whelihan, Esquire, Jordon, Coyne & Savits, Suite 600, 1100 Connecticut Avenue, N.W., Washington, D.C. 20036.



Douglas R. Taylor

128  
JB

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER

Plaintiff

v.

CASE NO. 88102069/CL79993

THE STUART HACK COMPANY

and

STUART HACK

Defendants

-----  
THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

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MOTION TO COMPEL

The Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, moves this Honorable Court as follows:

1. That all of the parties to this action have conferred regarding available dates to conduct depositions and have sought to cooperate in establishing a schedule for such discovery. That Plaintiff has been the only party following remand of this matter to attempt to schedule and complete depositions.
2. That in late August, the parties conferred and agreed that the dates of October 15 and 16, 1996 would be agreeable for the purpose of Plaintiff's scheduling depositions.
3. That Plaintiff advised counsel for Grabush, Newman & Co., P.A. (hereinafter referred to as "Grabush"), Third Party Defendant, that he desired to depose Mr. Ken Larash, an

1169

accountant in the firm which had done Plaintiff's accounting and tax work for approximately 20 years prior to the commencement of this litigation. That counsel for Grabush objected to Plaintiff's request, stating her belief that Mr. Larash's deposition had been previously taken.

4. Rather than press the issue at that time, Plaintiff advised Grabush through counsel that he would depose Mr. Harvey Newman and Mr. Barry Bondroff, two of the principals of Grabush on October 15, 1996. That Notices of Deposition were prepared and issued to all parties. That copies of those notices are attached hereto and prayed to be incorporated herein.

5. That counsel for Grabush advised Plaintiff that she objected to the deposition of the witnesses and that she would file a Motion for Protective Order. In anticipation of the filing of such a motion, Plaintiff canceled the depositions. That the short notice with regard to counsel's objections to these depositions made it impossible to schedule other depositions at that time slot.

6. That to date, no motion for protective order or any other relief has been filed. Plaintiff needs the testimony and the potential evidence which these three men can provide. That the aforesaid objections and delays are severely hampering Plaintiff's preparation of his case for trial.

7. Plaintiff does not understand Grabush's objections to discovery. It is quite clear that the Maryland Rules favor a liberal discovery policy, and Plaintiff should not be impeded in this way in his efforts to obtain evidence and prepare his case. That Plaintiff has not previously deposed any of three persons named herein (Mr. Ken Larash, Mr. Harvey Newman and Mr. Barry Bondroff). That Mr. Larash had been deposed once previously in this action, but that was at the request of the Defendant, not the Plaintiff.

8. Furthermore, in August of 1989, Plaintiff and Grabush entered into a written agreement wherein Grabush agreed to provide "[F]ull cooperation with Shofer's counsel with respect to Shofer's factual investigation of the Plaintiff's claims and Defendants' defenses against those claims in the Circuit Court case." Paragraph d, page 3 of the parties agreement which Plaintiff attaches hereto and prays to be incorporated herein.

9. That Grabush's objections to these proposed depositions violates not only the Maryland Rules but also the letter and the intent of the parties' agreement. As previously stated, these actions on the part of Grabush severely hamper and impede Plaintiff's efforts to prepare his case and to have his day in court.

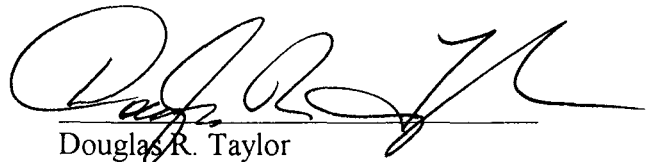


10. That it is imperative and in the interests of justice that the court direct Grabush to make the above named witnesses available for deposition, and that counsel be reminded of the fact that the Maryland Rules encourage open and broad discovery.

WHEREFORE, Plaintiff moves this Honorable Court as follows:

a. That this Honorable Court issue an order directing counsel for Grabush to produce Mr. Ken Larash, Mr. Harvey Newman and Mr. Barry Bondroff for depositions to be set at mutually convenient times within <sup>30 days</sup> ~~60~~ days from the date of this order.

b. And for such other and further relief as this Honorable Court may deem just and proper under the circumstances of this matter.



Douglas R. Taylor  
Attorney for Plaintiff  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

**Plaintiff Requests a Hearing on this Motion**

**Points and Authorities**

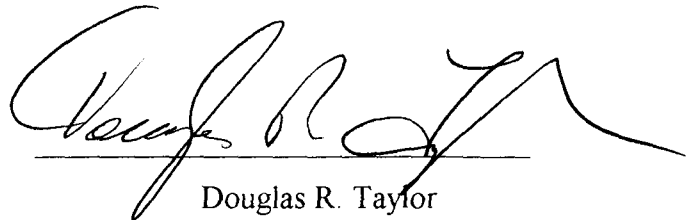
1. As stated above.
2. Maryland Rules 2-402, 2-404, and 2-432.
3. The agreement of the parties.

Certificate of Service

I hereby certify that on this 28<sup>th</sup> day of October, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Motion To Compel to the following:

Ms. Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204  
Attorney for Defendants, Hack and  
The Stuart Hack Company

John Tremain May, Esquire  
Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036

  
Douglas R. Taylor

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER

Plaintiff

v.

CASE NO. 88102069/CL79993

THE STUART HACK COMPANY

and

STUART HACK

Defendants

-----  
THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

NOTICE OF DEPOSITION

Please take Notice that, pursuant to Maryland Rule 2-412 the Plaintiff through counsel shall take the deposition of the person named below at the time and place therein designated.

NAME: Berry Bondroff  
Grabush, Newman & Co., P.A.

PLACE: 714 Park Avenue  
Baltimore, Maryland 21201

DATE: Tuesday, October 15, 1996  
11:00 A.M.

The deposition will begin at the indicated time and date, unless otherwise agreed to by counsel for the parties, and will continue thereafter from day to day until concluded.

---

Douglas R. Taylor  
Attorney for Plaintiff  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

**Certificate of Service**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Notice of Deposition to the following:

Ms. Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204  
Attorney for Defendants, Hack and  
The Stuart Hack Company

John Tremain May, Esquire  
Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036

---

Douglas R. Taylor

DOUGLAS R. TAYLOR  
ATTORNEY AT LAW  
P. O. Box 4566 ROCKVILLE, MARYLAND 20850

October 28, 1996

Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N. W.  
Washington, D. C. 20036

Re: Shofer v. Hack, et al  
Case No. 88102069/CL 799993

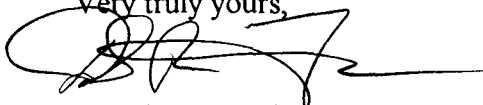
Dear Deborah:

We first made our intentions to depose Ken Larash known to you by means of a letter written on April 12, 1996, some six months ago. Although you have been aware of our intentions to depose Mr. Larash since April, you did not choose to let us know of your desire to object to our need to depose until sometime in August (four months latter) when the time to depose was closer at hand. In order to expedite matters, we backed off of deposing Ken Larash for the time being and, instead, decided to depose Mr. Harvey Newman and Mr. Barry Bondroff, both principals in the firm of Grabush, Newman, and both of whom having information we very much need.

You responded to our month old deposition notices stating verbally that you were going to file a motion for a protective order. Of course, your verbal statement alone had the effect of denying us an opportunity of deposing Grabush, Newman. Mr. Shofer is concerned that you have not followed through with your verbal statement that you were going to seek a "protective order" for almost a month now. More delay. Mr. Shofer believes that you are intentionally slowing things down so that we cannot properly proceed with our discovery.

Mr. Shofer has asked me to make this persistent and continuing delay in discovery an urgent issue with the court. He has instructed me to prepare promptly a motion to compel the attendance of Mr. Ken Larash, Mr. Harvey Newman and Mr. Barry Bondroff at depositions and to file such a motion with the court immediately. Accordingly, I have prepared and filed a Motion to Compel, a copy of which is enclosed herewith.

Very truly yours,



Douglas R. Taylor

cc: Hon. Albert Matricciani, Jr.  
Janet M. Truhe, Esq.

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER

Plaintiff

v.

CASE NO. 88102069/CL79993

THE STUART HACK COMPANY

and

STUART HACK

Defendants

-----  
THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

**NOTICE OF DEPOSITION**

Please take Notice that, pursuant to Maryland Rule 2-412 the Plaintiff through counsel shall take the deposition of the person named below at the time and place therein designated.

NAME: Harvey Newman  
Grabush, Newman & Co., P.A.

PLACE: 714 Park Avenue  
Baltimore, Maryland 21201

DATE: Tuesday, October 15, 1996  
9:00 A.M.

The deposition will begin at the indicated time and date, unless otherwise agreed to by counsel for the parties, and will continue thereafter from day to day until concluded.

\_\_\_\_\_  
Douglas R. Taylor  
Attorney for Plaintiff  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

Certificate of Service

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Notice of Deposition to the following:

Ms. Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204  
Attorney for Defendants, Hack and  
The Stuart Hack Company

John Tremain May, Esquire  
Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036

\_\_\_\_\_  
Douglas R. Taylor

LAW OFFICES

BLUM, YUMKAS, MAILMAN, GUTMAN & DENICK, P. A.

1200 MERCANTILE BANK & TRUST BUILDING

2 HOPKINS PLAZA

BALTIMORE, MARYLAND 21201-2914

(301) 385-4000

FAX (301) 385-4070

WRITER'S DIRECT DIAL

(301) 385-4020

August 24, 1989

HAND DELIVERED

Linda M. Schuett, Esq.  
Frank, Bernstein, Conaway & Goldman  
300 East Lombard Street  
Baltimore, Maryland 21202

Re: Shofer v. The Stuart Hack Company, et al.  
Case No. 88102069/CL79993

Dear Linda:

Here is the executed agreement, witnessed by me in all three spaces. I hope this is satisfactory.

Very truly yours,

151  
Thomas A. Bowden

Enclosure

cc: ✓ Mr. Richard Shofer

1478



AGREEMENT

This Agreement is entered into on this \_\_\_\_ day of August, 1989 between, on the one hand, Richard Shofer, Catalina Enterprises, Inc. t/a Crown Motors, and Catalina Enterprises, Inc.' Pension Plan (the "Pension Plan"), for themselves and for all of their respective employees, agents, heirs, executors, administrators, successors, and assigns (hereinafter referred to collectively as "Shofer"), and, on the other hand, Grabush, Newman & Co., P.A., for itself and its respective employees, agents, successors, and assigns (hereinafter referred to collectively as "Grabush").

WHEREAS, Richard Shofer has filed suit in the Circuit Court for Baltimore City, Case No. 88102069/CL79993 (the "Circuit Court Case") against Defendants, The Stuart Hack Company and Stuart Hack, relating to the Pension Plan established by Defendants; and

WHEREAS, the Defendants in that case have filed a Third Party Claim against Grabush, Newman & Co.; and

WHEREAS, prior to the filing of the Third Party Claim, Grabush assisted Shofer in connection with certain matters relating to the Pension Plan, including but not necessarily limited to the preparation of journal entries for the Pension Plan's balance sheet and the preparation of 990T returns; and

WHEREAS, the Internal Revenue Service is currently auditing the Pension Plan's 1986 returns and certain pension transactions for other years as well; and

WHEREAS, in light of Grabush's knowledge of certain matters being raised in the IRS audit, Shofer desires assistance and cooperation from Grabush in connection with the IRS audit; and

WHEREAS, Shofer also desires that Grabush continue to perform ongoing accounting services related to the Pension Plan but not stemming from the IRS audit; and

WHEREAS, as a result of the Third Party Claim and for other reasons, Grabush is reluctant to provide assistance and cooperation in the absence of this Agreement,

NOW, THEREFORE, Shofer and Grabush hereby stipulate and agree as follows:

1. In and for consideration of this Agreement, the promises and representations made in it, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Grabush agrees to provide (during the pendency of the Circuit Court Case and in accordance with its ordinary and customary billing practices) the cooperation and assistance requested by Shofer in connection with all matters in which Grabush is requested by Shofer to perform services, including certain matters relating to the Pension Plan which shall include but are not limited to:

- a. Full cooperation with the IRS and Shofer in the ongoing audit of the Pension Plan, including

- (1) Making available accountants, including Ken Larash, for the review and explanation of financial accounting data prepared by Grabush in connection with the Pension Plan's 5500 returns;
  - (2) Responding fully to all questions and issues raised by the IRS in the audit;
- b. Full cooperation with any other taxing authority that may audit or otherwise examine any matters pertaining to the Pension Plan;
  - c. Full cooperation with any taxing authority that may audit or otherwise examine any returns or documents prepared by Grabush for Shofer; and
  - d. Full cooperation with Shofer's counsel with respect to Shofer's factual investigation of the Plaintiff's claims and Defendants' defenses against those claims in the Circuit Court Case.

2. In and for consideration of this Agreement, the promises and representations made in it, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and subject to the provisions of paragraph 3 of this Agreement, Shofer does hereby forever covenant not to file any direct claim against Grabush in the Circuit Court Case and not to sue Grabush in any forum on any

matter that does or could arise out of or in any way relate to (A) all factual allegations and legal theories that are or could be raised by amendment or otherwise in the Circuit Court Case and (B) all cooperation and assistance rendered by Grabush pursuant to this Agreement.

3. If a judgment is entered in the Circuit Court Case which determines that Grabush is solely liable for all or part of Shofer's damages in that Case, then (A) Shofer's covenant not to sue Grabush in the Circuit Court Case or in any forum on any matter that does or could arise out of or in any way relate to all factual allegations and legal theories that are or could be raised by amendment or otherwise in the Circuit Court Case shall become null and void on the date of the judgment to the extent of such sole liability, and (B) Shofer may choose to sue Grabush to that extent as if no such covenant had been made, and (C) for purposes of any such suit, Grabush agrees that the running of the statute of limitations against it shall be tolled from the date of this Agreement up to 30 days after the date of any such judgment, and the statute of limitations shall begin to run again on the 31st day after the entry of any such judgment. If a judgment is entered in the Circuit Court Case which determines that Grabush is jointly liable with the Defendants for all or part of Shofer's damages in that Case, then Shofer's covenant not to sue shall remain in full force and effect for any part of the damages for which joint liability has been determined.

4. Shofer also agrees to waive any accountant/client privilege that may be applicable in the Circuit Court Case to the extent necessary to permit Grabush to fully defend its interests.

5. Although Grabush agrees to cooperate and assist Shofer in good faith, Shofer recognizes that Grabush must act at all times in its own best interests, consistent with this Agreement, to protect itself with respect to the Third Party Claim filed by The Stuart Hack Company and Stuart Hack. Shofer has retained its own independent experts and advisors in connection with the Circuit Court Case, and Shofer stipulates and agrees that Shofer at all times will rely exclusively on their advice (and not on the cooperation, assistance, or advice of Grabush) on all issues and matters pertaining to the conduct of that Case.

6. Shofer and Grabush mutually agree that neither will compromise or in any way settle any claims against or by The Stuart Hack Company and Stuart Hack in the Circuit Court Case without disclosing to each other the substance of all settlement discussions and without attempting in good faith to obtain a global settlement of all issues by all parties. This paragraph shall not impose any duty on Shofer to reduce the amount of any settlement demand made by him in order to obtain a global settlement of all claims.

7. All parties to this Agreement represent to each other that they were represented by counsel in connection with this Agreement and that they have authority to enter into it.

ATTEST OR WITNESS:

Thomas A Bowden

Richard Shofer  
Richard Shofer

ATTEST OR WITNESS:

CATALINA ENTERPRISES, INC.  
t/a CROWN MOTORS

Thomas A Bowden

By: Richard Shofer  
Richard Shofer, Trustee

ATTEST OR WITNESS:

CATALINA ENTERPRISES, INC.  
PENSION PLAN

Thomas A Bowden

By: Richard Shofer  
Richard Shofer, President

ATTEST OR WITNESS:

GRABUSH, NEWMAN & CO., P.A.

\_\_\_\_\_

By: \_\_\_\_\_

2009L

**RICHARD SHOFER,**  
  
**Plaintiff,**  
  
v.  
  
**THE STUART HACK COMPANY**  
  
and  
  
**STUART HACK,**  
  
**Defendants.**

\* \* \* \* \*  
**THE STUART HACK COMPANY**  
  
and  
  
**STUART HACK,**  
  
**Third Party Plaintiffs,**

v.  
  
**GRABUSH, NEWMAN & CO., P.A.,**  
  
**Third Party Defendant.**

\* \* \* \* \*  
**RICHARD SHOFER,**  
  
**Plaintiff,**

v.  
  
**STUART HACK**  
  
and  
  
**THE STUART HACK COMPANY,**  
  
**Defendants.**

\* \* \* \* \*

\*  
\*  
\* **IN THE**  
\* **CIRCUIT COURT**  
\* **FOR**  
\* **BALTIMORE CITY, Part 20**

\* **Case No. 88102069/CL79993**

\* \* \* \* \*

\* **Case No. 96135027/CL212124**

\* \* \* \* \*

## MEMORANDUM OPINION AND ORDER

### INTRODUCTION

Pursuant to a letter dated May 7, 1996 from Administrative Judge Joseph H. H. Kaplan to counsel of record, the original case of Shofer v. Stuart Hack Company, et al. was specially assigned to the Circuit Court for Baltimore City, Part 20 for the purpose of adjudicating all future proceedings in that matter. In the course of a pre-trial conference with counsel on July 9, 1996 this Court learned that a subsequent case involving essentially the same parties<sup>1</sup> had been filed by Plaintiff Richard Shofer on May 14, 1996. With consent of all counsel, the Court entered an order on August 5, 1996 consolidating the two cases.

On July 26, 1996 this Court conducted a hearing on all pending motions in these cases, each of which will be addressed seriatim in the body of this memorandum opinion and order.

There is no need to recount the facts which give rise to this litigation, those matters having been detailed repeatedly in the orders of this Court and in the appellate decisions which chronicle the history of this litigation from 1988 until its special assignment to Part 20 in May of this year.

### THE PENDING MOTIONS

1. Plaintiff's Motion for Revision of this Court's Prior Orders of 2/17/93, 7/11/94, 1/31/95 and 2/23/95.

On January 2, 1996 the Maryland Court of Special Appeals filed an opinion in the original case which began its recitation of the facts as follows: "This case is yet another stop

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<sup>1</sup> Third Party Defendant Grabush, Newman & Co., P.A. is not at this point a party to the 1996 case. Accordingly, the cases have been consolidated for motions purposes only and not for trial.



on the never-ending litigation odyssey otherwise known as *Shofer v. Hack Company*," Shofer v. Stuart Hack Company, 107 Md. App. 585, 589 (1996) ("Shofer II"). That decision recounts Shofer's unsuccessful attempt to obtain appellate review of three of the orders which are the subject of the present motion.<sup>2</sup> Because the Maryland Court of Special Appeals declined to entertain this interlocutory appeal, the prior orders entered by the judges of the Circuit Court for Baltimore City remain intact and constitute "the law of the case" with respect to Shofer's damage claims.

Dicta in the Court of Special Appeals' decision suggest that practical problems can occur when trial judges remove, prior to trial, a damage request from claimants' causes of action. The intermediate appellate court goes on to recommend that "where appropriate, trial judges can avoid this problem by presenting damage claims to the fact finder and, after a decision on liability and damages and upon proper motion, the trial court can modify an award that is believed to be inconsistent with Maryland law," Id., 107 Md. App. at 596. Encouraged by this language in the appellate opinion, Shofer again requests that the various damages which have been eliminated from his case be reinstated in accordance with the procedures suggested therein.

The problem with Shofer's argument is that he did not file a timely request for a jury trial and, because of this Court's disposition of the motions concerning the Fourth Amended Complaint, the Fifth Amended Complaint and the new case, it will make little sense for the Court, sitting without a jury, to follow the procedure suggested by the Court of Special Appeals here. In fact, the aforementioned dicta goes on as follows: "This is not to say the trial judges

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<sup>2</sup> The fourth order, dated February 23, 1995, was entered by Judge Andre Davis as a revision of his January 31, 1995 order to clarify his exclusion of damage claims for plaintiff's lost earnings on personal contributions to the pension plan and lost sheltered earnings on distributions used to extinguish plaintiff's pension loans. It did not materially affect the determination of this issue.

should routinely submit all damage claims, regardless of their validity, to the fact finder. When appropriate, trial judges should strike invalid claims . . . for which substantial evidence might need to be introduced that otherwise would be irrelevant or prejudicial," Id., 107 Md. App. at 596-97. Since the trial judge would have to determine in this case which damages are allowable at the end of the evidence, he may as well make that determination now in the interests of judicial economy. For the reasons later stated in this memorandum opinion and order with respect to the other pending motions, this Court will decline to follow the procedure seemingly suggested by the Court of Special Appeals' opinion.

In the present motion, Shofer requests that the four previous orders of the Circuit Court be stricken and that he be permitted to present evidence to establish all of his damage claims. Those damage claims include the following: federal and state income taxes, excise taxes, penalties and interest, fees paid to accountants and attorneys, loss of personal income and corporate profits, tax liens, loss of credit availability, loss of tax sheltered savings and the loss of interest and earnings on investments, as well as punitive damages.

Under the rulings now in effect (which were rendered prior to the filing of the Fourth and Fifth Amended Complaints and the 1996 case), plaintiff is limited to recovery of federal and state income taxes, penalties and interest thereon and professional fees incurred as a result of defendants' negligence, if proven.

Other than the language above cited from the opinion in Shofer II, the only other basis which plaintiff can articulate for revision of this Court's previous damage orders is his belief that cases decided after the decision was rendered in Shofer I have clarified the issue of which damages are preempted under the ERISA statute<sup>3</sup> and presumably have opened the door to

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<sup>3</sup> Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001-1461.

additional damages for him.

Having reviewed those cases, particularly those upon which plaintiff relies most heavily, such as Mertens v. Hewitt Associates,<sup>4</sup> 113 S.Ct. 2063 (1993); Horton v. Cigna Individual Financial Services Co., 825 F. Supp. 852 (N.D. Ill. 1993); and New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co., 115A S.Ct. 1671 (1995), this Court cannot agree that the subsequent case law provides a legitimate basis for expanding plaintiff's damage claims from those allowed by the Maryland Court of Appeals in Shofer I. Accordingly, Plaintiff's Motion for Revision of the four prior orders of this Court is denied.

2. Plaintiff's Motion for Summary Judgment on the Issue of Liability.

Plaintiff has filed for Summary Judgment on the Issue of Liability with respect to the letter from defendant Stuart Hack to plaintiff dated August 9, 1984, arguing that the letter is evidence of negligence per se, constituting professional malpractice by the defendant.

Defendants point out that the record includes expert deposition testimony to the contrary from a pension consulting actuary by the name of Edward E. Burrows, as well as defendant Hack's deposition testimony denying that he owed any such duty to the plaintiff.

Given its current posture, this issue is not ripe for summary judgment disposition because there are material facts in genuine dispute. Clea v. City of Baltimore, 312 Md. 662,679 (1988). Therefore, plaintiff's motion is denied.

3. Plaintiff's Motion to compel the Deposition of Defendant Stuart Hack.

The Court has reviewed the transcripts of previous depositions conducted in these

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<sup>4</sup> A similar argument was presented to Judge Hollander and addressed in her Memorandum Opinion and Order dated July 11, 1994 with respect to the impact of the Supreme Court's opinion in Mertens. In reaffirming Judge Hollander's decision, this Court notes that it has reviewed the additional case authorities now cited by plaintiff but is still disinclined to overrule Shofer I with respect to plaintiff's damage claims.

proceedings during which defendant Hack's testimony was taken on March 16, 1986, April 21, 1986, August 18, 1986, August 30, 1990 and September 20, 1990.

While the last deposition of defendant Hack was taken just over five years ago, he has submitted to extensive questioning with respect to his own role in these cases, as well as the role of his pension consulting business. Since this Court has declined to expand the scope of these proceedings to include additional damage claims, there is little purpose to be served in adding to the parties' litigation expenses by requiring extensive additional pretrial depositions.

Because plaintiff's new counsel entered the case in 1995 and he is now faced with preparing for a trial in June of 1997, the Court is willing to permit plaintiff's counsel to conduct a brief deposition of defendant Hack in Baltimore for one-half day at a date and time to be arranged among counsel (prior to March 1, 1997) for the purposes of updating the information already provided and to cover any areas that plaintiff's new counsel feels were not addressed in the prior depositions.

4. Defendants' Motion to Strike the Fourth Amended Complaint.

Plaintiff filed a Fourth Amended Complaint on March 1, 1996. Defendants object to the Fourth Amended Complaint on a number of grounds, the first of which is their assertion that under Md. Rule 2-341(b) plaintiff must have leave of Court to amend his complaint within fifteen days of the trial date. Defendants' argument continues that the appeal resulting in the decision in Shofer II was noted fourteen days before a scheduled trial date and that, at that point, it was too late for plaintiff to amend his complaint. Defendants contend that the ensuing appeal was not only unsuccessful but should not obviate plaintiff's obligation to comply with the aforesaid rule.

However, the reality is that the case is now more than six months short of trial and it appears to this Court to be hypertechnical to preclude the amendment of the complaint on the

basis of Rule 2-341(b).

The more troubling concern is plaintiff's assertion that the addition of the allegations in ¶19 thru 21 of the Fourth Amended Complaint adds a sufficient predicate for punitive damages which meets the requirements set forth by the Maryland Court of Appeals in Owens-Illinois v. Zenobia, 325 Md. 420 (1992).

In fact, the Court has further refined and developed the principle stated in Zenobia in the cases of Komornik v. Sparks, 331 Md. 720 (1993) and Ellerin v. Fairfax Savings, 337 Md. 216 (1995). The defendant in Komornik caused an automobile accident when he drove his sister's truck after drinking a substantial amount of alcohol. After the trial court declined to instruct the jury on punitive damages, plaintiff appealed and argued that defendant's decision to drink and then drive was analogous to the decision of the manufacturer of a known defective product to place the product for sale when harm to others is foreseeable. The Court of Appeals rejected the plaintiff's argument. Finding that the defendant had acted negligently, even with gross negligence, the Court found that the defendant did not have a state of mind consistent with the finding of ill will, evil motive or malice. It refused to allow a claim of punitive damages in that case but kept open the possibility that a future case might support a finding of punitive damages in a simple negligence action.

In Ellerin, the Court reiterated that the actual malice standard controls the award of punitive damages in non-intentional tort cases. The counter-plaintiffs alleged that the defendant lending bank had fraudulently inserted post-completion guarantees in loan settlement contracts, making the counter-plaintiffs liable for a substantial amount of money as guarantors of the lende limited partnership. The trial court had refused to instruct the jury regarding the "actual malice" requirement for punitive damages, holding that a finding on the fraud count would satisfy the

requirements of the malice standard. The Court of Appeals held that as the trial court failed to instruct the jury that "reckless indifference" as to the truth or falsity of the material statement would not be sufficient to support a finding of fraud, the jury's award may have been based on a faulty understanding of the law concerning fraud and that this was pertinent to the award of punitive damages. Id., 337 Md. App. at 241. Accordingly, the Court vacated the punitive damages award.

In light of these Court of Appeals' rulings, the plaintiff here must do more to fulfill its pleading burden than merely alleging that defendant Hack provided incorrect or even unlawful advice or that he was attempting by his actions to protect himself from civil liability. The bald allegation that his conduct "represents conduct characterized by an evil motive and a conscious, deliberate and reckless disregard for the welfare of his client . . ." will not support a claim for punitive damages under existing Maryland law. Consequently, Defendants' Motion to Strike the Fourth Amended Complaint is granted.<sup>5</sup>

5. Defendants' Motion to Strike Plaintiff's Fifth Amended Complaint.

Plaintiff filed a Fifth Amended Complaint on April 11, 1996 which included a count for fraud and deceit (Count III) based on information obtained during defendant Hack's deposition in March and April of 1989, allegedly indicating that the defendant fraudulently billed the plaintiff for research by an attorney named Barry Berman which was never conducted .

Defendants moved to strike this Fifth Amended Complaint, asserting that it is time barred under Maryland Code Annotated C&JP §5-101 (three-year statute of limitations) because it does not relate back to the filing of the original complaint and because the cause of action could have been discovered with due diligence well within the three-year limitation period.

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<sup>5</sup> But for the punitive damage allegations, the Fourth Amended Complaint is identical to the plaintiff's Third Amended Complaint.

Plaintiff counters that he was not put on notice of the defendants' fraud and deceit until July 20, 1995 when he received a letter from Mr. Berman indicating that he did not conduct research for the defendants in this case.

This Court cannot agree with plaintiff's argument. Maryland Code Annotated C&JP §5-203 clearly states that when knowledge of a cause of action is kept from a party by fraud of an adverse party, a cause of action accrues when the party discovers or by the exercise of ordinary diligence should have discovered the fraud (emphasis added). During the course of the 1989 and 1990 depositions, defendant Hack was questioned at considerable length concerning invoices he submitted to the plaintiff for research performed in connection with Shofer's inquiry and in connection with the defendant's letter of August 9, 1984. Given the dire consequences that plaintiff alleges flowed from the defendants' advice and research, he was placed on more than adequate notice at that time that he should inquire of Mr. Berman or of someone else as to what specific research was performed on his behalf.<sup>6</sup> Moreover, since Count III of this Fifth Amended Complaint asserts a new cause of action which does not relate back to the filing of the original complaint, it is barred by the applicable statute of limitations. Kirgan v. Parks, 60 Md. App. 1, cert denied, 301 Md. 639 (1984). Accordingly, Defendants' Motion to Strike Plaintiff's Fifth Amended Complaint is granted.<sup>7</sup>

6. Plaintiff's Demand for a Jury Trial.

In light of this Court's rulings with respect to the Fourth and Fifth Amended Complaints, plaintiff's jury demand is hereby stricken. Shofer's failure to demand a jury trial in connection

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<sup>6</sup> The issue presented is simply whether or not any research was performed. The record indicates that Shofer was aware of this issue more than seven years ago.

<sup>7</sup> Again, the Fifth Amended Complaint is in all other aspects identical to the plaintiff's Fourth Amended Complaint.

with his original complaint, his Amended Complaint, his Second Amended Complaint and/or his Third Amended Complaint constitutes a waiver of his right to a jury trial, since he was unable to plead successfully in any of his subsequent complaints a viable cause of action that was more than a reformulation of the counts presented prior to his jury demand. Luppino v. Gray, 336 Md. 194, 198 (1994); Maryland Rule 2-325.<sup>8</sup> Compare: Hawes v. Liberty Homes, Inc., 100 Md. App. 222, 233-34, cert. denied, 336 Md. 300 (1994).

7. Defendants' Motion for Summary Judgment and Sanctions.

On May 17, 1996, Shofer filed a new lawsuit against defendant Stuart Hack and The Stuart Hack Company (Case No. 96135027/CL212124). The new case includes two counts, one for negligence and the other for fraud and deceit. The allegations are identical to those contained in Count I of the Fourth and Fifth Amended Complaints and in Count III of the Fifth Amended Complaint in Case No. 88102069/CL79993 which have been stricken, supra.

Plaintiff contends that the 1996 case is viable because it adds a claim for excise taxes, the same having been assessed against plaintiff on January, 1995. Shofer argues that the period of limitations began to run on the date of assessment by the Internal Revenue Service and that any previous ruling with respect to his claims for excise taxes is not now dispositive. Defendant counters that the excise taxes were part of the damages claimed in the original action and that they were treated there as though they had been assessed. Plaintiff's counsel having conceded that they were not being pursued at the time Shofer I was argued in the Court of Appeals, they were excluded from the case and that ruling was affirmed by the subsequent orders of this Court which have today been reaffirmed.

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<sup>8</sup> While there was a timely jury trial prayer filed with the plaintiff's 1996 case, that issue is disposed of by virtue of this Court's ruling on Defendants' Motion for Summary Judgment in that case, infra.



This is essentially the only issue to be determined here. In all other respects, the 1996 case is identical to portions of the Fourth and Fifth Amended Complaints in the original action and is vulnerable to summary judgment disposition for the reasons previously stated in striking those complaints. The crux of Shofer's argument is that excise taxes, as a part of his "contingent liabilities" damages, were never specifically addressed by the Court of Appeals in Shofer I. Moreover, the excise taxes were then contingent only. They have now been assessed and there is Maryland case law to the effect that the statute of limitations may not begin to run until the date of their assessment by the Internal Revenue Service. Feldman v. Granger, 255 Md. 288,296 (1969); Leonhart v. Atkinson, 265 Md. 219,226 (1972). Since the first assessment of excise taxes occurred in January of 1995, plaintiff asserts that his new complaint for these damages is timely filed.

This argument, however, begs the question. The opinion of the Court of Appeals in Shofer I clearly indicates that the plaintiff was at one point pursuing excise taxes on prohibited transactions as a part of his damages, at least in discovery. Shofer v. Hack Company, 324 Md. at 111. In an effort to preserve Counts I and II of the Second Amended Complaint, which was then before the Court of Appeals, Shofer's counsel argued for a narrow reading of the damages sought by his client under Maryland malpractice law, a reading which would exclude all of the so-called "contingent liabilities." There is no question but that this concession saved that portion of the case from a fatal federal preemption which would have been occasioned by the inclusion of the so-called "contingent liabilities" because it would have established a relationship between the state law claims and the plan, bringing those counts within the purview of the ERISA statutory scheme. If not expressed, this ruling is implicit in the opinion of the Court of Appeals

in Shofer I.<sup>9</sup>

Having narrowly escaped an unsuccessful ending to this litigation in 1991, plaintiff has dressed his damage claim in new clothes here, asserting that it is merely a statute of limitations issue and ignoring the federal preemption problem. This Court cannot go along with that characterization of the issue. For the same reasons that excise taxes were excluded from the original case, they do not constitute viable damages in the new case and for all the reasons stated supra with respect to the causes of action set forth in the 1996 case identically to those contained in plaintiff's Fourth and Fifth Amended Complaints, summary judgment for defendants is granted.<sup>10</sup>

Defendants have also moved for their costs and attorney's fees in defending this action under Md. Rule 1-341. That motion is denied. However, plaintiff's continued efforts to revive damage claims and causes of action which have been eliminated from this case during eight years of litigation must stop now. Shofer should consider himself forewarned that any additional efforts to expand the scope of this litigation prior to trial may well be met by the imposition of appropriate sanctions, if the Court determines that he is acting in bad faith or without substantial justification. This Court has no intention of revisiting the issues ruled upon today, absent extraordinary circumstances.

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<sup>9</sup> Judge Hollander of this Court later grappled with the distinction between tax interest and penalties and excise taxes as being determinative of ERISA preemption. She was not at liberty to alter the ruling of the Court of Appeals in the original case. Neither is this Court willing to speculate as to why the Court of Appeals drew such a distinction. Clearly, the excise taxes were a part of the "contingent liabilities" which were eliminated in Shofer I in order to avoid preemptive treatment of the entire case.

<sup>10</sup> There is no question that plaintiff's malpractice claim under Count 1 is time barred. C&JP §5-101.

8. New Trial Date.

In view of the above rulings, the Court will adopt for the trial of the original matter, the trial date which had been assigned to the 1996 case, that is, June 26, 1997.

Counsel will contact the Court promptly upon receipt of this order to arrange a scheduling conference with respect to any and all open matters in this case.

  
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Albert J. Matricciani, Jr., Judge

Date: November 7, 1996



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IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER

Plaintiff

v.

88102069  
CASE NO. 88101069/CL79993

STUART HACK COMPANY, et al.,

Defendants

THE STUART HACK COMPANY, et al.,

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendants

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**PLAINTIFF'S OPPOSITION TO  
THIRD PARTY DEFENDANT'S  
MOTION FOR PROTECTIVE ORDER**

The Plaintiff, Richard Shofer, by and through his attorney, Douglas R. Taylor, opposes the Motion for Protective Order filed herein by the third party Defendant, Grabush, Newman & Co. P.A. (hereinafter referred to as "Grabush") and for reasons stated as follows:

1. That in August of 1996, Plaintiff's counsel and counsel for Grabush discussed prospective dates for the deposition of Kenneth Larash, one of the principals in the Grabush firm. That when counsel for Grabush declined to produce Mr. Larash for deposition on the basis that he had been previously deposed, Plaintiff informed Grabush's counsel that he would proceed to depose two other principals in the firm, Messrs. Newman and Bondroff. Grabush's counsel advised Plaintiff's counsel that she would determine their availability, and then after some time

elapsed, stated that they would not appear and that she would seek a protective order from the court. After several weeks went by and no protective order was requested, Plaintiff noted the depositions of Mr. Newman and Mr. Bondroff for September 21, 1996, and issued subpoenas therefor.

2. Counsel for Grabush responded to the Notices for Depositions by calling Plaintiff's counsel and advising him that the aforesaid deponents would not appear for deposition and that a protective order would be requested from the court.

3. After approximately two more weeks elapsed, Plaintiff elected to file a Motion to Compel, since the available deposition dates had then been exhausted and Plaintiff had been unable to depose any of the three principals of Grabush. Had Plaintiff known from the time he originally requested depositions of the three Grabush principals that the witnesses would never be produced except by court order, a Motion to Compel would have been filed several months ago and all of this time awaiting a response from counsel would have been eliminated.

4. That Grabush's bases for requesting a protective order in this matter are specious and completely without legal justification. It is totally irrelevant to the right to depose a witness to say that the deposition cannot take place because the Plaintiff does not have a claim against the witness. There is no authority that limits depositions to only those persons who have claims against each other. Any nonparty may be deposed by a party, and there are remedies to protect a witness from objectionable or inappropriate interrogation, but declining to produce the witness because the Plaintiff has no claim against him is not one of them.

5. Further, Plaintiff has never deposed any of the three principals which he seeks to depose. Mr. Larash, the only principal of Grabush to be deposed in this proceeding was deposed at the behest of the Defendants, Stuart Hack (hereinafter referred to as "Hack") and the Stuart Hack Company (hereinafter referred to as "Hack Company"), and not the Plaintiff. The Plaintiff has never noted the deposition of any Grabush officer or employee until this attempt to do so. The fact that the Plaintiff has not previously sought to depose a witness from Grabush up to this point in this litigation is also totally irrelevant and indeed contradictory to Grabush's earlier position that Plaintiff has already deposed Mr. Larash.

6. The fact that this court has entered an order reaffirming prior orders of court limiting the damages Plaintiff can seek in the upcoming trial is also irrelevant to Plaintiff's right to depose witnesses from Grabush. Grabush acted as Plaintiff's accountants for some seventeen years prior

to the events which gave rise to this litigation. Grabush worked on Plaintiff's original and amended income tax returns and other tax documents which ultimately resulted in the additional taxes, interest, and penalties which constitute some of the allowable damages in this case. Furthermore, the issue of liability has not been conceded by either Hack, The Hack Company or by Grabush, and Plaintiff expects relevant and material evidence to be produced at depositions of Grabush principals on this point as well. But discovery is just what the word implies - the discovery of evidence or the discovery of information and facts which can lead to evidence. Plaintiff is not limited to questioning the principals at Grabush about evidence of damages alone, but can interrogate those witnesses about the facts of this case generally. The allegation that Plaintiff already has the information which the principals at Grabush can provide, or that Plaintiff can discover the same information from other sources is no basis to prevent Plaintiff from deposing these witnesses. Additionally, Plaintiff desires to ensure that the testimony of these necessary and material witnesses is preserved and can be used at trial in the event the witnesses are not available to testify at trial.

7. That, since Plaintiff has never deposed any of the principals at Grabush, and particularly has not previously deposed the three witnesses named herein, it is erroneous to charge that the Plaintiff is attempting to subject Grabush to "multiple depositions" causing Grabush "needless expense and burden." A deposition may often be viewed by a deponent as a "burden" and a "needless expense", but the Plaintiff has a right to know the facts about the case and to prepare his case for trial. The law weighs the "burden" against a Plaintiff trying to prepare his case "in the dark" and without the facts versus the "burden" and "expenses" incurred by a witness in the same proceeding and has come down in favor of discovery and the avoidance of surprise at trial.

8. Furthermore, the agreement entered into between Plaintiff and Grabush (a copy of which is attached to the Motion to Compel as an exhibit) requires that Grabush "cooperate" with Plaintiff in Plaintiff's case against the Defendants herein. Refusal to make witnesses available to Plaintiff is not "cooperation" and violates the spirit and intent of the agreement. Plaintiff entered into the aforesaid agreement in good faith and fully expects Grabush to honor its terms.

9. If Plaintiff is not able to conduct these depositions, then Plaintiff's case will not be adequately prepared for trial, and Plaintiff will have been severely prejudiced by such action. Plaintiff has been totally shocked and dismayed by Grabush's refusal to produce the named witnesses, and the reasons advanced in the Motion for Protective Order are without a scintilla of

merit and has obviously been filed for the purposes of delaying Plaintiff's trial preparation and to hamper Plaintiff's efforts to obtain the fair trial guaranteed to him by the Constitutions of the United States and the State of Maryland and the rules of Court. It is utterly outrageous for Grabush to seek to limit Plaintiff's inquiry of the named deponents, and Plaintiff vehemently objects to any such attempts by Grabush to hamper and gag Plaintiff in his effort to uncover facts relevant to the presentation of his case.

WHEREFORE, for the reasons advanced herein, Plaintiff moves this Honorable Court as follows:

- a. That this Honorable Court enter an order denying the Motion for Protective Order filed herein.
- b. That this Honorable Court enter an order directing that Kenneth Larash, Harvey Newman and Barry Bondroff appear for a deposition at a time, date and place agreed upon by counsel but to occur no later than 30 days from the date of this order.
- c. And for such other and further relief as this Honorable Court may deem just and proper under the circumstances of this matter.

Respectfully submitted,



Douglas R. Taylor  
Attorney for Plaintiff  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209



## Plaintiff Requests a Hearing on this Motion

### Points and Authorities

1. As stated above.
2. Maryland Rules 2-402, 2-403, 2-404, and 2-411.
3. Maryland discovery rules are broad and comprehensive in scope. The rules are designed to allow a party to learn facts about the opposing party's case as well as obtain evidence which support his own case. It is not grounds to oppose the deposition of a party on the basis that the information is already known or can be obtained from other sources. M.L.E. Discovery, Section 4, pp. 441-442.
4. "This rule, [Rule 2-411 Deposition Right To Take] which is derived from former Rule 401, provides the broad grant to take depositions as a means of discovery. It is the most powerful and complete means of discovery and may be used as evidence at trial (see Rule 2-419) or for discovery, or both." Niemeyer and Schuett, Maryland Rules Commentary, pp. 269-270.
5. Billman v. State Deposit Corp., 86 Md. App. 1, 585 A2d 238, cert-den., 323 Md. 1, 590 A2d 158, 502 U.S. 909, 112 S.Ct. 304, 116 L.E. 2d 247 (1991).
6. The discovery rules are broad and comprehensive in scope and are to be liberally construed. The function and purpose of discovery is to insure that no party go to trial unsure about the facts giving rise to the litigation. Kelch v. Mass Transit Admin., 287 Md. 223, 411 A2d 449 (1980); Laws v. Thompson, 78 Md. App. 665, 554 A2d 1264 (1989).

Certificate of Service

I hereby certify that on this 3<sup>rd</sup> day of December, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Plaintiff's Opposition to Third Party Defendant's Motion for Protective Order to the following:

Ms. Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204  
Attorney for Defendants, Hack and  
The Stuart Hack Company

John Tremain May, Esquire  
Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036



Douglas R. Taylor

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IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

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CIVIL DIVISION

88102069

CASE NO. 88T01069/CL79993

RICHARD SHOFER

Plaintiff

v.

STUART HACK COMPANY, et al.,

Defendants

-----  
THE STUART HACK COMPANY, et al.,

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendants

**MOTION FOR LEAVE TO DEPOSE  
KENNETH LARASH**

The Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, moves this Honorable Court as follows:

1. That following remand of this case by the Court of Special Appeals for trial in this court, Plaintiff has been attempting to schedule the depositions of the parties, and representatives of the parties, in this action. One of the persons which Plaintiff has sought to depose is Kenneth Larash, CPA, one of principals of the third-party Defendant, Grabush, Newman & Co., P.A. (hereinafter referred to as "Grabush").

2. That after some discussion with Grabush's counsel concerning a mutually convenient date for the deposition of Kenneth Larash, Plaintiff's counsel was informed that Kenneth Larash would not voluntarily appear and be deposed by Plaintiff. Among several reasons cited by Grabush's counsel, both orally to Plaintiff's counsel and in the Third Party's Opposition To

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Plaintiff's Motion to Compel and Motion for Protective Order, is the fact that Kenneth Larash had already been deposed in this matter some seven years ago.

3. It is true that Kenneth Larash was deposed earlier, but that deposition was not taken by Plaintiff but rather by the Defendants Stuart Hack (hereinafter referred to as "Hack") and The Stuart Hack Company (hereinafter referred to as "Hack Company"). That while Plaintiff's counsel participated in the deposition as any party involved in this litigation would, the deposition was conducted by Defendants' counsel and the primary objective of the deposition was to question the witness from the vantage point of Defendants, not the Plaintiff. Clearly, the vast majority of time taken, and questions posed to Mr. Larash, were done so by Defendants' counsel. That deposition was in no way taken by Plaintiff nor did it address the issues on which Plaintiff desires to question Mr. Larash.

4. In its opposition to Plaintiff's Motion to Compel (which was not directed at Grabush's refusal to produce Mr. Larash), Grabush cites as additional reasons for refusing to produce Mr. Larash the agreement of the parties, which has been attached as an exhibit to Plaintiff's Motion to Compel. According to Grabush, the refusal to produce Mr. Larash is in accord with paragraph 5 of that agreement in which Grabush is free to "act at all times in its own best interests ... to protect itself with respect to the Third Party Claim filed by the Stuart Hack Company and Stuart Hack." But the purpose of this deposition is to enable Plaintiff to build his case against Defendants Hack and the Hack Company. Plaintiff has not sued Grabush, and has no claim against Grabush in these pleadings. The agreement requires that Grabush "cooperate" with Plaintiff, and it is quite clear that Grabush has violated both the spirit as well as the letter of the agreement.

5. Substantively, Mr. Larash was the principal accountant who worked on Plaintiff's tax returns and related filings with respect to the loans which triggered the additional taxes, penalties, interest, costs and other damages. Mr. Larash was uniquely positioned to know all of the mechanics of what occurred and what was necessary to repair the damage caused by the negligent acts of Defendants. Mr. Larash's testimony is valuable in further establishing both liability and damages, and he is absolutely a necessary and material witness. He will be called to testify at trial. It would be highly prejudicial to prevent Plaintiff from deposing so important a witness.


6. Grabush complains that Plaintiff has had "seven years to complete his discovery prior to the remand of this action" and the Plaintiff "should not be able to force the Defendants and the

third-party Defendant to do discovery all over again ..." That argument is nonsense. For much of the past seven years, Plaintiff's case has been "out of court" and on appeal. Additionally, the nature and character of the case has changed, in light of the decision rendered in Shofer I. Indeed, the specific complaint which will be the subject of the trial in this case is the Third Amended Complaint which looks far differently from the original complaint filed in this matter.

Furthermore, it is hard to understand how Grabush can complain that it is being forced to do discovery "all over again" when Kenneth Larash was never deposed by Plaintiff in the first instance, but whose deposition was taken seven years ago by the Defendants. It is even more difficult to understand that argument in light of the fact that neither Harvey Newman nor Barry Bondroff have ever been deposed in this case. Given the fact that Grabush acted as Plaintiff's accountant for 17 years, and given the intimate knowledge and information Grabush has about Plaintiff's business and income tax obligations, it is quite clear that Plaintiff should have the opportunity to depose Kenneth Larash and Harvey Newman and Barry Bondroff as a part of the discovery process in the preparation of this case. The depositions of all three witnesses are clearly authorized by the Maryland Rules, and Grabush itself entered into an agreement with Plaintiff, after Grabush had been sued by the Defendants herein, pledging to cooperate fully with Plaintiff in the preparation of Plaintiff's case. It is time now for Grabush to cooperate, and this court should require Grabush to do so.

WHEREFORE, Plaintiff prays that this Honorable Court as follows:

- a. That this Honorable Court enter an order directing that Kenneth Larash appear for his deposition to be conducted by Plaintiff at a date, time and place certain.
- b. And for such other and further relief as this Honorable Court may deem just and proper under the circumstances of this matter.



Douglas R. Taylor  
Attorney for Plaintiff  
P.O. Box 456  
Rockville, Maryland 20850  
(301) 565-0209

Plaintiff Requests a Hearing on this Motion

Points and Authorities

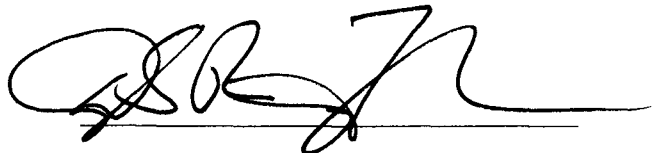
1. As stated above.
2. Maryland Rules 2-402, 2-404, and 2-411.
3. The agreement of the parties.

Certificate of Service

I hereby certify that on this 3<sup>rd</sup> day of December, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Motion for Leave to Depose Kenneth Larash to the following:

Ms. Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204  
Attorney for Defendants, Hack and  
The Stuart Hack Company

John Tremain May, Esquire  
Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036



Douglas R. Taylor

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IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFR,  
Plaintiff,

v.

STUART HACK COMPANY,  
et al.,  
Defendants.

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THE STUART HACK COMPANY,  
et al.,

Third-Party Plaintiff,

v.

GRABUSH, NEWMAN & CO., P.A.,  
Third-Party Defendants.

Case No. 88101069/CL79993

CERTIFICATE REGARDING DISCOVERY

I HEREBY CERTIFY that a copy of this Certificate Regarding Discovery, and a copy of the Answers of Third-Party Defendant to Plaintiff's Interrogatories, was hand-delivered, on the 25th day of May, 1997, to:

Douglas Taylor, Esquire  
P.O. Box 4556  
Rockville, MD 20850

and was mailed on the 27th day of May, 1997, to:

Janet Truhe, Esquire  
Ward, Janofsky & Truhe, P.C.  
Court Towers, Suite 505  
210 W. Pennsylvania Ave.  
Towson, MD 21204

I will retain the originals of these documents in my possession, without alteration, until the case is concluded in

es 7-23-97  
E.C.

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this Court, the time for noting an appeal has expired, and any appeal noted has been decided.

Respectfully submitted,

JORDAN COYNE & SAVITS

By: 

Deborah M. Whelihan  
33 Wood Lane  
Rockville, Maryland 20850  
(301) 424-4161

Mailing Address:

1100 Connecticut Ave., NW  
Suite 600  
Washington, D.C. 20036



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IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER,

Plaintiff,

v.

STUART HACK COMPANY,  
et al.,

Defendants.

-----  
THE STUART HACK COMPANY,  
et al.,

Third-Party Plaintiff,

v.

GRABUSH, NEWMAN & CO., P.A.,

Third-Party Defendants.

Case No. 88101069/CL79993

MOTION FOR SANCTIONS AND MOTION IN LIMINE  
TO EXCLUDE PLAINTIFFS' INTRODUCTION  
OF EVIDENCE NOT TIMELY PRODUCED IN DISCOVERY

The defendants, Stuart Hack and the Stuart Hack Company (hereinafter "the Hack defendants"), and the third-party defendant, Grabush, Newman & Co., P.A. (hereinafter "Grabush"), by and through their respective undersigned counsel, move for sanctions against the plaintiff and further move in limine to exclude from evidence at trial certain discovery that the plaintiff failed to timely produce, pursuant to Md. Rule 2-432 and Md. Rule 2-433. As grounds therefor, the Hack defendants and the third-party defendant Grabush state as follows:

1. On January 6, 1997, the parties met before this Court to agree to a discovery schedule. At that Court conference, the plaintiff agreed to designate his expert witnesses to be utilized

at trial on or before February 14, 1997. The parties also agreed to complete all discovery by May 16, 1997.

2. Despite the plaintiff's agreement to the informal scheduling order, the plaintiff in fact intended and has now attempted to ambush the Hack defendants and the third-party defendant Grabush prior to trial, by purposefully failing to timely provide proper and adequate supplemental discovery. See, Deposition of Richard Shofer dated March 21, 1997 at p. 37, the transcript of which is attached to this Motion as Exhibit A.

3. Since before this case was last scheduled for trial in February of 1995, the Hack defendants and the third-party defendant Grabush have repeatedly requested supplemental written discovery from the plaintiff. Well after the agreed upon close of discovery, Mr. Taylor hand-delivered supplemental answers to interrogatories propounded by Stuart Hack and supplemental answers to the third-party defendant's interrogatories.<sup>1</sup>

4. On February 14, 1997, the plaintiff purported to designate his expert witnesses. However, instead of providing the information that had been previously requested in interrogatories and in requests for production of documents propounded in years past, and as required by Md. Rule 2-402(e)(1), the plaintiff simply provided the names and addresses of his proposed experts in a letter dated February 14, 1997 that

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<sup>1</sup> Ms. Truhe received her written discovery and accompanying documents on Friday, May 23, 1997. Ms. Whelihan received her supplemental written discovery and documents on Sunday, May 25, 1997.

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was faxed to the Hack defendants and the third-party defendant Grabush at 5:56 p.m. See, letter dated February 14, 1997, which letter is attached to this Motion as Exhibit B.

5. As a result of communications with plaintiff's counsel about the plaintiff's experts, the plaintiff was notified that the information provided was insufficient. The plaintiff's counsel promised to supply the proper information within a week or two. See, letter dated February 21, 1997, which letter is attached to this Motion as Exhibit C. Despite numerous telephone and face-to-face conversations with the plaintiff's counsel about plaintiff's discovery obligations, the plaintiff has delayed in providing the necessary supplemental discovery requested.

6. The Hack defendants and the third-party defendant Grabush deposed two of the plaintiff's experts on May 8, 1997, having been told by the plaintiff's counsel that those experts had opinions that would be revealed in those depositions. However, both Wendy E. Martucci, C.P.A. and Nicholas J. Giampetro, Esquire were unable to articulate their opinions to be offered at trial. Ms. Martucci was not even told that she would be an expert until the first half of April of 1997. See, Deposition of Wendy E. Martucci dated May 8, 1997 at pp. 6-7, excerpts of which are attached to this Motion as Exhibit D. In fact, on May 8, 1997 when Ms. Martucci was deposed, she had had no discussions with either Mr. Shofer or his counsel about whether she would even be an expert witness or what her opinions would be. See, Exhibit D at pp. 21-24. In the case of Mr.

Giampetro, Mr. Giampetro conceded that he was not prepared to discuss his opinions because he had not formulated his opinions. See, Deposition of Nicholas J. Giampetro dated May 8, 1997 at pp. 4-20, excerpts of which are attached to this Motion as Exhibit E.

7. In supplemental answer to interrogatory no. 12, the plaintiff provided some of the cursory information that should have been supplied in February as part of the expert designation. See, supplemental answers to third-party defendant's interrogatories to plaintiff and supplemental answers to interrogatories propounded by Stuart Hack, which are attached to this Motion as Exhibits F and G.

8. In that supplemental discovery, the plaintiff clarified that he will rely upon another actuary, Dan A. Harbertson, to testify to the same issues as the plaintiff's original damage expert, Theodore Rosenberg, and the plaintiff provided a report from Mr. Harbertson. Unfortunately, the Hack defendant and the third-party defendant Grabush were not given the opportunity to have Mr. Harbertson's report prior to the discovery deadline. Furthermore, notwithstanding that the depositions of Ms. Martucci and Mr. Giampetro were a meaningless, and expensive exercise, the plaintiff did not supply reports from either Mr. Giampetro or Ms. Martucci and did not amplify their respective opinions.

9. The plaintiff clearly intended to ambush the Hack defendants and the third-party defendant Grabush prior to trial and has now accomplished that objective.

10. Because the plaintiff has intentionally withheld or delayed discovery from the Hack defendants and the third-party defendant Grabush, the plaintiff should be sanctioned, by having the supplemental information and additional experts excluded from trial. See, Hadid v. Alexander, 55 Md.App. 344, 462 A.2d 1216 (1983) (where a party who is under a duty to supplement information willfully refuses to do so, the amended information should not be admitted into evidence at trial). See also, Bartholomee v. Casey, 103 Md.App. 34, 651 A.2d 908 cert denied, 338 Md. 557, 659 A.2d 1293 (1995) (trial court has duty to fashion at least some remedy to alleviate prejudice by an opponent's failure to provide in a timely manner information in discovery).

WHEREFORE, the defendants, Stuart Hack and the Stuart Hack Company, and the third-party defendant, Grabush, Newman & Co., respectfully request this Court: (1) to exclude all evidence offered by the plaintiff that was not timely supplied to the Hack defendants and the third-party defendant Grabush; (2) exclude as witnesses the plaintiff's experts, Wendy Martucci, C.P.A., Dan A. Harbertson, ASA, R. Scott Gregory, FSA; (3) preclude the plaintiff's witness, Nicholas J. Giampetro, Esquire from offering any expert testimony to the extent that those opinions were not

produced in discovery prior to the June 26, 1997 trial date; and  
(4) award all further relief that is appropriate.

Respectfully submitted,

TRUHE & MAIER, P.A.

JORDAN COYNE & SAVITS

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for  
Sanctions and Motion in Limine to Exclude Plaintiff's  
Introduction of Evidence Not Timely Produced in Discovery, was  
hand-delivered, on this 6th day of June, 1997, to:

Douglas Taylor, Esquire  
P.O. Box 4556  
Rockville, MD 20850

Deborah M. Whelihan  
Deborah M. Whelihan

IN THE MATTER OF:

***RICHARD SHOFER***

-v-

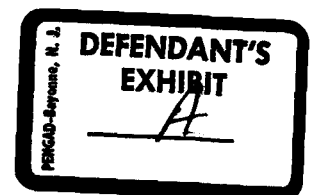
***THE STUART HACK COMPANY and  
STUART HACK***

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***RICHARD SHOFER  
MARCH 21, 1997***

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BALTIMORE, MD 21201  
(410) 728-9020***



***CONDENSED TRANSCRIPT AND WORD INDEX***

1717

Page 1

1 RICHARD SHOFER, \* IN THE  
 2 Plaintiff \* CIRCUIT COURT  
 3 v. \* FOR  
 4 THE STUART HACK COMPANY and \* BALTIMORE CITY  
 5 STUART HACK \*  
 6 Defendants \* Case No.:  
 88102069/  
 CL79993  
 7 THE STUART HACK COMPANY and \*  
 8 STUART HACK \*  
 9 Third Party Plaintiffs \*  
 10 v. \*  
 11 GRABUSH, NEWMAN & CO., P.A., \*  
 12 Third Party Defendant \*  
 \*\*\*\*\*  
 13  
 14 Pursuant to Notice, the deposition of  
 15 RICHARD SHOFER was taken on Tuesday, March 21,  
 16 1997, commencing at 10:16 a.m., at the law offices  
 17 of Janofsky & Truhe, P.A., Court Towers, Suite 505,  
 18 210 West Pennsylvania Avenue, Towson, Maryland,  
 19 before Richard D. Baker, Jr. a Notary Public.  
 20  
 21 Reported by Richard D. Baker, Jr.

Page 3

1  
 2 INDEX PAGE  
 3 WITNESS:  
 4 Richard Shofer  
 5 EXAMINATION:  
 6 By Ms. Whelihan 4  
 7 By Ms. Truhe 138  
 8  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
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 18  
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Page 2

1 APPEARANCES:  
 2 Douglas R. Taylor, Esquire  
 on behalf of the Plaintiff  
 3  
 4 Janet M. Truhe, Esquire  
 on behalf of Defendants/  
 Third Party Plaintiffs  
 5  
 6 Deborah Murrell Whelihan, Esquire  
 on behalf of Third Party Defendant  
 7  
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Page 4

1 STIPULATION  
 2 It is hereby stipulated and agreed that  
 3 the filing of this deposition with the Clerk of the  
 4 Court be and the same is hereby waived.  
 5 \*\*\*\*\*  
 6 RICHARD SHOFER,  
 7 called for examination, having been duly sworn to  
 8 tell the truth, the whole truth and nothing but the  
 9 truth, testified as follows:  
 10 EXAMINATION BY MS. WHELIHAN:  
 11 Q Okay, Mr. Shofer, could you state your  
 12 name for the record, please?  
 13 A Richard Shofer, S-H-O-F-E-R.  
 14 Q I'm not sure how much I need to know  
 15 that we don't know from the previous depositions.  
 16 Part of the problem I have, since you have not  
 17 supplemented your written discovery since February  
 18 of 1995 despite many discussions with your counsel,  
 19 that's sort of problematic for us. And I presume  
 20 that if there is some information provided in your  
 21 written discovery, assuming it's provided sometime

1505



1 timely before the trial date, subject to an  
 2 agreement among counsel we can reopen your  
 3 deposition to ask you about those items.

4 MS. WHELHAN: So I don't know if you  
 5 have a problem with that, Mr. Taylor. Now would be  
 6 a time to make an objection on the record.

7 MR. TAYLOR: I don't think anyone has  
 8 supplemented any written discovery at this point,  
 9 but we don't have any objections to making Mr.  
 10 Shofer available for any further examination  
 11 pending the receipt of any additional  
 12 documentation. I had told Ms. Truhe that once the  
 13 deposition of Mr. Shofer's accountants was  
 14 completed, if there was a need for Mr. Shofer to  
 15 come back, he was willing to do that.

16 Q Okay. One of the things I wanted to ask  
 17 you, since you probably have maybe greater  
 18 knowledge than Mr. Taylor, I'm not sure that that  
 19 is necessarily true, and you can actually help us  
 20 with this, is could you tell me what additional  
 21 opinions, if any, Mr. Kabala is going to render at

1 trial in this case?

2 A I really don't know at this time the  
 3 full extent of Mr. Kabala's anticipated  
 4 participation. That's about as complete an answer  
 5 as I can give. I am sure that he will be a witness  
 6 on the issue of liability and the duties of a  
 7 consultant or person in the pension field. Beyond  
 8 that, I don't really know what Mr. Kabala will be  
 9 saying at this time.

10 Q All right. But you were aware of what  
 11 his earlier opinions were when we were prepared to  
 12 go to trial in February of 1995, were you not?

13 A Well, when you say I'm aware of his  
 14 earlier opinions, back then when Mr. Kabala was  
 15 very active as a witness, Blum, Yumkas was handling  
 16 most of the, most of that, and I had left so much  
 17 of it in their hands that I can't say as I have  
 18 ever really done more than glance at Mr. Kabala's  
 19 written materials. The truth is his written  
 20 materials, I would say that at most I have probably  
 21 glanced at them. I have had conversations with

1 Blum, Yumkas where they said that Mr. Kabala  
 2 supported our viewpoints. And having that in my  
 3 head, I don't think I ever took the time to  
 4 thoroughly read everything that he said at this  
 5 point yet.

6 Q Well, have you had any meetings with Mr.  
 7 Kabala yourself since the case was scheduled for  
 8 trial in February of 1995, face-to-face meetings?

9 A No.

10 Q How about telephone calls?

11 A Yes.

12 Q What discussions did you have with Mr.  
 13 Kabala subsequent to let's say January of 1995  
 14 regarding the opinions that he was going to offer  
 15 in this case?

16 A I can't recall meetings that were  
 17 specifically about opinions that he was going to  
 18 offer. What I contacted Mr. Kabala about, and I'm  
 19 going beyond what you asked me looks like, what I  
 20 contacted Mr. Kabala about was the state of flux  
 21 regarding the issue of preemption and any help that

1 he might be able to give me in leading me towards a  
 2 better understanding of where preemption was going.

3 Q When did you contact Mr. Kabala, do you  
 4 remember?

5 A I don't think there's been any contact  
 6 for six months or more.

7 Q Okay.

8 A It's all been -- except that my counsel  
 9 may have informed Mr. Kabala of the upcoming trial  
 10 date.

11 Q All right. But your personal  
 12 discussions with Mr. Kabala, do you know when those  
 13 occurred?

14 A I think they go back six months or  
 15 longer. If you want me to ask my counsel, he was  
 16 aware.

17 Q Was Mr. Taylor a participant in your  
 18 telephone discussions with Mr. Kabala?

19 A He may have been. I don't recall. It  
 20 might have been a conference call.

21 Q All right. Can you tell me what it was

1 that you and Mr. Kabala discussed in your telephone  
2 conversation?

3 A It was probably just looking for his  
4 help on the issue of preemption.

5 Q Let's try it this way: How many  
6 telephone conversations did you have with Mr.  
7 Kabala?

8 A I can't say that I can recall. And  
9 probably in the last two years, probably not more  
10 than a total of two or three.

11 Q All right. Did the first telephone  
12 conversation of those two or three telephone  
13 conversations take place six months ago?

14 A No. It would have been much longer.

15 Q Do you remember when the first telephone  
16 conversation with Mr. Kabala took place?

17 A Well, I can't say it's the first. The  
18 first since when?

19 Q The first since the trial date of  
20 February of 1995.

21 A All right. Probably the first

1 conversation would have been shortly after Mr.  
2 Taylor started to represent me, because I would  
3 have made a telephone conversation to introduce Mr.  
4 Taylor to Mr. Kabala.

5 Q Okay. In that initial conversation,  
6 other than introducing Mr. Taylor to Mr. Kabala,  
7 did you have any other discussions with Mr. Kabala  
8 about the subject matter of your litigation?

9 A I can't recall. If there was any  
10 conversation about that, I can't recall what it  
11 would have been.

12 Q Did you take any notes regarding your  
13 telephone conversation with Mr. Kabala in that  
14 initial telephone conversation, once Mr. Taylor had  
15 gotten into the case?

16 A I don't recall taking any notes.

17 Q Does that mean you didn't take any notes  
18 or does that mean you can't simply remember whether  
19 you didn't take any notes?

20 A It means I can't remember.

21 Q Okay. Do you routinely take notes when

1 you have conversations with people in this case?

2 A No. What I usually do when I have a  
3 conversation is if someone said something that I  
4 think I have to remember, I look for the closest  
5 piece of scrap paper and write it on it and hope I  
6 don't lose it.

7 Q Okay. Do you give that scrap paper to  
8 Mr. Taylor or do you keep that at your office?

9 A Probably stays in my office until the  
10 relevance of it. Sometimes the relevance of it  
11 disappears and I throw it away or I file it.

12 Q Have you had a chance to look through  
13 your file of your scrap paper with your notes on it  
14 regarding this case in the last six months?

15 A The case, there's too many different  
16 files in different areas, so I don't regularly look  
17 through them. I try and focus on particular issues  
18 and look for what's there on the particular issue  
19 that I'm interested in.

20 Q Have you looked at any scrap pieces of  
21 paper with your notes regarding any conversations

1 with Mr. Kabala in the last six months that you can  
2 recall?

3 A I can't say whether I have or haven't  
4 because I don't recall.

5 Q And you don't have any recollection  
6 about your initial conversation with Mr. Kabala  
7 other than that was to introduce Mr. Taylor to Mr.  
8 Kabala; is that a fair statement?

9 A Would you repeat that again, please?

10 Q You cannot recall the substance of your  
11 conversation with Mr. Kabala in your initial  
12 conversation with Mr. Kabala other than the fact  
13 that you introduced Mr. Taylor to Mr. Kabala; is  
14 that a fair statement?

15 A Well, no, because there was probably  
16 some substance and the substance was, again, about  
17 the issue of preemption. I think virtually  
18 everything that I have had to communicate back and  
19 forth with Mr. Kabala has probably centered around  
20 the issue of preemption.

21 Q Why don't we try this: Can you remember

1019

1 the substance of your conversations with Mr. Kabala  
2 in your second telephone conversation with him?

3     A No.

4     Q How about your third conversation, can  
5 you remember the substance of your conversation  
6 with Mr. Kabala?

7     A I'm not even sure I had three  
8 conversations. I'm not even sure I had two. As I  
9 said, Mr. Kabala hasn't been -- I might cut it  
10 shorter by saying he has not been a central part of  
11 what's been going on with our pursuit of this issue  
12 in the last two years.

13    Q All right. In the last two years, tell  
14 me every discussion that you can recall that you  
15 had with Mr. Kabala. I would like you to exhaust  
16 entirely your memory.

17    A Well --

18    Q What I'm asking is for you to tell me  
19 what he said to you and what you said to him in the  
20 best chronological order that you can recall.

21    A First of all I have to paraphrase. I

1 can't remember anything specifically, specific  
2 words.

3     Q That's fine, you can paraphrase.

4     A Mr. Kabala -- when Mr. Taylor came on  
5 board, it was a period of time when I did not yet  
6 have a great deal of understanding about the issue  
7 of preemption. Probably still don't. It had --  
8 and I didn't understand totally the implications of  
9 the Mertins decision. And Mr. Bornhorst, my  
10 previous attorney, had always been talking about  
11 Mertins, so I was interested in the subject matter  
12 of how Mertins was impacting on our potential for  
13 damages in the future or recovering damages. And I  
14 think my initial contact with Mr. Kabala was to  
15 introduce Mr. Taylor to Kabala with reference to  
16 gathering information and looking into that subject  
17 matter.

18       Mr. Kabala at one time sent us a report,  
19 something about the, a black hole, that comes to my  
20 mind, a report by two attorneys on the dilemma of  
21 preemption, and we got a lot of information about

1 the subject of preemption from that report. And  
2 started following up on leads that that report led  
3 us to. Mr. Kabala had already provided a fine  
4 service for us just by sending us that. And then  
5 occasionally in the mail Mr. Kabala would from time  
6 to time, and I can't recall anything specific, but  
7 on one or two other occasions he sent us follow-up  
8 materials. I can't even now remember what those  
9 materials were but it would probably be some case  
10 that was just heard or something, or just decided,  
11 and it was, would have been of particular interest  
12 to us. So he sent it and I don't think he billed  
13 me for it.

14       And I'm trying to think if I had any  
15 further personal communication with him.

16    Q Well, I'm really looking for now is not  
17 what Mr. Kabala sent to you but what specifically  
18 you discussed with him. What did he tell you  
19 regarding any aspect of your case in any of the  
20 telephone conversations which you've had with him  
21 since this case was prepared to go to trial in

1 January of 1995?

2     A Give me a moment, because I'm going to  
3 see if I can recall anything. Preemption is the  
4 only issue that comes to my mind. If you want to  
5 bear with me I'll try to think if there was  
6 anything else.

7       (Pause in the proceedings.)

8     A Because his role was limited as a  
9 witness. He was going to be a witness as to  
10 liability.

11       (Pause in the proceedings.)

12    A I quite honestly at this moment can't  
13 think of anything.

14    Q All right. How about the issue of  
15 preemption? What did you discuss with Mr. Kabala  
16 about the issue of preemption in any of those two  
17 or three telephone conversations you had with him  
18 since January of '95?

19    A As I said, he provided me with some  
20 material. I don't think he specifically had any  
21 viewpoints on preemption that I found so remarkable

Page 17

1 that I remember them. He just, I think the most  
 2 significant thing he did was provide me with a 10-  
 3 or 12-page report by two other attorneys who had  
 4 written some comprehensive articles on the effects  
 5 of the Mertin case. That, and that stands out in  
 6 my mind as the most significant Kabala-related  
 7 event in the last two years.

8 Q All right. And can you tell me what  
 9 your knowledge is regarding any additional opinions  
 10 that Mr. Kabala is going to offer in this case as  
 11 your expert witness regarding the issues of  
 12 liability?

13 A I haven't thoroughly discussed that with  
 14 my attorney yet, so I don't know the full extent.

15 Q Give me your best understanding of those  
 16 additional opinions that Mr. Kabala is going to  
 17 offer.

18 A He will have to say what he has to say  
 19 about the standards of a professional such as Mr.  
 20 Hack is.

21 Q What I'm interested in is not what his

Page 18

1 other opinions and former opinions were when this  
 2 case was prepared to go to trial in January of '95,  
 3 but what additional opinions, if any, you're aware  
 4 that Mr. Kabala will offer in this case when it  
 5 goes to trial this year.

6 A I don't know at this time.

7 Q All right. In any of your telephone  
 8 conversations with Mr. Kabala, did you have any  
 9 discussions with him about the opinions of Mr.  
 10 Salkind?

11 A Quite honestly, I don't remember talking  
 12 to Mr. Kabala since the deposition of Mr. Salkind.  
 13 I don't know that I ever got back to Mr. Kabala.

14 Q Okay. Do you remember taking any notes  
 15 with respect to your second, or your third if one  
 16 occurred, telephone conversation with Mr. Kabala?

17 A I don't remember ever taking notes. As  
 18 I say -- I said that, I don't remember ever taking  
 19 notes. I might have but I don't remember.

20 Q What additional conversations have you  
 21 had with Nicholas Giampetro about the subject

Page 19

1 matter of the litigation since January of 1995?

2 A Numerous.

3 Q Okay. How many conversations have you  
 4 had with Mr. Giampetro?

5 A Probably comes up every time we meet or  
 6 talk in one way or another. So I probably would  
 7 say since '95 five or six times a year, because I  
 8 had less frequent communication with Mr. Giampetro  
 9 than previously.

10 Q Can you remember the substance of any of  
 11 your discussions with Mr. Giampetro by any of those  
 12 five or six occasions?

13 MR. TAYLOR: Let me just object to  
 14 limiting that question to matters pertaining to  
 15 this case. I think Mr. Giampetro also acts as Mr.  
 16 Shofer's counsel in matters relating to his pension  
 17 and I think that would be privileged information  
 18 but I think as it relates to Mr. Giampetro's status  
 19 as an expert witness, I think the question is  
 20 improper.

21 MS. WHELIHAN: Can I take it by your

Page 20

1 statement, Mr. Taylor, you will not be asking Mr.  
 2 Giampetro about any pension-related issues for part  
 3 of your proffer to the court beyond the damages  
 4 that this court has strictly limited this  
 5 litigation to?

6 MR. TAYLOR: What I'm simply saying for  
 7 the record is that Mr. Giampetro does work for Mr.  
 8 Shofer in his capacity as an attorney. And that's  
 9 unrelated to his position as an expert witness on  
 10 pension law. I only raised the question because  
 11 Mr. Shofer has indicated that he has talked with  
 12 Mr. Giampetro on numerous occasions when he has  
 13 been to see him on unrelated matters to this. And  
 14 I was simply wanting the record to reflect that the  
 15 information you're eliciting relates to Mr.  
 16 Giampetro's position as an expert witness in this  
 17 case and what discussions they may have had about  
 18 Mr. Giampetro's potential testimony and his  
 19 opinions about this case.

20 MS. WHELIHAN: Which was my original  
 21 question.

1 MR. TAYLOR: I just wanted the record to  
2 reflect that and so that Mr. Shofer would  
3 understand that.

4 Q Okay. Can you answer my original  
5 question?

6 A All right.

7 Q What discussions did you have with Mr.  
8 Giampetro regarding the subject matter of your  
9 litigation in this case since January of 1995?

10 A Numerous discussions. And I can't  
11 recall specifically the full content of each  
12 discussion. Our intention is to use Mr. Giampetro  
13 as a witness. So in that regard he's the same as  
14 Mr. Kabala, would be testifying as to the services  
15 and duties of a pension person such as Mr. Hack and  
16 their standards.

17 Mr. Giampetro would be testifying  
18 probably on issues of foreseeability, what a  
19 pension person should foresee as likely  
20 consequences for certain actions.

21 Q Are you done?

1 what specific discussions to the best of your  
2 recollection that you can recall you had with him?

3 A I can't recall specifically anything  
4 that stands out in my mind regarding this Hack  
5 issue other than that he expects to be a witness,  
6 an expert witness regarding aspects of this case.

7 Q Well, let's take that issue. The last  
8 time that this litigation was ready to go to trial  
9 Mr. Giampetro was only going to be a fact witness  
10 as to work he had done on your behalf. What  
11 additional discussions have you had with him  
12 regarding the fact he will now be an expert and a  
13 fact witness in this litigation?

14 A When you say what discussions, I -- is  
15 there some chronological order or something that  
16 you want me to get into? It's just like randomly  
17 when we would meet, we -- I don't know that we ever  
18 met specifically for the sole purpose of discussing  
19 his role as a witness. But it's our intention to  
20 utilize him as a witness regarding the issue of  
21 liability and foreseeability as well as perhaps

1 A I'm done.

2 Q Okay. I wasn't asking you, I hadn't  
3 actually gotten into the question about what his  
4 additional opinions were going to be. All I wanted  
5 to know is what discussions you had with him since  
6 January of 1995, to the best of your recollection,  
7 regarding the subject matter of the litigation.

8 A When you say what discussions since  
9 January of '95, that covers 24 months or longer, 26  
10 or 27 months now. And I have had meetings where we  
11 go over there to finish forms and have -- at the  
12 same time we're finishing forms he will say what's  
13 going on with the litigation. And I might have  
14 some, something to say that I don't even remember  
15 what I said now. It was just keeping him updated  
16 on where we were. I think Mr. Taylor has met Mr.  
17 Giampetro on one occasion at least. I'm not even  
18 sure of more than one occasion.

19 Q What I'm looking for, Mr. Shofer, is in  
20 the approximately 10 or 12 meetings that you might  
21 have had with Mr. Giampetro in the last 24 months,

1 other things that I haven't even completely gone  
2 over with Mr. Taylor yet. This case isn't fully  
3 prepared yet.

4 Q I understand that. But all I'm asking  
5 you to tell me in detail, to the extent that you  
6 have any recollection about it, is what  
7 specifically you've discussed with Mr. Giampetro  
8 regarding the expert opinions he will offer in this  
9 case and his role as an expert witness as opposed  
10 to --

11 A In other words, his feelings about  
12 liability?

13 Q Whatever you and he have said in words  
14 to each other regarding his new role as an expert  
15 witness as opposed to his prior role as a fact  
16 witness.

17 A Well, he feels quite certain that the  
18 letter that Mr. Hack wrote is ludicrous, and I'm  
19 paraphrasing. I'm not saying that he used that  
20 same word. And that substantial consequential  
21 damages would be foreseeable with any provider of

Page 25

1 those services. In other words, if a professional  
 2 rendered the kind of advise that Mr. Hack rendered,  
 3 that catastrophic events would be foreseeable.  
 4 Again, I don't know that he used the word  
 5 catastrophic. I'm just paraphrasing. And that's  
 6 the sum and substance of my conversations, all of  
 7 my conversations with him regarding his role as an  
 8 expert or his personal opinions when we weren't  
 9 even discussing it in the frame of him being an  
 10 expert. There were times we had conversations  
 11 where I didn't actually say you're going to be my  
 12 expert so what do you think as an expert. It was  
 13 just because of our relationship that he would  
 14 makes comments.

15 Q When did you make the decision to use  
 16 Mr. Giampetro as an expert witness as opposed to a  
 17 fact witness?

18 A As opposed to a?

19 Q Fact witness.

20 A I didn't say I wasn't going to use him  
 21 as a fact witness. He will be a fact witness also.

Page 26

1 Q What I'm getting at is when you made the  
 2 decision to use him as an expert in addition to his  
 3 earlier role.

4 A I can't say when. There came a time in  
 5 this case where I gathered some resolve and decided  
 6 to expand as far as I had to expand to achieve the  
 7 goal that I wanted to achieve and I would use as  
 8 many experts as I found practical to use.

9 Q When did you come to that conclusion?

10 A A few years ago when Mr. Taylor came on  
 11 board.

12 Q Sometime in '95?

13 A Yeah.

14 Q Okay. And in 1995 did you discuss with  
 15 Mr. Giampetro that you intended to use him as an  
 16 expert witness?

17 A I imagine it was before '96. I can't  
 18 say when in '95 we specifically got to that issue.  
 19 If it was in '95, but it may have been in '95.

20 Q All right. Other than telling you that  
 21 the letter that Mr. Hack wrote was ludicrous, what

Page 27

1 other discussions did you have with Mr. Giampetro  
 2 regarding any opinions that he could offer  
 3 regarding either the services of a pension  
 4 consultant or the duties owed to you by a pension  
 5 consultant?

6 A From time to time during the dozen,  
 7 roughly dozen meetings that we may have had over  
 8 the last two years, in perhaps as many as 50 to 75  
 9 percent of those meetings, something would come up  
 10 regarding the Hack issue. Maybe even 80 or 85  
 11 percent of the time, I don't know. But my meetings  
 12 with Mr. Giampetro may -- over the last two years,  
 13 predominantly my meetings with Mr. Giampetro were  
 14 over the details of resolving my ongoing  
 15 communications with the Labor Department over the  
 16 prohibited transaction issue. So really most of  
 17 what my business with Mr. Giampetro concerned was  
 18 either pension record-keeping or the Labor  
 19 Department and income tax issues. That was most of  
 20 it. His role as a potential witness was secondary  
 21 at this time.

Page 28

1 Q Well, I'm not asking for your analysis  
 2 of your discussions with Mr. Giampetro. What I'm  
 3 looking for from you is for you to regurgitate in  
 4 detail, to the extent that you can recall, what  
 5 specifically Mr. Giampetro discussed with you  
 6 regarding additional opinions or opinions that he  
 7 will offer in this case regarding anything.

8 A I think I already answered that. I  
 9 can't think of anything else specifically at this  
 10 time.

11 Q What you did say was that Mr. Giampetro  
 12 would say that the letter that Mr. Hack wrote is  
 13 ludicrous. And you also said that you discussed  
 14 with Mr. Giampetro services that a pension  
 15 consultant should provide and the duties a pension  
 16 consultant would owe. I want to know specifically  
 17 what it is Mr. Giampetro said to you regarding his  
 18 opinions regarding the duties of a pension  
 19 consultant.

20 A I paraphrased it and summarized it and I  
 21 don't think that it was, there was much more

1 explicit discussion about it. You have to remember  
 2 that my conversations with Mr. Giampetro on this  
 3 matter of Mr. Hack's responsibility covered not a  
 4 two-year period from '95 but a ten-year period.  
 5 And at Mr. Giampetro's rates, I am not interested  
 6 in the redundancy of going over things again and  
 7 again. I have been going over that issue of his  
 8 responsibility for ten years, not two years. And  
 9 Mr. Giampetro's busy too. So we don't, when I meet  
 10 with Mr. Giampetro it's generally for short blocks  
 11 of time between other appointments. And we don't  
 12 waste time rehashing old things that have been well  
 13 decided in our own minds.

14 Q But what I'm not clear on, because you  
 15 have not articulated in response to my questions,  
 16 the information I'm looking for is what  
 17 specifically you're aware of that Mr. Giampetro  
 18 will say regarding the opinion that he's expected  
 19 to offer in this case, whenever they took place.

20 A I don't know what he will say exactly.  
 21 I don't know the full extent of what he will say or

1 the full extent of how he will be rendering his  
 2 expert opinions. I'm not finished with Mr.  
 3 Giampetro and neither is Mr. Taylor in the  
 4 formation of what's going to happen here.

5 Q Well, I'm not looking for an exact or  
 6 full recital of what it is Mr. Giampetro is going  
 7 to say. What I would like to hear from you is what  
 8 you know and what you can remember that he will  
 9 say.

10 MR. TAYLOR: Let me object. I think the  
 11 witness has tried to answer that question on  
 12 several occasions. I don't think the witness knows  
 13 what Mr. Giampetro is going to say and I don't  
 14 think he can recall exactly what the substance of  
 15 that conversation was.

16 MS. WHELIHAN: Thank you so much, Doug.  
 17 Let me explain what the Maryland rules allow you to  
 18 do. They allow you to object if you don't like the  
 19 form of my question, which, I may say, was not  
 20 objectionable. Your client has not in fact  
 21 responded to any of the questions that I asked

1 regarding Mr. Giampetro's opinions. And for you to  
 2 instruct your client by giving a speaking objection  
 3 at this deposition is entirely inappropriate. If  
 4 you continue to do that I'm going to have to alert  
 5 the judge to that and then we're going to have a  
 6 problem. I would prefer if you simply make your  
 7 objection and not educate your client as what you  
 8 think his answer should be.

9 MR. TAYLOR: I didn't educate my client.  
 10 I recited what he previously said.

11 MS. WHELIHAN: That's not actually what  
 12 he said. The record will reflect that.

13 MR. TAYLOR: I have been very patient  
 14 about your line of questioning here.

15 MS. WHELIHAN: That's good because  
 16 you're the one that had the duty to actually  
 17 supplement the expert designation, which has not  
 18 been supplemented. The problem I have is Mr.  
 19 Shofer, according to you, is the one who actually  
 20 is having the discussions with the potential  
 21 experts and the fund of knowledge regarding his

1 discussions. Since I can't articulate what those  
 2 discussions are, I have to assume, unless he can  
 3 better clarify his answers, he has no earthly idea  
 4 what any of his proposed experts are going to say  
 5 in this case.

6 MR. TAYLOR: I don't think he has an  
 7 obligation to know what his experts are going to  
 8 testify to. They are experts. That's why he's  
 9 calling them as witnesses.

10 MS. WHELIHAN: I think that's actually  
 11 incorrect. We can argue about that. All I would  
 12 like you to do in this deposition is reserve your  
 13 comments, to the extent you're going to make them,  
 14 until after the deposition is over and simply  
 15 object for the record and not make an improper  
 16 speaking objection.

17 MR. TAYLOR: I'm going to represent my  
 18 client the best I can. I appreciate your advise  
 19 but I'm going to represent him the best I can. He  
 20 tried to answer your question and he can't answer  
 21 your question. I would suggest we move on to some

Page 33

1 other questions.

2 Q Well, Mr. Shofer, is what your attorney

3 has represented as your potential answer to any

4 question correct; that is, are you unable to say

5 what it is Mr. Giampetro will say in this case as

6 his opinions as an expert other than he finds Mr.

7 Hack's letter to be ludicrous and he will offer

8 opinions regarding the services provided by a

9 pension consultant and the duties a pension

10 consultant owes?

11 A **He will additionally provide testimony**

12 **regarding the issue of foreseeability and damages**

13 **that one might expect would come from this kind of**

14 **advice.**

15 Q All right. Other than generally

16 identifying Mr. Giampetro will provide those types

17 of opinions, can you provide any more specifics as

18 to what the actual opinions Mr. Giampetro will

19 offer in this case are?

20 A **Not at this time. And I'm not saying**

21 **that there won't be in the future additional**

Page 34

1 **opinions he will be rendering on certain issues.**

2 Q But you can't say what those opinions

3 are today?

4 A **Not today.**

5 Q How about Mr. Rosenberg, have you had

6 any discussions with Mr. Rosenberg since this case

7 was prepared to go to trial in January of 1995?

8 A **Yes.**

9 MS. TRUHE: Excuse me. Before we move

10 on to Mr. Rosenberg, Mr. Taylor, could we have

11 clarification from you as to the scope of Mr.

12 Giampetro's testimony? Up until this point in time

13 I was under the impression that the sole liability

14 witness on the issue of whether Mr. Hack had

15 breached any duty of care towards Mr. Shofer would

16 be Edward Kabala. Has that changed? In other

17 words, will Mr. Giampetro be offering duplicative

18 testimony on that issue?

19 MR. TAYLOR: I don't know it would be

20 duplicative. It may overlap. As you may recall,

21 Ms. Truhe, we had a motions hearing in August of

Page 35

1 last year, and at that motions hearing Mr.

2 Giampetro was present. It had been my intention to

3 call him as a witness in support of the motions

4 that we were going to argue at that time. In light

5 of the way the matter was handled, Mr. Giampetro

6 did not testify. But I read into the record a

7 proffer of what Mr. Giampetro's testimony would be.

8 MS. TRUHE: As I understood it, it went

9 solely to the issue of foreseeability.

10 MR. TAYLOR: I think it touched on the

11 issue of liability as well as foreseeability. I

12 believe. There was a written affidavit that I was

13 going to submit. But in view of the way in which

14 the hearing was conducted, it was simply read into

15 the record.

16 MS. TRUHE: Well, then I would just like

17 to state for the record that in view of the fact

18 that Mr. Giampetro is now going to be offered at

19 least to some extent as a witness on the issue of

20 standard of care applicable to Mr. Hack and whether

21 that standard of care duty was breached, I would

Page 36

1 like to reopen Mr. Giampetro's deposition, because

2 at the time I took his deposition he certainly was

3 not expressing any opinions in that regard nor did

4 he envision his function in the case to be that of

5 an expert. It was strictly factual testimony I was

6 eliciting from him. With that said, let's move on

7 to Mr. Rosenberg.

8 Q All right. As to Mr. Rosenberg, what

9 opinions will Mr. Rosenberg offer beyond what

10 opinions he was prepared to offer when this case

11 was originally scheduled to go to trial in February

12 of 1995?

13 A **Mr. Rosenberg will be doing calculations**

14 **to substantiate the proper numbers on certain areas**

15 **of damages. At this time the areas of damages that**

16 **are in the present case are taxes now, taxes later,**

17 **just to put some -- the difference between paying**

18 **taxes now or in the '80s and paying taxes sometime**

19 **in the next century, what those numbers really**

20 **mean. He will, however, also be providing numbers**

21 **on other areas of damages that are not addressable**



1 in the present case but some of his information  
2 will be available for the proffer or in the proffer  
3 that we expect on other damages.

4 Q What additional documents have you  
5 supplied to Mr. Rosenberg for his calculations?

6 A I haven't provided him anything new in  
7 the last couple of years because, as all actuaries,  
8 his time is expensive and I wanted to summarize it  
9 at the last minute or at the last, in the last  
10 month. I wanted to update it based on the clearest  
11 picture that we have in the last month before  
12 trial.

13 Q All right. So you were planning on  
14 giving him additional documents in the month prior  
15 to trial?

16 A If he asked for them. He may not need  
17 them. What he indicated to me is by the methods  
18 that he uses, he already has all of the information  
19 he needs. All he's got to do is ask his computer  
20 to do some calculations that bring it current to  
21 trial time.

1 discussion that's probably the better part of two  
2 years old about Mrs. Truhe, Ms. Truhe's quoting Mr.  
3 Rosenberg or misquoting Mr. Rosenberg. I had some  
4 discussions with Mr. Rosenberg about that. There  
5 was an area of damages regarding my interest  
6 expense on the Virgin Islands piece of property and  
7 Ms. Truhe put into a motion or some document to the  
8 court some verbiage thatááand I'm just generally  
9 speaking now because I can't speak

10 specificallyáábut she put into the record something  
11 to the effect that Mr. Rosenberg said that there  
12 was no way that he could calculate the extent or  
13 the true interest cost to me of the effect my  
14 credit would have had, my credit being damaged  
15 would have had on the ultimate cost of paying a  
16 higher interest rate on the Virgin Island property.

17 And the way that it was written to the  
18 court, Mr. Rosenberg -- she indicated to the court  
19 that Mr. Rosenberg's opinion -- that he knew enough  
20 about it to render the opinion, that it wasn't  
21 fathomable. And I asked Mr. Rosenberg about that

1 Q But it's your understanding that he has  
2 not yet done that, he has not brought his  
3 calculations current?

4 A That's my understanding.

5 Q All right.

6 A I haven't asked him to.

7 Q Can you remember any discussions that  
8 you had with him since January of 1995 regarding  
9 the opinions he's going to offer in this case other  
10 than what you just generally described?

11 A Yes. I discussed, I discussed having  
12 his numbers reviewed by other actuaries to support  
13 the theories that he operated under so that there  
14 would be some backup numbers or some backup  
15 testimony from other experts on Mr. Rosenberg's  
16 approach to these matters.

17 Q Anything else that you can recall in  
18 your discussions with Mr. Rosenberg?

19 A In the last two years?

20 Q Yep.

21 A Well, yes. There was, there was some

1 and what he said was that I hadn'tááand which is  
2 the truthááI never asked him to really do a  
3 calculation on that element of damage, so he knew  
4 nothing about it. And what he really was saying to  
5 Ms. or had intended to say to Ms. Truhe is I don't  
6 know anything about it, nobody ever asked me to do  
7 that kind of a calculation. But the meaning of  
8 what he said got turned around by the time it got  
9 onto -- by the time Ms. Truhe printed it.

10 MS. TRUHE: For the record, Mr. Shofer,  
11 that item of damage has been conceded out of this  
12 case by your previous counsel before Judge Ellen  
13 Hollander. It's no longer an issue in the case.

14 MR. TAYLOR: Just for the record, a lot  
15 of damages that have been excluded may still be  
16 issues on appeal.

17 MS. TRUHE: I understand some damages  
18 which were excluded by way of motion and subsequent  
19 granting of motion may be the subject of an appeal.  
20 But this is an item of damage which your own  
21 attorney, Mr. Bornhorst, withdrew voluntarily in

Page 41

1 the course of the hearing before Judge Hollander  
2 and told everyone on the record that it was no  
3 longer an item of damage in the case. It can't  
4 come back in. It has been withdrawn by your  
5 attorney, not by one of us trying to get it knocked  
6 out of the case and the judge agreeing with our  
7 opinion. This is something that was withdrawn by  
8 your attorney.

9 THE WITNESS: Would you like me to  
10 comment on that?

11 MS. TRUHE: No.

12 Q I thought maybe I would ask my questions  
13 first and then we'll take turns. Let me finish  
14 with what I want to ask you about Mr. Rosenberg,  
15 which is in your discussions with Mr. Rosenberg  
16 about having his calculations reviewed by other  
17 actuaries to support his approach, did you actually  
18 discuss with him the retaining of other actuaries?

19 A Yes.

20 Q Did he tell you who it was that he  
21 recommended?

Page 42

1 A No.

2 Q To whom he recommended these  
3 calculations be given. Now you can say no.

4 A No.

5 Q All right. Did you suggest to him any  
6 actuaries he should use to have his calculations  
7 reviewed?

8 A No.

9 Q Has he done that yet?

10 A Done what?

11 Q Sent his calculations to another  
12 actuary.

13 A No.

14 Q Okay. Have you given him any kind of  
15 information, either verbally or in writing, about  
16 the Virgin Islands interest expense damage that may  
17 or may not be in this case?

18 A No. I had discussion with him about it.

19 Q All right. And have you completely  
20 summarized your discussions with him regarding that  
21 aspect or is there something additionally that you

Page 43

1 can remember that you discussed with Mr. Rosenberg  
2 regarding the interest expense?

3 A What I said to Mr. Rosenberg was that  
4 the -- I showed him a calculation that I had done  
5 and asked him if it was a reasonable calculation.  
6 I don't recall his response, but Mr. Rosenberg  
7 indicated to me that if it became an issue, that he  
8 wanted my -- and I wanted his assistance on it,  
9 that he could do, he could do calculations on that  
10 element of damages. I didn't ask him to do it  
11 because it's an up-in-the-air issue to say the  
12 least. It's at least just up in the air as to  
13 whether it will ever be a relevant, will be  
14 relevant to this case or not. I can't spend money  
15 on those kinds of damages until they become  
16 relevant.

17 Q Does your counsel have a copy of the  
18 calculation that you gave to Mr. Rosenberg?

19 A I don't know that I ever gave Mr.  
20 Rosenberg calculations. I say I showed him  
21 calculations.

Page 44

1 Q Does your counsel have a copy of those  
2 calculations done by you?

3 A I don't know.

4 Q Do you remember what the result of your  
5 calculations were?

6 A I can generalize.

7 Q All right, why don't you do that?

8 A There came a time when interest rates  
9 dropped substantially. I was paying 13 percent on  
10 my original mortgage and the bank in St. Thomas was  
11 advertising rates somewhere around 7 or 8. They  
12 kept dropping. And I had already had another  
13 successful mortgage with that bank that I prepaid.  
14 So I felt that I probably could have gone to that  
15 bank and remortgaged my 13 percent mortgage down to  
16 their new advertised low rates back in the late  
17 '80s were it not for the fact that I had tax liens  
18 recorded against me with the IRS because of the  
19 Hack situation. And I made a call -- my  
20 recollection is that I made a call to the bank in  
21 St. Thomas that I had dealt with and they confirmed

Page 41 - Page 44

Page 45

1 to me that they couldn't process an application if  
2 I had personal tax liens, or they couldn't approve  
3 an application if I had personal tax liens against  
4 me in those amounts of money.

5 So I was stuck with keeping my fingers  
6 crossed that the lady who was carrying the mortgage  
7 of 13 percent would renew it but I didn't want to  
8 make any waves about that issue because if I  
9 frightened her and she didn't renew it, because it  
10 ballooned after five years and it was up to her to  
11 either renew it or not renew it, I knew I couldn't  
12 get another mortgage if she didn't renew it. So I  
13 just patiently made my payments and asked her to  
14 renew it.

15 Subsequently there came a time when I  
16 indicated that I wanted, that the property was for  
17 sale and I was anxious to sell it. And she said if  
18 I didn't sell it she would lower the interest rates  
19 and she subsequently lowered it from 13 to 10,  
20 where it is now. Even when she lowered it to 10,  
21 lower rates were available to owners down on the

Page 46

1 island. So calculations would subsequently be then  
2 the difference between 13 percent and 7 or 8  
3 percent from one period of time and then 13 percent  
4 to 10 percent for an ongoing period of time based  
5 on the fact that those advertised rates were  
6 available. So it is calculable.

7 Q Okay. Other than making a telephone  
8 call to somebody at this Virgin Island bank, did  
9 you do anything else to apply for a different  
10 mortgage?

11 A No. One understands when there's  
12 \$200,000 tax liens against them, no financial  
13 institution is going to give them a mortgage on  
14 real estate. I mean if I need an expert witness to  
15 tell that to the court I'll get one. But I had  
16 already tried, incidentally, not regarding the  
17 island property, but several times during the  
18 course of a year, or a number of times, I would try  
19 other avenues to try and get lines of credit or  
20 some extension, even offering to pay as much as 20  
21 percent. And I have been turned down at 20 percent

Page 47

1 by lenders based on the situation that I was in  
2 with the Labor Department and the liens that I had.  
3 So being turned down by local lenders at 20  
4 percent, it's unlikely I'm going to be able to go  
5 off-island and get some favorable rate with tax  
6 liens against me. There comes a time it pays not  
7 to even pursue it.

8 Q So the answer to my question was no?

9 A No. Well, the answer to the question is  
10 I tried to get credit in other ways but  
11 specifically not on that property.

12 Q Okay. Do you remember the identity of  
13 the person to whom you spoke at the bank?

14 A At what bank?

15 Q Virgin Islands bank.

16 A No. It would have been someone who just  
17 answered the phone in the real estate department.

18 Q Did you ever talk to the person who held  
19 the mortgage before she lowered the rate because  
20 you were thinking of selling the property about  
21 lowering the rate?

Page 48

1 A No. Excuse me, I can't say no. But I  
2 don't recall specifically having a conversation. I  
3 didn't want to bring up the issue of threatening to  
4 take my business elsewhere when I couldn't.

5 Q When you say you can't say no, does that  
6 mean you don't recall any conversations?

7 A With her about lowering the rate, no.

8 Q Okay. When did she lower the rate on  
9 your Virgin Islands property to 10 percent? What  
10 year was that?

11 A It's been more than two years but I  
12 can't recall. She renewed it at 13 and then  
13 sometime during that renewal period it was changed  
14 and lowered to 10.

15 Q Who is Don Hannahs, H-A-N-N-A-H-S?

16 A Don Hannahs is a estate planner with  
17 Signa.

18 Q What conversations have you had with Mr.  
19 Hannahs about this litigation?

20 A Well, I met Mr. Hannahs a few years ago,  
21 and the first conversation regarding the litigation

Page 49

1 was that he was going to do some estate planning  
2 for me, a will that I needed. And as part of  
3 providing the service for doing the will, it was --  
4 it would have been a complicated type of document  
5 because it involved personal members of the family  
6 and real estate and future values of money and  
7 pension plans. So it was so complicated I actually  
8 met him in a seminar that he was giving. I went to  
9 this seminar and I was very impressed with his  
10 apparent knowledge of these matters. And so he was  
11 going do my estate planning.

12 And when he came to my home to discuss  
13 that issue, in the dialogue, the complications  
14 surrounding the litigation, they were a necessary  
15 part of the conversation. So that was his  
16 introduction to my litigation situation. And as  
17 our relationship continued and he started pressing  
18 me to get on and continue with this estate  
19 planning, I kept realizing how many things were so  
20 uncertain that it was difficult to do it properly  
21 and I kept putting it off. But during that period

Page 50

1 of time I became aware of his extensive knowledge  
2 regarding this issue, the issue of estate planning.  
3 And where it ended up is that I intend to use him  
4 as a witness regarding the purposes of estate  
5 building of pensions and estate building and the  
6 future value of a pension account. And the,  
7 actually he will be a witness regarding the damage  
8 done to my pension account. That's the sum and  
9 substance of it.

10 Q Do you remember when it was, the seminar  
11 was that you met Mr. Hannahs?

12 A No. But I think it was more than two  
13 years ago.

14 Q Did Mr. Hannahs do an estate plan for  
15 you?

16 A No. He hasn't finished that but he has  
17 done -- he's handling my life insurance now.

18 Q When did you buy life insurance from Mr.  
19 Hannahs?

20 A Well, I already had the life insurance.

21 He was the agent that handled the conversion of it

Page 51

1 from term life to universal life.

2 Q I must have misunderstood your previous  
3 testimony. I thought you first met Mr. Hannahs in  
4 a seminar?

5 A I did, but he's an insurance agent also.

6 Q He had been your insurance agent prior  
7 to meeting him?

8 A No. Another agent had the policy but I  
9 used Mr. Hannahs for the conversion of the policy.

10 Q When did he convert your policy?

11 A A couple of years ago.

12 Q After the seminar?

13 A So I had to know Mr. Hannahs perhaps  
14 three years or longer because the policy has  
15 between converted for about two years. Maybe I  
16 knew him four years. I'm thinking back now.  
17 You're reminding me of the fact the policy was  
18 converted. Now when I realize the policy has been  
19 converted for two years, I probably knew Mr.  
20 Hannahs more than three years, yeah, maybe four.

21 Q Did Mr. Hannahs convert your life

Page 52

1 insurance prior to your meeting him at the seminar?

2 A No.

3 Q You met him at the seminar first?

4 A Yes. Sometime after that, perhaps a  
5 year to two years after that he converted my  
6 policy.

7 Q Did you do a will for you?

8 A No, not yet.

9 Q All right. Other than providing you  
10 with a converted life insurance policy, has he, and  
11 your meetings with him regarding your estate plan  
12 that has not been completed, has he provided any  
13 other services to you?

14 A Officially, no.

15 Q All right. How about unofficially?

16 A Yes.

17 Q What other services has he provided to  
18 you?

19 A He introduced me by way of telephone or  
20 gave me a lead that was very productive for me. As  
21 part of my settlement with the Labor Department,

Page 49 - Page 52

Page 53

1 the Labor Department required that I have an IRA in  
 2 place to buy any delinquent paper that the  
 3 pension -- that if in the future in correcting all  
 4 prohibited transactions the pension of Crown Motors  
 5 couldn't buy back a piece of paper, there had to be  
 6 a facility to correct a transaction so that it  
 7 wouldn't be prohibited. What was determined was  
 8 that I could set up an IRA and I could take a bad  
 9 piece of paper and attach it to my own personal  
 10 account and my pension and move it out of the  
 11 pension into an IRA, which would not be the same as  
 12 a distribution because it would still be in a  
 13 sheltered environment but at least it would be  
 14 getting the bad paper out of the pension attached  
 15 to my account instead of other participants. It  
 16 was a mechanical device to protect other  
 17 participants from being involved in bad paper  
 18 because I would take it all myself. But it did  
 19 require the setting up of an IRA.

20 In '84 when I was having those  
 21 discussions with the Labor Department, things were

Page 54

1 such a mess that I couldn't find a local bank to  
 2 allow me to set up an IRA. They were just afraid  
 3 that it was too complicated for them to get  
 4 involved in. And Mr. Hannahs knew of a person who  
 5 had just started a trust company or who was  
 6 building a trust company in Virginia that was one  
 7 of his clients, and that gentleman provided the  
 8 facility down in Virginia for me to have an IRA  
 9 account. So that's the service that he did for me.

10 Q Who was it that Mr. Hannahs introduced  
 11 you to in Virginia, the name of that gentleman?

12 A I don't even remember the man's name  
 13 right now. And I don't even remember the name --  
 14 actually there's very little that goes on with that  
 15 account. So it's a Virginia -- it's Virginia Bank  
 16 and Trust or something. I don't remember the name  
 17 of it even. But it's an IRA account.

18 Q That's still in existence?

19 A It still exists.

20 Q Okay. When did you tell Mr. Hannahs  
 21 that he was going to be an expert in this case?

Page 55

1 A I didn't tell him. I asked him if he  
 2 would be willing to be an expert.

3 Q When did that discussion take place?

4 A Sometime late last year I guess.

5 Q Do you know what his opinions are going  
 6 to be that he's going to offer in this case  
 7 regarding the purposes of estate building and  
 8 building a pension?

9 A No.

10 Q Do you know what his opinions are that  
 11 he's going to offer in this case regarding the  
 12 future value of the pension account?

13 A I never discussed specific numbers or my  
 14 own particular case with him in any detail. I just  
 15 have a feeling generally that anyone versed in the  
 16 area of estate planning knows the difference  
 17 between sheltered money and unsheltered money and  
 18 the damage that can be done when a pension account  
 19 is depleted before its time.

20 Q So is it a fair statement to say you  
 21 haven't had any discussions with Mr. Hannahs about

Page 56

1 your actual situation and the specifics of that  
 2 situation?

3 A He expects to be called in a deposition  
 4 and he expects to be utilized as an expert witness.

5 Q Right. But other than what his  
 6 expectations are, you have not specifically  
 7 discussed your situation with him; is that a fair  
 8 statement?

9 A No. Well, I have specifically discussed  
 10 it but we haven't gotten down to any details. We  
 11 don't even have a date set for the deposition yet.

12 Q Okay. Did he tell you what he thought  
 13 his opinions could be as to the damages done to  
 14 your pension account?

15 A No.

16 Q All right. Did you have any discussions  
 17 with him regarding his opinions regarding sheltered  
 18 money versus unsheltered money?

19 A Well, that was his introduction to me  
 20 back years ago when we first met. At the seminar  
 21 they were the numbers that he was using in his --

1 actually that seminar that he gave of course was a  
2 seminar where he hopes to get clients out of it.

3 And the demonstration he uses includes of course  
4 the dramatic differences that happen when money  
5 stays sheltered instead of unsheltered. I already  
6 knew that but I was still impressed with him.

7 Q But as to your specific situation in  
8 this litigation, you haven't had any discussions  
9 with him regarding his specific pension; is that  
10 right?

11 A Right.

12 Q Okay. How about Wendy Martucci, what  
13 opinions is she going to offer in this case?

14 A I don't know at this point exactly what  
15 role she'll take. She is my present accountant.  
16 I'm quite sure that she will probably participate  
17 at some point in time in some areas of this case,  
18 being my accountant, since my records will be the  
19 subject matter in this case or will be involved in  
20 the subject matter.

21 Q When did she become your accountant?

1 out our office and meet my wife and see our  
2 operation and discuss the possibility of becoming,  
3 her becoming my accountant.

4 Q All right. After she became your  
5 accountant, what services did she provide to you?

6 A Accounting services.

7 Q But what specific accounting services?

8 A Well, she provided accounting services  
9 for my parent corporation, my pension, and myself  
10 personally. I would consult with her on issues  
11 that I felt it appropriate to do so regarding any  
12 accounting procedures.

13 Q Okay. What specific things did she do  
14 for your parent corporation?

15 A She does the books. She finalizes the  
16 books for it.

17 Q She reviews the records kept by your  
18 bookkeeper or she actually does the bookkeeping for  
19 your --

20 A She reviews the records done by my  
21 bookkeeper.

1 A I think sometime in '92, to the best of  
2 my recollection.

3 Q How did you meet her?

4 A Sitting adjacent to her in a jury duty  
5 room. We were both working on our own individual  
6 projects while we were waiting to be called as  
7 jurors. We had a conversation, we went to lunch  
8 together, and I expressed the fact that my present  
9 accountants were becoming too expensive.

10 Q Any other part of that discussion that  
11 you can remember that you had with her in '92?

12 A That discussion?

13 Q Right.

14 A Yeah, we both liked Chinese food.

15 Q Anything else regarding her providing  
16 services to you?

17 A No. It was -- we didn't get too deeply  
18 into that at that time about her providing  
19 services. She gave me her card and I think at  
20 some -- I don't know if it was during that initial  
21 time or very close after that I asked her to come

1 Q Anything else she does for your  
2 corporation?

3 A No.

4 Q Okay.

5 A I already included that I consult with  
6 her when necessary. So she will, if it's an area  
7 that she can provide me with help on, she does  
8 that.

9 Q Does she do your business tax returns?

10 A Yes.

11 Q Okay. What's the first year in which  
12 she did your tax returns for your business?

13 A I think the first year she completed was  
14 '92. Could be '91 but I think '92.

15 Q What services does she provide for your  
16 pension?

17 A She makes sure that the pension records  
18 balance and I think she does my 990. She does my  
19 990.

20 Q When she checks to see that your pension  
21 records balance, is she performing a review

Page 61

1 function or doing the actual record-keeping for the  
2 pension?

3 A No. She is doing a review function.  
4 Pension services does my actuarial work.

5 Q What services does Ms. Martucci provide  
6 to you personally?

7 A That's it, accounting services and  
8 consulting when I ask her.

9 Q So she --

10 A On issues I'll ask her.

11 Q She does your personal tax returns?

12 A Yes.

13 Q All right. Does she also answer your  
14 tax questions; is that what you mean by consulting?

15 A Yes.

16 Q Okay. Anything else that she does for  
17 you personally?

18 A No.

19 Q Does she play any role in issuing 1099s  
20 or any kind of documents that are generated as a  
21 result of your business or a pension that would be

Page 63

1 five years. He's independent, however. When you  
2 say hire, he is not on our payroll. He works as an  
3 independent contractor. And he does have other  
4 clients, but we're his largest.

5 Q Is he a CPA?

6 A No.

7 Q What's his accounting expertise?

8 A He was a controller for a large national  
9 or even international painting contractor in  
10 Dundalk for a number of years. And our business is  
11 actually very small compared to the business that  
12 he was controller for. And the way I met him is  
13 that his wife was in our office as a good employee  
14 for more than a dozen years and she suffered a  
15 heart attack and died about six years or so ago.  
16 And it was in the year after that where he was  
17 making a transition that he started doing work for  
18 us.

19 Q Do you recall the name of his painting  
20 contractor business?

21 A No.

Page 62

1 construed as tax records?

2 A No. Well, I'm sure there's other forms  
3 she handles for me besides the 990. But when you  
4 mention 1099s, I think they come right out of our  
5 office, so she doesn't handle that form.

6 Q Who currently does the bookkeeping for  
7 your business?

8 A There are about three or four different  
9 people that are involved in the bookkeeping of my  
10 business. My wife, Sarah, does some of it.  
11 There's a Michelle Munson, M-U-N-S-O-N, does some  
12 but she is involved in record-keeping but she is  
13 not a bookkeeper. But the chief person in my  
14 office that does it is a gentleman named Karl Auch,  
15 K-A-R-L, A-U-C-H. He's the in-house accountant  
16 that I have. And he prepares actually everything  
17 that goes to Ms. Martucci. He prepares it before  
18 it goes to her and reviews it to minimize the work  
19 that she has to do on it.

20 Q Okay. When did you hire Mr. Auch?

21 A He has been with our company more than

Page 64

1 Q Okay. Now, his name appears on the  
2 expense analysis that you did in connection with  
3 the meeting before Judge Kaplan?

4 A Yes.

5 Q What specific services is he charging  
6 that you're claiming as damages in this litigation?

7 A It would take some time really to break  
8 it all out and be accurate with it. But from time  
9 to time, regarding different matters in this  
10 litigation, I would go to him and he would help me  
11 prepare the documentation that I needed and  
12 calculations regarding damages or other elements of  
13 my involvement with the Labor Department. Things  
14 that I have had to do in the Labor Department  
15 before I was finished with them and matters such as  
16 that. I mean I could go and ask him what specific  
17 things do you recall having done for me over the  
18 years. I'm sure he could come up with a long list.

19 Q Did he submit any bills to you in  
20 connection with the services that he provided  
21 beyond the regular accounting services, that he was

Page 65

1 providing to your business as the in-house  
2 accountant?  
3 **A No. As a matter of fact, what I did**  
4 **with Mr. Auch was take his gross amount of money we**  
5 **paid him and took a very small percentage of that,**  
6 **I think something like 5 or 10 percent of what he**  
7 **did for me was related to this, related to the**  
8 **litigation.**

9 Q That was a calculation that you did  
10 based on what total amount?

11 **A I had discussed with him on it so that**  
12 **we could determine what was reasonable based on the**  
13 **full scope of his duties and what percentage of**  
14 **those duties leaped into the elements of damages**  
15 **that were recoverable.**

16 Q Okay. Just so the record is clear, the  
17 reporter can't take us both down if we're talking  
18 simultaneously. You need to let me finish my  
19 question before you start answering even if you  
20 know what my question is going to be.

21 **A Okay.**

Page 66

1 Q How much is Mr. Auch currently making as  
2 an independent contractor to your business?

3 **A He gets an hourly rate and he, I don't**  
4 **even see the bills because he handles that with**  
5 **Sally.**

6 Q So you can't tell me what, let's say  
7 calendar year 1996, how much you paid Mr. Auch for  
8 his services to your company?

9 **A I can't at this time. I would have to**  
10 **look.**

11 Q Okay. Was it his conclusion that  
12 approximately 5 to 10 percent of the services that  
13 he provided for you since he has been employed as  
14 an independent contractor to your business were  
15 related to this litigation?

16 **A He was involved in the calculation and**  
17 **agreed that the ultimate percentage that we used as**  
18 **being conservative and appropriate.**

19 Q Did you propose initially to him that  
20 his value to this litigation in terms of the damage  
21 issue was the 5 to 10 percent and he agreed with

Page 67

1 your opinion?

2 **A I can't recall.**

3 Q Okay. Other than your wife, Michelle  
4 Munson and Karl Auch, is there anybody else that  
5 your company used in providing any kind of  
6 accounting services or financial record-keeping?

7 **A No.**

8 Q Okay. Can you tell me what Ms. Martucci  
9 has done in connection with this litigation?

10 **A Well, one issue I went to Ms. Martucci**  
11 **with -- okay. Probably one issue was, the first**  
12 **issue if I take it chronologically, one of the**  
13 **first issues that comes to my mind, and it may not**  
14 **be the first and I may be skipping over some**  
15 **issues, was in my resolving prohibited personal**  
16 **loan transactions and loan transactions with the**  
17 **pension in the final agreement with the Labor**  
18 **Department. I had to get all debt cleared up**  
19 **between Crown Motors and the pension, and that**  
20 **involved attaching debt to my own personal account**  
21 **and moving it out of the pension. And I needed**

Page 68

1 **accounting and legal opinions as to how to do that**  
2 **without violating the law and a practical way to do**  
3 **it. She participated in that process and also she**  
4 **introduced me to a tax lawyer to assist in seeing**  
5 **that it was done appropriately. The tax lawyer's**  
6 **name was Ron Shiff. I think it's S-H-I-F-F.**

7 Q Okay. Any other services that you think  
8 Ms. Martucci provided to you that are related to  
9 this litigation?

10 **A Well, yes. Throughout this litigation**  
11 **Mr. Hack has maintained that it's appropriate, that**  
12 **the advice he gave me about not filing amended**  
13 **returns was appropriate. And in pursuit of that**  
14 **issue I asked Ms. Martucci to do some research on**  
15 **that issue and she did a report that actually cost**  
16 **me well over a thousand dollars for a comprehensive**  
17 **report on the different laws that I would be**  
18 **violating had I followed Mr. Hack's advice. And**  
19 **she provided that report.**

20 Q Does your counsel have a copy of that  
21 report?

Page 65 - Page 68



1 A I imagine he does.

2 Q Any other services that Ms. Martucci

3 provided to you in connection with this litigation?

4 A Well, since this litigation is such an

5 attached part of my lifestyle right now, everything

6 she does numbers and issues come up about this

7 litigation I guess. But I don't know of any

8 specific projects that I have given her other than

9 the two that I mentioned. I used her in consulting

10 regarding the accounting procedures in correcting

11 prohibited transactions. And I used her for that,

12 the opinion on the note, on the advice that Mr.

13 Hack gave me about not filing amended returns.

14 Q We can agree I think, but let's see if

15 we can. Can we agree some of the services Ms.

16 Martucci has provided to you would have been done

17 regardless of this litigation? In other words, she

18 would have had to prepare, if she was your

19 accountant, tax returns for you personally and for

20 your business and 990 forms for your pension?

21 A Yes. But they became more complex. The

1 whole process was more complex because of the

2 litigation. In other words, it would have been a

3 simpler convoluted process other than for the

4 litigation.

5 Q Have you gone through the charges that

6 you've incurred with respect to Ms. Martucci's

7 services and separated out those charges which you

8 believe are actually related to the litigation

9 because they were beyond what regular services she

10 would have provided to you as your accountant?

11 A Not specifically every item, no. I used

12 a general rule. I came up with my own formula for

13 determining her expense to this litigation.

14 Q Did you discuss with Ms. Martucci your

15 formula regarding her expense with respect to this

16 litigation?

17 A No.

18 Q When was it that Ms. Martucci provided

19 you with the report regarding her research

20 conclusions on not filing amended tax returns?

21 A My recollection is it was more than a

1 year ago, but I don't specifically remember a date.

2 Q All right.

3 A I'm sure I have a cover letter

4 somewhere.

5 Q Okay.

6 A Or a package. It was a package that she

7 sent me.

8 Q Any other services that Ms. Martucci has

9 provided to you in connection with this litigation

10 that you can recall?

11 A Well, as I say, there probably -- much

12 of what she provides is in some way related to the

13 litigation. But I can't recall any specific

14 projects about, that the litigation was totally the

15 reason for the project.

16 Q Have you discussed with Ms. Martucci

17 that she will be an expert witness in this case?

18 A I can't honestly say that I have, do

19 recall a conversation. I'm not even sure -- may I

20 go off the record and ask Mr. Taylor if I listed

21 her as an expert?

1 Q You did. So it's your recollection you

2 haven't actually discussed with her being an expert

3 in this case; is that a fair statement?

4 A I would assume, I would assume, now that

5 you're asking me this question, that if expert

6 testimony were required regarding either

7 calculations or, even though she is not an actuary,

8 or the accuracy of lists, documentation, numbers,

9 that she would be the likely person for me to turn

10 to, my own accountant, to validate numbers, terms

11 like that.

12 Q But other than what you're assuming, you

13 cannot recall today having any specific discussions

14 with her regarding her role as a potential expert

15 in this case?

16 A Not at this time.

17 Q I take it that you have not had any

18 discussions with her regarding opinions that she

19 would offer as an expert in this case other than

20 opinions that she has given you with respect to

21 particular projects or questions you had?

Page 73

1 A Correct. I had no discussions with her  
2 regarding opinions that she would give.  
3 Q All right. How about Mr. Lasser,  
4 James F. Lasser, how do you know him?  
5 A Mr. Lasser is a gentleman that did a  
6 valuation for me a couple of years ago to determine  
7 a proper value on a debt obligation between my  
8 company and myself. And the reason I listed him as  
9 an expert is because there was a time limit on  
10 producing experts, and without knowing specifically  
11 the full scope of his possible potential  
12 participation, I, after looking at -- I determined  
13 that after looking at the full scope of our  
14 discovery and preparation of our case, he may be of  
15 value to us in some way, his expertise. He's an  
16 ex-banker, has an awful lot of credentials, a fine  
17 background, from having met him once. And I was  
18 convinced that he may be a value as an expert  
19 regarding some areas of this litigation either now  
20 or during the proffer stage.

21 Q What valuations services has he provided

Page 74

1 to you?

2 A Well, as I said, there was a debt  
3 between my company and myself and since my  
4 company -- it had to do with the removal of the  
5 debt from the pension. The pension owed a lot of  
6 money -- or my parent company owed a lot of money  
7 to my pension, and it was attached to my account  
8 and removed as a distribution. So it had to do  
9 with the value of that distribution. In other  
10 words, he had to look at the asset, the bad debt  
11 asset, the length of time it was a bad debt, the  
12 likelihood of recovery from that bad debt and what  
13 that note would have been worth to an independent  
14 outside party who would be buying it at an auction.  
15 There's a complicated mysterious process that  
16 actuaries use to determine the valuation of the  
17 notes and I had no way of doing it with any degree  
18 of accuracy myself so I used him for the job.

19 Q And how did you discover him as a --

20 A He was recommended to me by Mr.  
21 Rosenburg, who knew of him.

Page 75

1 Q Okay. Was his valuation that he did a  
2 couple years ago, was that in writing?

3 A Yes. A written report.

4 Q Does your counsel have a copy of that?

5 A No. Not that I know of. It's not  
6 subject -- it's not a matter of this litigation,  
7 actually.

8 Q I forgot to ask you this when we were  
9 talking about Ms. Martucci. Who is the tax lawyer  
10 she introduced you to?

11 A Ron Shiff, Ronald Shiff.

12 Q What services did Mr. Shiff provide to  
13 you?

14 A Provided legal opinion on the properness  
15 of handling the discounted, the note, the removal  
16 of that obligation from the pension to out of the  
17 pension. Did extensive research to make sure that  
18 it conformed with the laws and that if the IRS ever  
19 scrutinized it that it would pass, that it was,  
20 that there wouldn't be any objections that they  
21 could sustain about it.

Page 76

1 Q Why did you use Mr. Shiff for that as  
2 opposed to Mr. Giampetro?

3 A Because Mr. Shiff was Ms. Martucci's  
4 personal -- or she had a great deal of faith in  
5 him. And he apparently has good credentials and  
6 she recommended that he be used. And I didn't want  
7 to interfere with her having full confidence level  
8 in the person that she wanted to use so I let her  
9 use who she wanted to use.

10 Q Does Mr. Giampetro know that you're also  
11 using Mr. Shiff or that you used Mr. Shiff?

12 A He may, but it doesn't -- I don't recall  
13 specifically whether I had any conversation with  
14 Mr. Giampetro about Mr. Shiff or not.

15 Q Going back to Mr. Lasser, what  
16 discussions have you had with him regarding being a  
17 potential expert in this case, if any?

18 A I called him and told him that I would,  
19 would I have his permission to use his name, and  
20 that I'm not even sure the extent or full nature of  
21 the issues that would be coming up but that I would

Page 73 - Page 76

1 be getting back to him at a time in the future when  
2 it was appropriate when, after discovery was  
3 further along and I knew the scope of his  
4 involvement.

5 Q When did you have that discussion with  
6 Mr. Laser?

7 A Prior to using his name. So it would  
8 have been probably in the week or so before the  
9 list was due.

10 Q So February?

11 A I think Mr. Laser was even before  
12 February.

13 Q Sometime in 1997?

14 A Probably the early part of '97.

15 Q Other than asking for permission to use  
16 his name as a potential expert, did you have any  
17 discussions with him regarding potential opinions  
18 that he could offer in this case?

19 A Mr. Rosenberg knew him and I had  
20 initially asked about using Mr. Lasser as an  
21 actuary. And Mr. Rosenberg said that his area of

1 that I would be using him and the full nature of  
2 the project so that I could paint a picture for him  
3 and determine what fee would be relevant for that.

4 Q Did he charge you for giving you  
5 permission to use his name as an expert?

6 A No.

7 Q All right. How about Mr. Dan A.  
8 Harbertson, who is he?

9 A An actuary.

10 Q And how did you meet him?

11 A I never met him.

12 Q How do you know who he is?

13 A He was recommended to me by an actuary  
14 organization.

15 Q What actuary organization recommended  
16 Mr. Harbertson?

17 A I can't give you the name of it yet. It  
18 came over the Internet. Actually what happened, to  
19 give you a fuller explanation, is that Ted  
20 Rosenberg, I asked him to provide me with the name  
21 of an actuary and he said well, you know, actuaries

1 expertise was more focused on other specialties  
2 rather than pure actuarial work. And that because  
3 of his background -- and that I might look for a  
4 more purist, actuary purist for that. Having used  
5 Mr. Lasser and feeling quite comfortable about his  
6 quality, I decided to use him perhaps in another  
7 way and I'm not fully sure what that way is yet.

8 Q So would it be a fair statement to say  
9 you really haven't had any discussions with Mr.  
10 Laser about the proposed opinion he will offer in  
11 this case?

12 A Yes, absolutely. For sure.

13 Q Did you have any discussion with Mr.  
14 Laser about what his fee would be if he were to be  
15 an expert in this case?

16 A No.

17 Q Do you know what his hourly rate, if he  
18 has one, is?

19 A They are all over a hundred dollars an  
20 hour. No, I didn't. I thought that I would be  
21 more specific about rate when I got to the extent

1 are pretty hard to find, good actuaries. He didn't  
2 know of anybody currently that he could recommend.  
3 So I just went to the Internet and found out that  
4 there was an actuary society in Baltimore and there  
5 was a president of it. So I printed off that data  
6 and I called the president and he wasn't there but  
7 I talked to someone else. Pretty soon I was  
8 talking to someone who knew the list of actuary  
9 members in their organization. I went through a  
10 list of about four or five, called them and Mr.  
11 Harbertson was one. I had a nice conversation with  
12 him. He said he would be very happy to be  
13 available for the purpose I talked to him about.

14 Q Did you save a copy of the information  
15 that you printed off of your computer?

16 A I don't know if I saved a copy of it. I  
17 may not have. But I may have it. I don't know.

18 Q Did you provide that information to your  
19 counsel?

20 A The computer printout?

21 Q Right, the information that was

Page 81

1 contained in the printout.

2 A I don't know. I don't recall.

3 Q Do you remember who it was you spoke to  
4 at the society of actuaries in Baltimore?

5 A I may be able to go back and find the  
6 paper.

7 Q Does that mean no?

8 A No, it doesn't mean no. It means I  
9 don't know at this moment. One person I talked to,  
10 I can reference it down to an exact name but I  
11 can't remember the name offhand, is that the  
12 president of the society had another contact number  
13 and it was a lady's name. And I reached that lady  
14 and she said yes, I'm an actuary also and I work  
15 for this big firm. And I told her what I wanted  
16 and she said well, you probably don't want to use  
17 me because my cost would be prohibitive but I can  
18 give you the name of people who have done work at  
19 IRS or who are actuaries that I would recommend.

20 She gave me several names and said she  
21 knew of these people. So I started calling them

Page 82

1 and had perhaps a total of three or four  
2 conversations with different people. Actually I  
3 can't remember the person's name now. One or two  
4 people wouldn't do it. One of them even worked for  
5 Stuart Hack once. So they weren't available. But  
6 they said it would be sort of a conflict if the one  
7 said I'm a friend of Stuart Hack, I'll probably see  
8 him in a conference, I can't do it. You know, like  
9 that. But there were others that didn't know  
10 Stuart Hack and --

11 Q Do you remember the names of any of the  
12 people that you spoke to?

13 A Well, there's -- I would have to go back  
14 to my list. I cannot remember offhand the names of  
15 the people that we didn't chose. But Harbertson is  
16 one that we did chose. Although I never met him, I  
17 discussed the nature of what his involvement would  
18 be.

19 Q All right. But in the search for Mr.  
20 Harbertson, do you recall any of the names of the  
21 people that you spoke to today?

Page 83

1 A I don't recall the names, no.

2 Q All right. And what was it that you  
3 told any of those people as to why you needed the  
4 services of an actuary?

5 A I told them that I was in litigation and  
6 that there were certain sets of numbers and  
7 calculations that, number one, I had another -- I  
8 already had an actuarial presentation and I had to  
9 have someone to either validate its accuracy or to  
10 come up with some alternate methodology, if they  
11 had their own methodology that was different. In  
12 other words, I wasn't saying to an actuary I just  
13 want you to validate this. I was saying you may  
14 have your own formulas and different numbers, and  
15 if you do, you will run yours.

16 Q Other than telling the people with whom  
17 you spoke that you were involved in litigation, did  
18 you provide any commentary regarding either the  
19 subject matter of that litigation or the identity  
20 of the parties involved in that litigation?

21 A I always named the identity of the party

Page 84

1 because I wanted to know if there was a conflict of  
2 interest.

3 Q Any other aspect of any of your  
4 discussions with those persons leading to your  
5 search and discovery of Mr. Harbertson that you can  
6 recall?

7 A Repeat that again.

8 Q Can you tell me anything else that you  
9 recall from your discussions with any of the  
10 persons whose names you can't recall at the moment  
11 which led to your finding Mr. Harbertson?

12 A Well, I had just a nice conversation  
13 with Mr. Harbertson. He seemed like a --

14 Q I'm going to get to that.

15 A I can't remember the content.

16 Q Prior to Mr. Harbertson, do you recall  
17 any other discussions you would have had with the  
18 persons who led you to Mr. Harbertson other than  
19 what you already testified to?

20 A No. I -- no, I don't think so.

21 Q Did you take any notes of any of those

1 discussions other than the computer printout to the  
2 extent that is a note?

3 A No. My recollection is that I was  
4 writing this all on the back sheet of a piece of  
5 scrap paper, 8-and-a-half-by-11 piece of paper. I  
6 was just writing names and phone numbers. I may  
7 still have that sheet of paper. I may not have  
8 thrown it away yet. And if I do --

9 Q Could you give it to Mr. Taylor and  
10 maybe he could give it to us?

11 A If I can find it I will.

12 Q All right. When did you first speak to  
13 Mr. Harbertson?

14 A My guess is within a week of the  
15 deadline, because I remember that different events  
16 had kept me from getting to the issue of completing  
17 the expert witness list and we had other deadlines  
18 for different things and I decided all of a sudden  
19 I had to just stop whatever I was doing and turn my  
20 attention to this because we had only a matter of  
21 days. And that's when I started into that issue.

1 So it had to be within a five-day period of the  
2 deadline for providing names.

3 MS. TRUHE: So sometime in early  
4 February '97?

5 THE WITNESS: Yes. If that would fit  
6 in.

7 Q How many telephone discussions did you  
8 have with Mr. Habertson?

9 A Maybe two or three.

10 Q And can you recall the discussions that  
11 you had with Mr. Habertson in any of those  
12 telephone discussions?

13 A No. I just was trying to get a sense of  
14 what kind of person he was and whether I thought I  
15 would enjoy working with him or not or using him.  
16 I was quite satisfied. It might have been -- I  
17 might have only had one or two conversations with  
18 him, not three.

19 Q What did you tell Mr. Habertson about  
20 this litigation and his role in this litigation?

21 A Well, I can't specifically say as to

1 what I said to Mr. Habertson, but my recollection  
2 is I had the very same for everybody I talked to.  
3 That is, I already had one actuary analysis, at  
4 least two separate groups of calculations on  
5 damages and that I would need someone else to  
6 validate the accuracy of those and perhaps in the  
7 alternative to produce their own calculations. And  
8 that the elements of damages that were presently of  
9 concern to me most were taxes now, taxes later. I  
10 didn't describe it that way. But that and the cost  
11 of a depleted pension account, the true actual cost  
12 of the damage to, the monetary damage to the  
13 account. So they were the two specific areas that  
14 I was concentrating on then. And I think that's  
15 about what I limited my explanation to as to what  
16 they would be used for.

17 Q Do you recall what Mr. Harbertson  
18 discussed with you, what he said to you in your  
19 conversations with him?

20 A He said he would be happy to do it.

21 Q Okay. He said he would be happy to do

1 what?

2 A He would be happy to be a witness for me  
3 and do the calculations. And I think I got a  
4 sense, I really don't recall what his rate was but  
5 I got a sense it wouldn't be prohibitive.

6 Q Did he send you any kind of retainer  
7 agreement or agreement?

8 A No. But he did send me, he faxed me as  
9 a matter of fact, and I know it's not with me of  
10 course, but he faxed me a, what you would call --  
11 curriculum vitae.

12 Q Okay. Did you reach an agreement on  
13 what his services would cost you?

14 A No. As I said already, I don't know the  
15 full extent or nature. And I wanted to make sure  
16 that he fully understood what I would be using him  
17 for and that he agreed to be available for that so  
18 that he would -- and so that I could use his name.  
19 I told him I am going to be using your name as an  
20 expert witness for these purposes, is that okay,  
21 and he said yes.

Page 89

1 Q Other than your telephone discussions  
 2 with him, did you provide him with any documents?  
 3 A No, but I told him that it was a matter  
 4 in litigation, Shofer versus Hack.  
 5 Q Did you provide him with any  
 6 calculations done by Mr. Rosenberg?  
 7 A No. It was, I told him that I was going  
 8 to and I started looking through the calculations  
 9 to fax to him, and Mr. Rosenberg had provided me  
 10 with so many different updates and sets of  
 11 calculations that I started looking at that mess of  
 12 materials that Mr. Rosenberg provided and said I  
 13 can't even see what is most recent. I couldn't  
 14 pick it out. I was having a mental conversation  
 15 with myself. I've got to get back with Mr.  
 16 Rosenberg and get him to give me his last printout  
 17 so that I will, so that I can separate what's most  
 18 relevant and send it. But Mr. Rosenberg has given  
 19 me a printout for that purpose. But I haven't sent  
 20 it yet and I'm not even fully sure how to analyze  
 21 the printout that he sent me. So I wanted to have

Page 90

1 further conversation with Mr. Rosenberg so that I  
 2 fully understood what I would be sending. So  
 3 that's the way it stands now.  
 4 I've got Mr. Rosenberg's most current  
 5 printout, which is not, doesn't mean current  
 6 calculations, it means current printout, and I  
 7 wanted to have a discussion with Mr. Rosenberg so  
 8 that I fully understood all of it before I would  
 9 forward it to Harbertson.  
 10 Q When did Mr. Rosenberg provide you with  
 11 his printout?  
 12 A Sometime in the last ten days as I  
 13 recall.  
 14 Q Okay. Have you had any conversations  
 15 with Mr. Rosenberg about speaking to him in greater  
 16 detail about the printout that he provided to you  
 17 to give to Mr. Harbertson?  
 18 A No.  
 19 Q And can you tell me what your purpose is  
 20 in using Mr. Harbertson? Are you using him as a  
 21 witness to supplement Mr. Rosenberg's testimony or

Page 91

1 to replace Mr. Rosenberg?  
 2 A No. It would be an additional expert  
 3 witness. The amounts of money are so much that I  
 4 want to make sure that I have an adequate amount of  
 5 credible expert testimony from unrelated parties.  
 6 Q Did Mr. Rosenberg know Mr. Harbertson?  
 7 A No.  
 8 Q Did Mr. Harbertson know Mr. Rosenberg?  
 9 A No.  
 10 Q Who is Scott Gregory?  
 11 A Another actuary.  
 12 Q How did you get his name?  
 13 A The same way I got Mr. Harbertson's  
 14 name.  
 15 Q Have you had any discussions with Mr.  
 16 Gregory?  
 17 A Yes.  
 18 Q When did those discussions take place?  
 19 A Roughly the same time the ones, within a  
 20 day of the discussion with Mr. Harbertson, maybe  
 21 even the same day.

Page 92

1 Q Did those discussions take place by  
 2 telephone?  
 3 A Yes.  
 4 Q And did you discuss basically the same  
 5 thing you discussed with Mr. Harbertson?  
 6 A The conversation was different of course  
 7 but the role that he would be playing would be  
 8 roughly the same.  
 9 Q All right. Do you recall your  
 10 discussions with Mr. Gregory and how those differed  
 11 from your discussions with Mr. Harbertson?  
 12 A Yes.  
 13 Q How do they differ?  
 14 A Mr. Gregory was a different sort of an  
 15 individual. One of the things he said, I can't  
 16 talk to you much longer because tomorrow I'm  
 17 leaving for Guatemala for a week as part of a  
 18 dental expedition into the jungles. Of course that  
 19 piqued my interest. We had a nice conversation and  
 20 he said that he would be happy to talk further when  
 21 he got back. And I, it may be that we completed

1 our conversation about him being -- he sent me his  
2 curriculum vitae and also -- but he sent me hard  
3 copy. It wasn't faxed. And he also sent me a  
4 retainer agreement with an hourly rate of \$200 an  
5 hour. And I explained to him the same as Mr.  
6 Harbertson about the nature of my use of him.

7 Q Did Mr. Gregory agree to serve as your  
8 expert witness?

9 A Yes. I mean it's in the retainer  
10 agreement.

11 Q Did he agree you could identify him as  
12 your expert?

13 A Yes.

14 Q Did you actually agree to the retainer  
15 agreement with Mr. Gregory?

16 A Well, I didn't know -- I can't recall  
17 that in our initial conversation I mentioned \$200  
18 an hour or he mentioned -- I don't think he  
19 mentioned 2. And I haven't talked to him since I  
20 got the retainer agreement. So that's where that  
21 stands right now.

1 would be.

2 Q Have you not agreed to the retainer  
3 agreement that he provided you?

4 A I haven't disagreed either.

5 Q Okay. Is it your intention to use Mr.  
6 Gregory?

7 A Yes.

8 Q How is Mr. Gregory's opinions, if you  
9 know, going to be different from those offered by  
10 Mr. Harbertson?

11 A I imagine all three, using their own  
12 methodology, will come up with somewhat different  
13 estimates of my damages. My expectation is that  
14 they will all be substantial and they will differ,  
15 because no two people are going to independently  
16 think exactly alike. But that the sum total of  
17 three people coming up with substantial damages,  
18 independently thought out, will provide a certain  
19 degree of credibility. Especially if they are  
20 unrelated unknown parties to each other.

21 Q And have you provided Mr. Gregory with

1 Q So you haven't actually agreed to retain  
2 him in writing; is that accurate?

3 A It's my intention to use him.

4 Q It's your intention to send him back the  
5 retainer agreement but you haven't done so?

6 A He didn't ask for money. I think what  
7 would do is ask him for an estimate on the cost of  
8 doing a project before I -- I mean regardless of  
9 what the hourly rate is. I'm looking at the cost  
10 of doing a project. And that is to supplement Mr.  
11 Rosenberg's work to pass judgment -- actually maybe  
12 to do his own calculations, and they will certainly  
13 be done by different methodology than Mr.  
14 Rosenberg's, and see if they are in the same  
15 ballpark. I think that might be a better approach  
16 as we stand here and talk about this.

17 Q Can we agree you actually haven't  
18 entered into a written retainer agreement with Mr.  
19 Gregory?

20 A I haven't agreed to send him any money.  
21 He hasn't documented to me what his hourly rate

1 any documents or calculations for Mr. Rosenberg?

2 A Not yet.

3 MS. WHELIHAN: Do you want to take a  
4 brief break?

5 MS. TRUHE: That would be a good idea.  
6 (Deposition suspended at 12:30 p.m.)

7 (Deposition resumed at 3:21 p.m.)

8 BY MS. WHELIHAN:

9 Q Mr. Shofer, I probably now know more  
10 than I did know based on your attorney's statements  
11 today to Mr. Hack, but is it correct that you, the  
12 pension plan and your business were all audited by  
13 the IRS in 1989?

14 A It started in 1989.

15 Q Okay. And how did it start?

16 A Do you mean why did it start?

17 Q No, how. Did you receive notices of  
18 deficiency?

19 A No. I received -- notices of deficiency  
20 is a different process. I received notices that  
21 the IRS wanted to audit me personally and my

1 corporation.

2 Q Okay. Did you learn what the reasons  
3 were that the IRS wanted to audit you personally?

4 A I can't say that I was given a specific  
5 reason. I made an assumption that it was probably  
6 because of the amended returns that I filed.

7 Q Now, did you ever understand from the  
8 IRS why it was they decided to audit your business?

9 MS. TRUHE: Objection.

10 A It would have been in conjunction with  
11 the personal audit since I'm the sole owner of the  
12 business.

13 Q What was the result of the IRS audit?

14 A I don't know how you mean that.

15 Q Is the, is your dispute with the IRS  
16 over?

17 A Do you mean is that audit complete?

18 Q Is the audit complete and have you  
19 reached a final resolution of the audit issues?

20 A Yes and no.

21 Q What do you mean by yes and no?

1 additional income based on my not having made  
2 timely payments back to my pension on certain  
3 pension loans and the interest that I didn't pay  
4 timely triggered additional income.

5 We didn't disagree that it was a taxable  
6 event. But the amount was at issue. In other  
7 words, they used one formula for determining how  
8 much income it was and I think we had another. And  
9 the issue was supposed to be looked at at an appeal  
10 level. But it went through some long process. I  
11 don't know whether it got lost in the woodwork or  
12 got assessed to me along with so many other things  
13 that it just fell in and I didn't recognize it as  
14 having been assessed or what. I don't even know if  
15 it's still an open issue or not. It's actually  
16 been so many years and there have been so many  
17 other events occurring, that it sort of got -- I  
18 don't know if it's lost somewhere or showed up as a  
19 tax bill that I didn't recognize because it was  
20 part of another tax bill. I don't know. Other  
21 than that, the IRS issues are settled with me

1 A The corporate audit is settled, and  
2 there was no income assessed against me from that.  
3 All elements of the personal audit were agreed to  
4 except one, and we appealed the IRS's determination  
5 on one item. You'll have to excuse me for a second  
6 so that I can give you a clear answer on what that  
7 one item was.

8 Q Okay.

9 (Pause in the proceedings.)

10 A There was additional, there was an  
11 additional assessment of income tax against me.

12 Would you like to wait for Mrs. Truhe to  
13 come back because she is pretty familiar with this  
14 issue?

15 MS. WHELIHAN: Okay.

16 (Pause in the proceedings.)

17 A To continue with the one item that may  
18 or may not yet be settled, and I don't know. At  
19 the time of the audit the one thing that we didn't  
20 finally agree on, and everything was settled except  
21 that, was that the IRS had determined that I had

1 personally and my corporation.

2 Q Okay. How about the Department of  
3 Labor's proceedings with respect to your pension  
4 plan and the disqualification?

5 A They are now settled and that exposure  
6 is no longer.

7 Q All right. And when was that settled?

8 A The basic agreement was made in 1994 and  
9 different elements of that agreement that had to  
10 fall into place fell into place sometime in the  
11 next year or so. During 1995 and 6 there were  
12 various elements of the agreement they wanted to  
13 check on and make sure they were in compliance and  
14 all of the final portions had been completed. So  
15 that's a done deal now.

16 Q Okay. Who represented you in the  
17 Department of Labor proceedings?

18 A I had several representatives.

19 Q All right. Would you list them?

20 A Nicholas Giampetro primarily. And to  
21 some degree Tom Bornhorst, who did a magnificent



1 job. I've got to say off the record maybe, but  
2 it's probably the most magnificent thing he did for  
3 me to the Labor Department.

4 Q Anybody else other than Mr. Bornhorst  
5 and Mr. Giampetro who were involved in the  
6 Department of Labor proceedings?

7 A Well, as attorneys representing me?

8 Q No. I'm also talking about anybody --

9 A Well, Grabush, Newman, they were, they  
10 had discussions with the Labor Department. Karl  
11 Auch -- I'm not sure of Karl Auch. I said Karl  
12 Auch but now that I think about it, he was talking  
13 with the IRS people more than the Labor Department.  
14 I don't think he talked with labor people. Just  
15 give me a moment.

16 (Pause in the proceedings.)

17 A I think it was mostly Giampetro.

18 Q How about Martucci? Was she involved in  
19 the Department of Labor proceedings?

20 A I don't think so. There was no personal  
21 communications or meetings that involved her.

1 your pension plan that were required by the  
2 Department of Labor, were you required to pay off  
3 any loans that you owed to your business?

4 A Not my business, to my pension.

5 Q And did you pay those loans off?

6 A Yes.

7 Q When were those loans paid?

8 A In 1994. To be exact I think June 30th  
9 of '94 or July 1.

10 Q Okay. And are there documents that  
11 reflect the agreement that you had with the  
12 Department of Labor and your implementation of  
13 their requirements?

14 A I don't know if there's one specific  
15 document that covers everything. There were  
16 letters, there was a series of letters stating what  
17 they wanted done and the letters from us stating  
18 what we did. I'm not sure that I can think of one  
19 particular agreement that says this is the  
20 agreement. There was certainly a series of  
21 correspondence that together made up the agreement.

1 Q The asset valuation that Mr. Lasser did,  
2 was that in connection with the Department of Labor  
3 proceedings or your dispute with the IRS?

4 A Well, it wasn't a dispute with the IRS.  
5 I didn't have any dispute with them.

6 Q You had problems with the IRS, how about  
7 that?

8 A Well, it was actually Mr. Lasser's -- I  
9 contacted Mr. Lasser to do an evaluation on a note  
10 that the, that my company produced that represented  
11 its debts to my pension and that was assigned to my  
12 pension account and taken out of the pension as a  
13 distribution. And I needed a independent  
14 evaluation of the true value of that note.

15 Q Was that done as part of the Department  
16 of Labor proceedings regarding your pension?

17 A Yes.

18 Q Okay.

19 A It was part of correcting a prohibited  
20 transaction.

21 Q Okay. As part of the corrections to

1 Q And the series of correspondence, would  
2 that be something that Mr. Giampetro would have,  
3 Mr. Bornhorst would have or you would have?

4 A I think both Mr. Giampetro and I would  
5 have copies of all of that.

6 Q Have you given any of that material to  
7 Mr. Taylor?

8 A I'm not sure that -- I would probably  
9 say Mr. Taylor has not seen much of that material.

10 MS. WHELIHAN: Maybe we could speed this  
11 up. I have never seen anything relating to the  
12 audit or to the Department of Labor proceedings.  
13 And I had asked actually Tom Bornhorst for that  
14 stuff back in 1994. I'm still waiting.

15 MR. TAYLOR: Well, I haven't, just for  
16 the record to explain, I haven't looked or seen any  
17 of the Department of Labor matters because that was  
18 already resolved when I began representing Mr.  
19 Shofer. But I will be happy to sit down with Mr.  
20 Shofer in the next couple of days and try to get  
21 that material together for you. We have no

Page 105

1 objection for making that available.

2 MS. WHELIHAN: That's good because it's  
3 probably discovery and we asked for it.

4 MR. TAYLOR: Well, it is. Just again  
5 for the record specifically you want any  
6 documentation dealing with the Department of Labor  
7 and any agreements that may have been entered into  
8 with Mr. Shofer, his companies and the Department  
9 of Labor?

10 MS. WHELIHAN: I think it's only going  
11 to be related to the pension plan. That would be  
12 my understanding of how it works.

13 THE WITNESS: When you say whatever, if  
14 you don't mind, all of the various -- it was a very  
15 big thing with the Labor Department that went back  
16 and forth for years. And what I will do is gather  
17 the final agreement, the different elements that,  
18 that comprise correcting the prohibited  
19 transactions, and their blessing that if this is  
20 done that's fine.

21 MS. TRUHE: Mr. Shofer, would that also

Page 106

1 include documents that reflect the paying off of  
2 these loans by June or July of '94?

3 THE WITNESS: Yes.

4 MS. TRUHE: Great, because we would like  
5 those too.

6 Q All right. And when were the audit  
7 issues with the IRS, with the exception of the one  
8 issue that was not resolved, when were those issues  
9 resolved?

10 A The IRS were resolved before the Labor  
11 Department issues. They were resolved in '90,  
12 think for the most part in '92 or '93 except for  
13 the Labor Department's continuing.

14 Q Who were the persons who you hired who  
15 were involved in the IRS audits?

16 A Well, the expensive part of the IRS  
17 audits was done by Grabush, Newman. In one year  
18 they billed me approximately \$30,000 for their  
19 communication with the IRS involving those audits.  
20 But subsequently it become too much for me to  
21 handle with them and I phoned the IRS and said that

Page 107

1 I would prefer that they didn't meet at Grabush,  
2 Newman's offices anymore and take up all of their  
3 audit issues with me personally. And then things  
4 started to move faster and more smoothly.

5 Q So other than Grabush, Newman, there  
6 were no other tax professionals, lawyers that  
7 you've identified as persons to whom you paid  
8 professional service fees who are involved in the  
9 resolution of the IRS audits?

10 A With the IRS audits, yes. There was  
11 Allen Schwait. And Allen Schwait is supposed to be  
12 handling the appeal of that one issue that remains  
13 open. Or at least he was the one designated.  
14 However, he is now a judge.

15 Q I was going to say that would be hard  
16 for him to do.

17 A I know. See, when I got in touch with  
18 Mr. Schwait, it wasn't necessarily because of that  
19 little item. There was so much bigger unsettled  
20 items with the IRS, but they all settled out. And  
21 it only left that little item, but it left Allen

Page 108

1 Schwait with that little item. When I say little,  
2 it wasn't that little but it was comparatively  
3 little to some of the other exposures I had. Other  
4 professionals that were involved with the IRS --  
5 first of all, Karl Auch was involved. He become  
6 much more deeply involved in my IRS audits after I  
7 terminated using Grabush, Newman for that purpose,  
8 after I stopped with them. And Karl and I -- and  
9 that was before I met Martucci. So it was actually  
10 Karl Auch and myself that finished with the audits,  
11 for the most part, with the IRS. And Karl in fact  
12 I think was the one who reviewed their final audit  
13 statements with me.

14 Q Okay. Other than Mr. Schwait, Mr.  
15 Giampetro, and Mr. Auch, Grabush, Newman, and  
16 yourself, was there any other professionals who  
17 were involved in your IRS audits?

18 A I don't think so.

19 Q Is there correspondence regarding your  
20 IRS audits and the resolution of those audits?

21 A Yes.

Page 105 - Page 108

1 Q Do you have possession of those  
 2 documents?  
 3 A Yes.  
 4 Q Can you give those to Mr. Taylor so that  
 5 we can --  
 6 A Sure, that would be called the final  
 7 audit results. Yes, okay. They were actually like  
 8 amended returns that comprised being the audit  
 9 results.

10 Q Right, I would like to see all of them.  
 11 A Okay.  
 12 Q When you say you thought somebody was  
 13 appealing the one item that was not resolved, was  
 14 that a tax court appeal or was that going to be a  
 15 federal court appeal or some kind of internal IRS  
 16 appeal?  
 17 A It hadn't gone that far yet. I think it  
 18 was going to be reviewed at some appellant level  
 19 that was not tax court. I really don't know where  
 20 it is now. I don't know if it was assessed to me,  
 21 and it's up to me to follow. I just don't know.

1 A Yes.  
 2 Q Can you give those to Mr. Taylor too?  
 3 A Yes.  
 4 MS. WHELIHAN: I take it, Doug, you  
 5 don't have those, right?  
 6 MR. TAYLOR: I don't have them.  
 7 A Mr. Taylor was a part of that process  
 8 too. And so were other professionals. The payment  
 9 of those IRS taxes.

10 Q All right. Who were the professionals  
 11 who were involved in the payment of the IRS taxes,  
 12 penalties and interest charges?  
 13 A Mr. Taylor, Bernie Denick from Blum,  
 14 Yumkas, Ms. Tyler, the IRS agent. And technically  
 15 there were professionals such as real estate  
 16 appraiser who had to appraise a peace of property  
 17 for me getting -- there was a mortgage process that  
 18 allowed me to get the funds to get the IRS liens  
 19 paid. And that mortgage process involved quite a  
 20 number of professionals and quite a bit of expense.  
 21 Q Okay. Did you pay the taxes, penalties

1 The thing is I just have so many other issues to  
 2 focus on that I don't, I never got back to looking  
 3 at that one.  
 4 Q All right. But it was your  
 5 understanding that that issue was going to be  
 6 pursued in some kind of court forum like the United  
 7 States District Court?  
 8 A No, I'm not sure it was going to go to  
 9 court. I think it would probably be reviewed and  
 10 discussed at an appellant level before a court  
 11 level.

12 Q Within the IRS?  
 13 A Within the IRS. That's my recollection,  
 14 that it was waiting for that process to happen.  
 15 Q Have you now completely paid off the  
 16 taxes that you owed to the IRS as a result of the  
 17 borrowings that you took from your pension plan?  
 18 A Yes.  
 19 Q And when was -- do you have any kind of  
 20 document that would indicate the payments that you  
 21 made and when those payments were made?

1 and the interest, did you pay them off finally all  
 2 at the same time?  
 3 A Well, there was a -- I was paying 2,000  
 4 a month for several years. I was paying 4,000 a  
 5 month for a few years while the state was involved  
 6 and then back to 2,000, then a lump sum late last  
 7 year of more than 200,000.  
 8 Q And that included all of the remaining  
 9 taxes, penalties and interest assessed against you  
 10 by the federal government and the state of  
 11 Maryland?

12 A Yes, plus the substantial excise taxes  
 13 that were subsequently assessed sometime late in  
 14 '95 or thereabouts.  
 15 Q Are there documents that you have in  
 16 your possession that will show the amount of taxes  
 17 and the payments that you made toward those taxes  
 18 and when those payments were made?  
 19 A Yes.  
 20 Q Okay. Can you produce those documents  
 21 to Mr. Taylor?

Page 113

1 A Yes.

2 Q Okay. See, I don't want to ask you

3 questions about things you can't answer with the

4 documentation in front of you.

5 The mortgage that you obtained to pay

6 off the taxes, where did you get that mortgage?

7 A From the lady in Florida who is

8 financing my condo also. The lady I bought my

9 condo from.

10 Q Which condo?

11 A The remaining condo that I have in --

12 which condo? I only have one. It's in St. Thomas.

13 Q Is she a private investor or --

14 A Private investor.

15 Q Okay. What's her name?

16 A King, Vivian King.

17 Q Like C-A-N?

18 A Like King, K-I-N-G.

19 Q Where does she reside?

20 A Coral Gables? Coral Gables. I don't

21 know why -- I'm pretty sure it's Coral Gables.

Page 114

1 Q Okay. Who were the professionals who

2 were involved in the mortgage process for you?

3 A Well, she had an attorney. What's her

4 attorneys name?

5 THE WITNESS: Doug, do you remember?

6 MR. TAYLOR: I don't know that I can

7 supply that unless we go off the record.

8 A Well, she had an attorney down there but

9 the attorney down there said that they would need

10 to be represented by a firm up here in this

11 mortgage process. They needed someone to represent

12 Mrs. King's interests. And they said that they

13 were interested in holding my expenses down so did

14 I know of anyone who would be appropriate for that.

15 And I recommended that the best real estate person

16 I knew in this area was Bernie Denick. And I

17 explained that at the present time Mr. Denick and I

18 had had some difficulties that I thought were

19 resolved and that if they chose to use him I'm sure

20 they could count on him to represent their interest

21 fairly. So they looked him up in Martindale

Page 115

1 Hubbell and got in touch with Mr. Denick. And Mr.

2 Denick wrote them a letter explaining how we

3 resolved our differences. And Mr. Denick

4 represented her quite precisely and accurately.

5 Q The closing for that mortgage, did that

6 occur in June of '94?

7 A No. It occurred in December of '96.

8 December 19th of '96. I think it was 19th. I

9 think so.

10 Q Who represented you in the mortgage

11 process?

12 A Mr. Taylor.

13 Q At the time that Mr. Denick represented

14 Ms. King, had your lawsuit against Blum, Yumkas

15 been totally resolved?

16 A Yes.

17 Q Was the resolution of that lawsuit in

18 any way related to Mr. Denick then representing Ms.

19 King?

20 A It was unrelated. It was just that I

21 was anxious for Mr. Denick to know there was no

Page 116

1 continuing animosity and that independent of what

2 had happened, that unfortunate incident of the

3 lawsuit, that I wanted to let him know my feelings

4 about it by recommending him.

5 Q Prior to going to Ms. King to obtain a

6 mortgage, did you go to any other lenders?

7 A Yes.

8 Q What other lenders did you go to to

9 obtain --

10 A I would have to go back to my records

11 but over a period of the last couple of years I had

12 gone to six or eight different lenders. I went to

13 Hopkins Bank. I think Hopkins, Hopkins something

14 over in east Baltimore. I think there was a

15 Maryland Permanent Trust. A couple of private

16 lenders. I have a list.

17 Q Okay. Can you give that list to Mr.

18 Taylor if he doesn't already have it?

19 MR. TAYLOR: I don't have it.

20 MS. WHELIHAN: Okay.

21 A It may not be a complete list but I'll

Page 113 - Page 116

1 give a substantial list.

2 Q Why is it you waited until December of  
3 '96 to go to Ms. King for your mortgage?

4 A Ms. King is an elderly lady, private  
5 investor, down to earth. When I say a private  
6 investor, I don't know really how much of that she  
7 does. But in the first place, I had been turned  
8 down by so many commercial lenders, always for the  
9 same reasons, that the tax liens existed. Well,  
10 it's a progression of events. If you really want  
11 to know the answer to this, to give it to you out  
12 of context would be incomplete. If you want to  
13 know how I got to Mrs. King or how it occurred to  
14 me to go to her, I have to sort of tell it to you  
15 so you understand the picture.

16 If I had gone to Mrs. King a year from  
17 now or something I probably would have been turned  
18 down because I couldn't go to her with anything  
19 that would have convinced her that it was a  
20 worthwhile investment. And she might have, and it  
21 might have just ruptured my relationship that I had

1 months of '96 she was saying look, go out and  
2 borrow money on your ground or do something. And I  
3 was in no position to borrow money yet because my  
4 books were behind. And I knew that in order to  
5 make a mortgage loan I had to have my books up to  
6 date. The first thing anyone asked for was  
7 financial statements. The reason my books were  
8 behindááit's complicatedáábut the reasons my books  
9 were behind was because as a result of the Labor  
10 Department agreement I had to go and build a new  
11 computer program to monitor the relationship  
12 between my business, my Crown Motors company, and  
13 my pension. It was a very complicated relationship  
14 financially and could only be done by a very  
15 complex computer program. But the building of that  
16 program caused a delay in my bookkeeping. A delay  
17 in my bookkeeping means I didn't have books and I  
18 was in even in less of a position to acquire a  
19 mortgage anyway until the program was complete and  
20 books were complete.

21 Things started to finally fall into

1 with her.

2 In -- I had been trying with local  
3 commercial lenders to get money to run my business  
4 and always run into roadblocks because of the tax  
5 liens that stood there and the excise taxes that  
6 come up. Things got substantially worse when the  
7 excise taxes were assessed, because before the  
8 excise taxes were assessed I had a payment plan  
9 that I was keeping up with with the IRS and they  
10 weren't pressuring me any further. After the  
11 excise taxes were assessed there was an additional,  
12 I guess close to 80-some thousand dollars against  
13 me personally. Those excise taxes were turned over  
14 to a new IRS agent, Ms. Tyler, and she came out to  
15 see me now. She, when she got the excise taxes  
16 case she got my whole file. Now I had to deal with  
17 her not only on the excise taxes but with the whole  
18 other taxes also.

19 She was patient -- and this was back in  
20 the end of '95 or the early part of '96, I can't  
21 remember which -- but anyway, during the middle

1 place in the middle of '96, where the program was  
2 complete enough that I could get my returns done.  
3 Actually in the last several months of '96. But it  
4 was getting complete enough that I could start  
5 assembling enough financial information to be able  
6 to provide to a lender. But in the meantime by now  
7 Mrs. Tyler had gotten impatient and had seized my  
8 property. I had some property on Park Heights that  
9 I was developing. And she seized it and said it  
10 was going to be auctioned in 30 days. At that time  
11 I really panicked and went to, first, Ron Shiff,  
12 who was a tax attorney, and asked him to intercede  
13 for me. But he was so busy he never got back to  
14 me. And then I went to Allen Schwait. And Allen  
15 Schwait told me what a monumental job it is to deal  
16 with the IRS in seizure things today. And he made  
17 it sound like -- and suggested somebody else. He  
18 really felt like somebody could do a better job for  
19 me than he. And that person actually was the  
20 person at Blum, Yumkas but I never met the man. It  
21 was an ex-IRS man who was a tax person at Blum,

Page 121

1 Yumkas.  
 2 Then I started thinking well, why not  
 3 use Doug Taylor? So Doug Taylor went down and  
 4 turned the whole thing around for me with Mrs.  
 5 Tyler. He got her to put a hold on the seizure  
 6 while I got an appraisal of the property. The idea  
 7 was to beááI still at this time didn't think of  
 8 going to Mrs. Kingáábut the idea was to be that if  
 9 I could prove that the property had as much value  
 10 as I said it had, because the big disagreement with  
 11 the IRS was that I said it was worth substantially  
 12 more than they had it on the books for and that it  
 13 would be a big hardship to lose it, and they said  
 14 well, if you can prove that. So I had to get an  
 15 appraisal of the property. And the appraisal of  
 16 the property actually came out so fine and it was  
 17 so impressive, that while Mrs. Tyler was reviewing  
 18 it I say hey, this appraisal looks so good, let me  
 19 show it to Ms. King. Maybe she would lend me some  
 20 money. That's when the idea occurred to me.  
 21 Prior to that I wouldn't have had the

Page 122

1 things in place to go to Mrs. King. I wouldn't  
 2 have had the appraisal. I wouldn't have had my  
 3 books in condition to provide financial reports.  
 4 It was something that came as a progression of  
 5 events. It was something -- I never thought of  
 6 going to Mrs. King without having records or an  
 7 appraisal that was so impressive. But when it came  
 8 out to be that way, I did. And I just apparently  
 9 got her at the right time.  
 10 Q The appraiser who appraised the  
 11 property, who was that?  
 12 A William Currie & Associates.  
 13 Q The property that you were developing,  
 14 were you developing it for what purpose? Was it a  
 15 commercial development?  
 16 A It was two residential building lots.  
 17 It was one lot being subdivided into two  
 18 residential lots.  
 19 Q When did you start developing that  
 20 property?  
 21 A It's again a slow process. I owned the

Page 123

1 property since the late '60s. My idea to make two  
 2 building lots and sell it started sometime in the  
 3 '80s or earlier. It first was in the hands of one  
 4 engineer and then another engineering company. And  
 5 the process of subdividing the lots was about a  
 6 five-year ordeal. It was very tedious and time-  
 7 consuming, a lot of different agencies involved.  
 8 There were streams. There's trout streams and a  
 9 bridge to be built and involved all kinds of  
 10 different government involvement. It was about a  
 11 five- or six-year process.  
 12 Q Was the property finally subdivided?  
 13 A It was subdivided into two lots in the  
 14 late -- in like sometime about '93 or 4, but I  
 15 didn't have any money to put a bridge up. Even  
 16 though it was subdivided, it wasn't really  
 17 marketable until -- it needed a bridge and an  
 18 entrance road to the property. Because there's a  
 19 trout stream, you have to cross a bridge. And the  
 20 bridge was going to cost 35 to \$50,000 and I didn't  
 21 have any such money to invest in building a bridge

Page 124

1 or any place to get it.  
 2 Q Was there any prior mortgages on the  
 3 property?  
 4 A Well, I bought -- well, there, when I  
 5 bought the property there was that mortgage that I  
 6 paid off and then subsequently I purchased my  
 7 wife's interest in the property.  
 8 Q Was that the \$30,000 mortgage that you  
 9 had? Was that the property that had the \$30,000  
 10 mortgage?  
 11 A No. It was a, the mortgage I gave her  
 12 was 50,000 but that goes back to the late '80s or  
 13 something. And the 50,000 was part of the purchase  
 14 price. There were other debts that were forgiven  
 15 between her and I that was part of the purchase  
 16 price also.  
 17 Q At the time -- when did you pay off all  
 18 of the mortgages on that property, the last  
 19 mortgage?  
 20 A The one to my wife on the property so  
 21 that it was free and clear?

37

1 Q Yeah.

2 A I think sometime in the last two years.

3 The last payment was, I think it was a five-year

4 installment mortgage that paid out sometime in '95

5 or 6. '95 I would have to say.

6 Q When did you put in the computer program

7 in your business?

8 A I have had computers since the late

9 '70s.

10 Q The new computer system?

11 A Do you mean the new software that I

12 completed?

13 Q When did you put that in?

14 A That took about a year and a half to

15 develop it. Sort of just finished it in the last

16 several months. But it was functional, became

17 functional, close to being completely finished,

18 sometime around last summer.

19 Q Did you use a company to put in the

20 software?

21 A Yes.

1 A There's some documentation and I can

2 certainly give you a list of names and approximate

3 times and in a lot of cases exactly who I talked to

4 and their responses.

5 Q Can you give that to Mr. Taylor?

6 A I could spend a week putting that

7 together, but I'll try to be as complete as I can

8 in a reasonable period of time. Depends on how far

9 back you want me to go.

10 Q Well, I would probably say from 1989

11 forward would be probably --

12 A I know I can't think of them all, but

13 I'll give you a number of people.

14 Q Okay. That would be great.

15 The expense analysis that you did in

16 connection with our meeting before Judge Kaplan

17 listed a variety of professionals and their bills

18 to you by a time period or I guess by year when

19 those bills were submitted to you or paid by you?

20 A I'm not looking at the -- I'm going from

21 memory in my discussion with you about that now.

1 Q What was the company that put in the

2 software?

3 A J. Henn and Associates.

4 Q What's the name of the software?

5 A It's custom software. I designed it

6 actually. They wrote the program but I designed

7 it.

8 Q Prior to going to Ms. King, had you

9 gotten any kind of loans from any commercial

10 institutions?

11 A No. I have been unable to get credit.

12 Just credit card debt. I keep getting more and

13 more of that. As much as we could.

14 Q But none of the six to eight commercial

15 lenders you went to would give you loans?

16 A No. In fact, one of them said I'll do

17 it for 20 percent. I said okay, I'll give you the

18 20 percent. And then they changed their mind.

19 Q Is there documentation that would

20 reflect that you went to these various lenders and

21 that they refused you?

1 If you have it, if you can help me by showing me

2 that, I can probably answer you with more accuracy.

3 Q Here is the chart that you --

4 A Uh-huh, okay.

5 Q But what I want to know is if you have

6 any bills or written documentation to support the

7 charges by these professionals and your payments to

8 them?

9 A In many cases, yes.

10 Q Because I would actually like to see

11 that.

12 A I might say within -- if you'll let me

13 look at it a moment I can enlighten you further on

14 this.

15 (Document tendered.)

16 Q I don't want to take a lot of time

17 testing your memory without the documentation.

18 It's just that one page.

19 MR. TAYLOR: Just for the record and for

20 your information, I asked Mr. Shofer just a week

21 ago to get that material together.

Page 129

1 MS. TRUHE: Because presumably he will  
 2 be submitting that in support of his request for  
 3 damages in connection with those professional fees.  
 4 MR. TAYLOR: Yes, exactly right. And I  
 5 asked him to start putting that together.  
 6 MS. TRUHE: We have some of that from  
 7 way back when.  
 8 MS. WHELIHAN: Right, like, you know --  
 9 A I can tell you this. Grabush, Newman,  
 10 Giampetro and Kabala I can give you almost every  
 11 bill. Allen Schwait, I have the bills. Now, the  
 12 ones that I don't have an exact bill is, I took --  
 13 I'm going to look at this and say probably 10  
 14 percent of what Karl Auch did for me and I'll tell  
 15 you how I arrived at that. Grabush, Newman, I  
 16 looked at the amount of time that Auch spent with  
 17 me and probably I assumed that 10 percent would be  
 18 reasonable based on the number of different issues  
 19 that he took up with me on this.  
 20 Martucci is a smaller percentage and --  
 21 I think a smaller percentage -- and what I did was

Page 130

1 took actually a fraction of the percentage that I  
 2 used that Grabush, Newman actually billed me for.  
 3 I said well, if Grabush, Newman is billing me this  
 4 much regarding, and showing documentation, and  
 5 although I don't have the documentation from  
 6 Martucci, it's fair to assume since the IRS audit  
 7 is over it's going to be a much smaller percentage  
 8 but it still had to do with unwinding prohibited  
 9 transactions and my using her for consulting  
 10 issues. Even the issue about the project that she  
 11 did for me, that one project alone was well over a  
 12 thousand dollars. The project of --  
 13 Q But Ms. Martucci has probably submitted  
 14 bills to you; is that right?  
 15 A Well, I have -- yeah. I have to look  
 16 through her statements to see exactly if they  
 17 pinpoint issues. I would have to get all of her  
 18 statements out from five years. I can ask my wife  
 19 to get them out and look at them and see. Doug  
 20 Taylor, in '96 I'm using Doug Taylor, had to do  
 21 with the Tyler thing, yes. And believe me, at the

Page 131

1 amount -- Allen Schwait was about to put me into  
 2 the hands of someone that would have cost \$10,000  
 3 to stop that seizure. Bornhorst, \$2,000 in '94  
 4 for -- \$2,000 is a fraction of what I paid  
 5 Bornhorst. But what he did was stop proceedings  
 6 when the IRS was ready to close down on me and they  
 7 were going to move ahead. And he went to the Labor  
 8 Department in Washington after Nick had said, Nick  
 9 Giampetro said there's no process for dealing with  
 10 the Labor Department, there isn't even a process or  
 11 procedure to do it, Bornhorst went to the Labor  
 12 Department directly and started talking with them  
 13 and got them and got the IRS to reverse its thrust  
 14 because it was ready to really start moving ahead  
 15 with seizures and things.  
 16 Q Because I think it would just make  
 17 things so much easier if we had the written  
 18 documentation, there would be a lot of questions we  
 19 wouldn't have to ask you.  
 20 A Mr. Bornhorst didn't actually write  
 21 anything down. But I could get him to give you a

Page 132

1 summary if you'd like of what he did. I considered  
 2 it probably more significant. He might not realize  
 3 how significant what he did was. We were right in  
 4 the juncture where things were heating up to  
 5 boiling.  
 6 Q Did Mr. Bornhorst send you bills?  
 7 A He didn't, no. Because my arrangement  
 8 with Mr. Bornhorst was different. He was on a  
 9 retainer, contingency. It was sort of a hybrid  
 10 type of a relationship.  
 11 Q How did you arrive at the charges of  
 12 \$2,000?  
 13 A I thought that was a modest expense  
 14 related to the money I was paying him and the  
 15 amount of time and result that he produced in  
 16 taking the heat off of the IRS/Labor Department  
 17 situation back then.  
 18 Q Did you have like a retainer agreement  
 19 with Mr. Bornhorst that would reflect what payments  
 20 you made to him or cancelled checks or some sort of  
 21 written documentation?



1 A I paid Mr. Bornhorst probably close to  
2 \$50,000 over a period of the years that he was with  
3 me, but it was on different -- it wasn't all  
4 related to the Hack matter.

5 Q As to the Hack matter as opposed to say  
6 the Blum, Yumkas matter, are there cancelled checks  
7 you have or documentations that show what he  
8 charged you and --

9 A It's not exactly what he charged me.  
10 Yeah, I have cancelled checks. I have a record of  
11 what I paid Mr. Bornhorst.

12 Q Did he generate any kind of time records  
13 or bills in connection with your legal matters?

14 A I don't think so. There may have been a  
15 few fractured time records and bills not related to  
16 that charge but -- actually it wouldn't show, it  
17 wouldn't be a meaningful picture, whatever time  
18 records he has. The gross amount of checks I gave  
19 him would be the thing that would substantiate what  
20 I paid him.

21 MR. TAYLOR: I'll get that information

1 probably suffice. Then whatever documentation you  
2 have to show that would allow us to determine what  
3 it is you're claiming and what, if anything, is  
4 really related to the litigation.

5 MR. TAYLOR: We will assemble that.

6 A Incidentally, the assemblage of this  
7 would probably be best done with the help of Karl  
8 Auch. He's in Europe right now. He left there for  
9 this whole month. He will be back in the early  
10 part of April. I would rather get into that  
11 project with his help because he can put his hands  
12 on the things as well as anybody. His mind is such  
13 that he won't get confused by it. He will be able  
14 to assemble it.

15 Q Other than Mrs. Tyler, were there any  
16 other IRS personnel with whom you dealt personally?

17 A Well, she was the most recent. But  
18 since the tax obligations surfaced, there have been  
19 quite a number of agents both with the state and  
20 federal. Three or four different agents.

21 Q Do you have correspondence reflecting

1 for you. Some of the professionals probably  
2 haven't rendered separate statements on particular  
3 items but I'll talk to you about that.

4 MS. WHELIHAN: Anything that would show  
5 what they did for what time increments.

6 MR. TAYLOR: Filling that in with  
7 affidavits in terms of an outline of statements as  
8 to what they did and what they charged because some  
9 of these are -- there was a lot of billing that was  
10 done. For instance, the accountants have lots of  
11 activities that they do and only a portion of that  
12 related to this. Going through all of those bills,  
13 that is pulling all the bills out and submitting  
14 them, may be more confusing than kind of  
15 recapitulating it with an affidavit.

16 MS. WHELIHAN: You could just supplement  
17 the answer to one of my interrogatories, which  
18 wasn't from me but one of my predecessors, says  
19 what are the damages you're claiming in this case  
20 and how did you calculate the damages. You could  
21 go back and maybe answer that and that would

1 your communications with those individuals or can  
2 you give me a list of those individuals with whom  
3 you dealt personally? Maybe you can give it to  
4 Doug and he can give it to me. And the same thing  
5 with the Department of Labor. Whoever you dealt  
6 with personally.

7 A I'm sure I can get ahold of  
8 correspondence that has names.

9 Q Because I don't want to waste a lot of  
10 your time asking you questions that you're not  
11 prepared to answer because you don't have the  
12 documentation. That's a waste of both of our time.  
13 That's what I would prefer to do.

14 A But for instance are you saying if I had  
15 an IRS agent that agreed to take \$2,000 a month  
16 back in 1991, between the period of '91 and '94,  
17 you want his name?

18 Q Yes. And the correspondence relating to  
19 your IRS audit.

20 A I don't even know that I kept every  
21 scrap of correspondence.

1 Q Whatever you have.  
2 A **A lot of those notices were redundant**  
3 **notices that keep coming in every month. I'm sure**  
4 **we didn't keep everything.**

5 Q Whatever you have is what I would be  
6 interested in.

7 MR. TAYLOR: I made a note. I'll, we'll  
8 go through those documents.

9 MS. WHELIHAN: Subject to that  
10 limitation, I really have any other questions for  
11 Mr. Shofer. I think he will supply most of the  
12 answers I need or at the very least help me to  
13 streamline my questions. What I would like to do  
14 is suspend my questions. I don't think we're going  
15 to get done today anyway. I don't know what  
16 Janet's plans are.

17 MS. TRUHE: I would like to ask few  
18 questions and then suspend as well until we see all  
19 of the documentation which brings us up to date on  
20 Mr. Shofer's --

21 MS. WHELIHAN: Maybe we don't need to

1 take Mr. Shofer's deposition anymore if we get all  
2 of the documentation, although I think that we will  
3 probably still have some questions.

4 MR. TAYLOR: Probably. I would think  
5 so, yes.

6 EXAMINATION BY MS. TRUHE:

7 Q Mr. Shofer, you mentioned quite some  
8 time ago that as part of your settlement with the  
9 Department of Labor you had to set up a special IRA  
10 account?

11 A Yes.

12 Q When did you set that up?

13 A **In June of 9 -- wait a minute. No, that**  
14 **was set up in February of '95.**

15 Q How much money did you put into it at  
16 that time?

17 A **Wasn't money.**

18 Q What did you put into it?

19 A **Accounts receivable from the pension**  
20 **that was, that was assigned to my account and my**  
21 **pension account and moved to the IRA.**

1 Q When you were speaking about the  
2 services which Ms. Martucci currently performs for  
3 both your, or I should say your business, your  
4 pension and your personal situation, were these all  
5 the same types of functions that Grabush, Newman  
6 performed?

7 A **Yes. But I have to qualify that a bit.**

8 Q Go ahead.

9 A **Between the time that I started dealing**  
10 **with Ms. Martucci and the time that I was dealing**  
11 **with Ken Larash or Grabush, Newman I'd hired or**  
12 **formed my relationship with Karl Auch. And,**  
13 **therefore, Karl Auch could take care of much of the**  
14 **bookkeeping needs of the company. Which meant that**  
15 **it was a less, or it was a less arduous task for**  
16 **Mrs. Martucci to complete my records. In other**  
17 **words, she was dealing with somebody who was**  
18 **already spoke her language.**

19 Q When did you hire Karl Auch?

20 A **As I say, he was an independent**  
21 **contractor that sort of came to me sometime around**

1 **1991.**

2 Q Did he become a full-time employee of  
3 yours at the time?

4 A **No. He is not a full-time employee. He**  
5 **has a few other clients now and people that he was**  
6 **doing business with I think before he started with**  
7 **me. And he works on a flexible hourly arrangement**  
8 **and comes and goes as he feels, as he pleases when**  
9 **he sees the need to be there. And when he sees**  
10 **that my work is fairly current and he doesn't have**  
11 **anything important to do, sometimes he don't come**  
12 **in for a week or so.**

13 Q And is he paid on an hourly basis?

14 A Yes.

15 Q And is he paid by you personally or by  
16 Crown Motors?

17 A **He's paid by Crown Motors because most**  
18 **of the function he does is for Crown Motors.**

19 Q Who, again, is Ron Shiff?

20 A **Ron Shiff is an attorney with, I have to**  
21 **think of the name of the firm, it's a large**

1530

1 downtown firm, but he's a tax attorney, a  
2 well-known tax attorney in the city.

3 Q How did you become involved with him?

4 A Ms. Martucci recommended that we should  
5 get the best tax advice we could on procedures  
6 regarding removal of the debt from the pension, the  
7 Crown debt, that transaction as it was going  
8 through and the valuation of the note. And she  
9 recommended, said that she would like me to meet in  
10 her office Ron Shiff, who is the person that she  
11 would use for something like that. So that's how.

12 Q I would like to see any bills that have  
13 been submitted by Ron Shiff for his services  
14 rendered.

15 You also mentioned that at one point in  
16 time, maybe this is the same time period we have  
17 been talking about, that Crown Motors owed the  
18 pension something?

19 A Yes.

20 Q What was the pension lending Crown  
21 Motors?

1 the debt of Crown and attach it to your account,  
2 Richard Shofer, and move it out of the pension.  
3 And that's the only way we can correct the  
4 prohibited transaction.

5 A prohibited transaction exists when  
6 there's a debt between a parent company and the  
7 pension. The only way it can corrected is to get  
8 it out. There was no way that Crown could pay that  
9 debt to the pension any other way other than  
10 removing it into my own account so that other  
11 participants wouldn't suffer, so there wouldn't be  
12 a loss to another participant. I had an account of  
13 three and a half million dollars in the pension and  
14 two million of that was debt from Crown to the  
15 pension and it was put in my -- it was attached to  
16 my account and distributed to me. So Crown owes me  
17 \$2 million but Crown has a negative net worth.

18 Also, at the same time, the unpaid loans  
19 of \$100 close to \$200,000 that was still left as a  
20 result of, from the Hack loans, they were about a  
21 \$200,000 level or 175 and that had to be corrected

1 A They didn't lend Crown Motors anything.  
2 The pension had entered into financing arrangement  
3 for receivables. As my credit line tightened up or  
4 my ability to get funds decreased, Crown was unable  
5 to keep up its obligations with the pension. So  
6 debt started building up between Crown and the  
7 pension for unpaid repos. And those, and that debt  
8 started accruing interest at 12 percent compound.  
9 So it started to be a runaway expense between Crown  
10 and the pension. The pension was receiving  
11 compound interest on bad debt, repos as well as its  
12 financing that it was doing. And it was just  
13 bleeding Crown. And finally -- and that process  
14 was going on during the audit and getting worse and  
15 worse by the year in the early '90s, and Crown  
16 couldn't do anything about it. Finally as a  
17 resolution the Labor Department said okay, we'll  
18 take all of the debt that Crown owes the pension --  
19 and by now Crown had a very negative net worth, it  
20 didn't have any real equity in anything. Its note  
21 would have been practically worthless. Take all of

1 or distributed. And that was distributed to me  
2 also, to correct prohibited transactions of a loan  
3 existing between a participant. So that's how the  
4 prohibited transactions were corrected but it  
5 decimated my pension account down to, from three  
6 and a half million to down under a million. The  
7 way -- just to continue so the picture is complete,  
8 I know you're happy to get more information, part  
9 of the agreement was, so that no further prohibited  
10 transactions would occur between Crown and the  
11 pension, that an IRA would be created as a sort of  
12 safety valve. If Crown couldn't meet its future  
13 obligations to the pension, then any obligations it  
14 didn't meet would be attached to my account and  
15 removed from the pension so that there wouldn't be  
16 any future prohibited transactions. That was in  
17 essence part of the agreement.

18 Q There are a lot of questions I want to  
19 ask you but I'm just going to take it from the top.  
20 The last loan you took, the ninth loan you took  
21 from the pension was on September 30th, 1986,

Page 145

1 correct?

2 A I guess if that's the date you say.

3 Q You testified at one of your previous

4 depositions that since that last loan you proceeded

5 to borrow heavily from Crown Motors instead,

6 correct?

7 A Did I use the word instead?

8 Q Well, you borrowed heavily from Crown

9 Motors, correct?

10 A I have borrowed from Crown Motors, yes.

11 Q I don't recall when I last deposed you.

12 A But I have borrowed from Crown Motors,

13 yes.

14 Q How much do you currently owe Crown

15 Motors?

16 A About \$800,000 more or less. Actually

17 that's the sum of two loans. My spouse, Sally, has

18 some loans with Crown and it's the sum of both

19 loans because it's now treated as one loan more or

20 less.

21 Q I'll get back to that in a minute. I

Page 146

1 would first of all like copies of all of your

2 income tax returns from 1987 to date.

3 A You already have '87. I think you

4 already have some up into the '90s.

5 Q Well, again, if you would --

6 MR. TAYLOR: I'll talk to you. We can

7 work that out in terms of what you have or what you

8 don't have.

9 MS. TRUHE: All right. Because I would

10 like complete tax returns.

11 Q Let's start with 1988. Did you take a

12 salary from Crown Motors?

13 A In 1988?

14 Q Yes.

15 A I think so. I don't recall.

16 Q Do you recall ballpark how much it was?

17 A No. I can't recall what, when I stopped

18 taking salaries from Crown Motors. But there came

19 a time when I started accruing salaries that were

20 never eventually ever paid to me. I can't

21 remember. I think it was in the early '90s.

Page 147

1 Q Well, let's go back to this \$800,000

2 loan you have accumulated. Why were you taking

3 money from Crown Motors? For what purpose?

4 A Do you mean why was I borrowing from

5 Crown Motors?

6 Q Yes, since 1986.

7 A I would like to be able to -- you're

8 asking me why I'm borrowing money from Crown

9 Motors?

10 Q Yes. In other words, wasn't your salary

11 enough in 1986 for your personal needs?

12 A It couldn't afford to pay me a salary in

13 the '90s. It was so cash struck itself it couldn't

14 afford to pay me a salary.

15 Q Since 1986 it has managed pay you in the

16 form of loans \$800,000. What I would like to know

17 is --

18 A Excuse me. It didn't give me \$800,000.

19 That's principal and interest. It gave me much

20 less but interest accrued on it. That's like what

21 it came out to be after the interest expense

Page 148

1 compounded it.

2 Q How much money did you borrow from Crown

3 Motors in 1986?

4 A '86?

5 Q Yes.

6 A I can't recall specifically any amount

7 in any particular year without going back to

8 records.

9 Q Why were you borrowing from Crown Motors

10 at all during any one of those years?

11 A '86?

12 Q Yes, let's start out initially.

13 A I'm not sure I borrowed any --

14 Q Excuse me. When you initially started

15 borrowing money from your company Crown Motors, why

16 were you doing that?

17 A First of all, the question initially

18 goes back to the '70s probably or the '60s. The

19 company is 30-some years old. When you say

20 initially, initially during a particular period of

21 time?

1 Q I'm focusing on the time period after  
2 you took your last loan from the pension on  
3 September 30, 1986. You testified in your earlier  
4 deposition that you then started borrowing heavily  
5 from Crown Motors. I want to know when you first  
6 started borrowing heavily from Crown Motors  
7 sometime in 1986, what were you using the money  
8 for?

9 A Actually probably extended legal  
10 expenses and expenses related, personal expenses.  
11 I'm not sure, first of all. I have to look back  
12 and see if I really borrowed a lot in 1986 or 7 or  
13 8 or when the borrowing started to be heavy. If I  
14 used the word heavy borrowing -- I'm not sure that  
15 the heavy borrowing started in '86. I think it was  
16 heavier in '89, '90 or '91. In '86 I was still  
17 taking salary and it wasn't necessary to borrow.

18 Q When did you start borrowing from Crown  
19 Motors?

20 A I always have been borrowing from Crown  
21 Motors and paying back. When I say always, I

1 frequently did this in periods of time in cycles  
2 throughout the decades.

3 Q Was that for the purpose of avoiding  
4 paying income taxes?

5 A No. Because I always paid it back. You  
6 have to eventually get income to have the money to  
7 pay it back. So it couldn't be for avoidance.

8 Q Let's try this again. In 1986 when you  
9 first started borrowing from Crown Motors, after  
10 you stopped borrowing from the pension, what were  
11 you using the money for?

12 A Well, I can't really say without going  
13 back to the records. For instance, if you're  
14 saying borrowed heavily like --

15 Q My question was not borrowed heavily.  
16 When you first -- I'm going to try this once again.  
17 Mr. Shofer, you're an intelligent man. I think you  
18 don't want to answer my question. When you first  
19 started borrowing from Crown Motors after you last  
20 took a loan from your pension, why were you  
21 borrowing from Crown Motors? What were you using

1 the money for?

2 A Okay. Let's take the year '86.

3 Q What did you use the money you borrowed  
4 from Crown Motors for in 1986?

5 A Let's take the year '86. I don't know  
6 specifically. I'm not a lavish spender. I can't  
7 say that I remember going to Las Vegas and gambling  
8 or something. First of all, I've never have been  
9 to Las Vegas.

10 Q Mr. Shofer, let's try it this way.

11 A Let me say this. In 1986 I had two  
12 condominiums. Both condominiums, they were  
13 originally purchased to be income-producing  
14 condominiums.

15 Q Are these the two in the Virgin Islands?

16 A Yes. However, things didn't turn out as  
17 they should have. In 19, sometime in early 1986 or  
18 during the year 1986 after I had bought and  
19 furnished one of the condominiums to put it on the  
20 rental market, the rental program company went  
21 broke and I had only bought it to put it on a

1 rental market. When the rental program went into  
2 bankruptcy I put it up for sale. But I had a  
3 30-some-thousand-dollar-a-year expense on that  
4 condo just keeping it up, paying condo fees and  
5 interest debt on the purchase of it. And it was  
6 bringing in no income until it was sold at  
7 eventually a loss a couple of years later. The  
8 second condo was in a similar position where I had  
9 put it on a rental program but the rental program  
10 company went broke. So there wasn't a program in  
11 place for me to rent it. Now I had two  
12 condominiums I had originally bought for investment  
13 purposes during the old tax law time before the --  
14 remember I bought these in '95. In '95 there was  
15 no --

16 Q '85?

17 A '85. And in '85 it was before the new  
18 tax change that would have probably stopped me from  
19 buying the condo anyway. What happened was after  
20 the tax law change the value of condos went down  
21 and it became difficult to sell them and get out of

Page 153

1 them. So now I'm faced with the expenses of two  
2 condos bought for investment as hotel properties  
3 that I couldn't sell and had on the market. And  
4 the expense of keeping them up alone, just take two  
5 condos, personal expense of keeping up two condos  
6 in 1986 would have probably been 30,000 apiece.

7 Q Did any professional counsel, advise,  
8 recommend or otherwise participate in your decision  
9 to borrow from Crown Motors for the purpose of  
10 paying those expenses?

11 A No. I don't ask someone if I can borrow  
12 from Crown Motors.

13 Q So is it your testimony that you dipped  
14 into your business to pay these personal expenses  
15 in 1986?

16 A No. You're asking me to characterize  
17 a -- I can't say that. You're asking me to  
18 characterize a situation as it occurred 11 years  
19 ago. And I can't remember specifically all of the  
20 things that happened 11 years ago or whether I  
21 actually even borrowed any money in the year 1986

Page 154

1 from my company. But I'm only trying to fill you  
2 in with what I can remember here and that is that I  
3 had two condominiums that each had a \$30,000  
4 expense attached to them.

5 Q And it is your best recollection that  
6 you borrowed from your business Crown Motors in  
7 order to keep up the expenses on those two  
8 properties in '86?

9 A I think eventually some of the expense  
10 or a good deal of the money I borrowed from Crown  
11 Motors probably went, probably somehow ended up  
12 going into that. Probably some of it ended up  
13 going into litigation expense. Some of it ended up  
14 going into repayment of income taxes. I can't  
15 begin now to give you an accurate summary of where  
16 the money came from or where it went. I would have  
17 to look at records to do that more accurately. And  
18 we do have enough records to be able to paint a  
19 picture.

20 Q Well, in terms of painting the picture  
21 in general, in the years after 1986, would you have

Page 155

1 been borrowing from Crown Motors up to \$800,000 or  
2 around that for similar types of expenses, personal  
3 expenses?

4 A I don't think -- first of all I don't  
5 think my own personal borrowings, they didn't go to  
6 \$800,000. I think my wife's borrowings -- first of  
7 all, we started using credit card debt as well  
8 as -- I had no credit card debt before the --

9 Q Mr. Shofer, this deposition is already  
10 way too long. Please listen to my question and  
11 answer only the question that is asked.

12 A Okay.

13 Q Let's try it this way. Approximately  
14 how much have you borrowed from Crown Motors since  
15 1986?

16 MR. TAYLOR: If you know.

17 Q What's your best guess?

18 A 3 or 400,000 plus interest that  
19 accumulated to make it more.

20 Q How much has your wife borrowed from  
21 Crown Motors since 1986?

Page 156

1 A Probably a few hundred thousand plus  
2 interest.

3 Q Let's go back to you. Have you paid any  
4 of that money back?

5 A Some.

6 Q How much?

7 A Very little.

8 Q When you say very little, give me your  
9 best ballpark figure.

10 A Totally maybe a hundred thousand in  
11 interest in the last couple of years.

12 Q Has your wife paid any of the money  
13 back?

14 A No. Jointly together we paid about a  
15 hundred thousand perhaps in interest.

16 Q In terms of the types of things the two  
17 of you have been spending that money on since 1986,  
18 can you give me categories -- you started giving me  
19 some such as to keep up the condos in the Virgin  
20 Islands, to pay litigation experiences, pay some  
21 taxes. Were there any other expenses that you used

Page 153 - Page 156

1 this money for such as the mortgage on your home,  
2 living expenses, that type of thing? Can you tell  
3 me your best list of categories on which you spent  
4 this money that you borrowed from Crown Motors?

5    **A Mostly litigation expense and taxes.**

6    **Q I would like to cover one more topic**  
7 **before we wrap up.**

8           In terms of attorneys' fees, how much to  
9 date have you paid the law firm of Blum, Yumkas in  
10 attorneys' fees?

11   **A Regarding the Hack matter?**

12   **Q Yes.**

13   **A In excess of \$130,000 I believe.**

14   **Q Do you owe them any more?**

15   **A No.**

16   **Q Approximately how much have you paid Tom**  
17 **Bornhorst in legal fees related solely to the Hack**  
18 **matter?**

19   **A I'm going to guess and say about**  
20 **\$30,000.**

21   **Q Do you owe him any more in legal fees?**

1 company owes me. Rental income from the property  
2 that I own, that I leased to my company.

3    **Q Let's go category by category. The**  
4 **first one was interest income on a loan Crown**  
5 **Motors owes you?**

6    **A Not a loan. The \$2 million debt that**  
7 **was, the note for all of the debt that was removed**  
8 **from the pension is interest bearing and supposed**  
9 **to be paid over a 25-year period. Crown is not**  
10 **keeping up its obligation to me because it does not**  
11 **have the cash flow to do it. But it does the best**  
12 **it can, and it's a 10 percent note. And it paid me**  
13 **approximately \$200,000 last year in interest.**

14   **Q Was that the first year it paid you**  
15 **money?**

16   **A No. It started paying me money in '94**  
17 **when the note --**

18   **Q How much did it pay you in '94?**

19   **A I think somewhere around 70 or 80,000.**

20   **Q How much did it pay you in '95?**

21   **A I think somewhere close to 200,000.**

1    **A No.**

2    **Q Approximately how much have you paid Mr.**  
3 **Taylor in legal fees?**

4    **A Well, he's working on two matters. I**  
5 **would have to separate them. They were billed**  
6 **separately and my wife pays the bills. I quite**  
7 **frankly don't look at the bills on a regular basis.**  
8 **So I really don't know without looking. But I**  
9 **would say under a hundred thousand dollars and more**  
10 **than 50. I just don't know without looking.**

11   **Q So the Hack matter is not the only**  
12 **matter Mr. Taylor is representing you on?**

13   **A He's representing me in another -- he's**  
14 **representing the pension in a piece of litigation.**

15   **Q That is unrelated to the Hack**  
16 **litigation?**

17   **A That's unrelated to the Hack litigation.**

18   **Q Can you list for me today, as of this**  
19 **moment in time, your sources of income?**

20   **A Interest income from the \$2 million loan**  
21 **that the pension owes me -- or not the pension, my**

1    **Q Let's go to the next category, which was**  
2 **rental income.**

3    **A Yes.**

4    **Q Who is paying you rental income on what?**

5    **A Just Crown Motors on the property that**  
6 **it leases.**

7    **Q How much did it pay you in 1996?**

8    **A '96, to the best of my -- oh, in '96 I**  
9 **think \$48,000.**

10   **Q How much did it pay you in '95?**

11   **A Nothing. It was accrued.**

12   **Q How much did it pay you in '94?**

13   **A Nothing it was accrued. Excuse me. I**  
14 **say that. I think all '94's rent was accrued. May**  
15 **have paid me a small amount. I don't know.**

16   **Q How about in '93?**

17   **A '93, I think it paid its rent in '93 but**  
18 **it -- there's a couple of years at least it's**  
19 **accrued that it hasn't been able to pay me.**

20   **Q But it did pay you 48,000 last year?**

21   **A That was the first year I think in three**

Page 161

1 years it paid any.  
 2 Q What was its usual annual rent?  
 3 A **48,000.**  
 4 Q Do you think there was about a  
 5 three-year period there when it could not pay its  
 6 rent?  
 7 A **Yes. Still can't pay its rent.**  
 8 Q Any other sources of income?  
 9 A **No.**  
 10 Q Do you still own any property in the  
 11 Virgin Islands?  
 12 A **I still own that one unit.**  
 13 Q Do you have a mortgage on that property?  
 14 A **Yes.**  
 15 Q How much?  
 16 A **Approximately 170,000.**  
 17 Q What do you pay a month on that  
 18 mortgage?  
 19 A **I would have to ask my wife. I think**  
 20 **it's 20-some hundred dollars. Like 23 or**  
 21 **something. I'm not sure.**

Page 162

1 Q Do you own a home?  
 2 A **Yes.**  
 3 Q Where is that located?  
 4 A **St. Dunstins (phonetic) Road.**  
 5 Q Do you have a mortgage on that home?  
 6 A **Yes.**  
 7 Q How much?  
 8 A **I have two mortgages. I have a first**  
 9 **for 130,000 and a home equity for 80,000.**  
 10 Q How much a month are you paying in  
 11 connection with those?  
 12 A **We keep rebuilding the home equity every**  
 13 **time it goes down. So somewhere in the**  
 14 **neighborhood of 2,000 a month on that mortgage.**  
 15 Q Do you own any other property?  
 16 A **Personally?**  
 17 Q **Yes.**  
 18 A **Well, I own my business property on**  
 19 **Liberty Heights.**  
 20 Q That's where the Crown Motors is  
 21 located?

Page 163

1 A **Yes.**  
 2 Q What is the value of that property? I'm  
 3 sorry. First of all, are you making any payments  
 4 on that?  
 5 A **I'm making interest payments to Maryland**  
 6 **National Bank on a mortgage of 120,000.**  
 7 Q What do you pay a month on that?  
 8 A **The interest.**  
 9 Q How much?  
 10 A **It fluctuates. A few over prime. I**  
 11 **don't know what it is. My wife takes care of it**  
 12 **and --**  
 13 Q **Ballpark?**  
 14 A **Probably a thousand a month average.**  
 15 **But that's a more complicated deal than that.**  
 16 **Actually that money is really a Crown obligation.**  
 17 **The property is in my name and the loan is in my**  
 18 **name, but it's really a Crown Motors obligation.**  
 19 Q The thousand dollars a month is paid by  
 20 Crown Motors?  
 21 A **Ultimately it passes through and it's a**

Page 164

1 **Crown payment and not mine.**  
 2 MS. WHELIHAN: That was the loan that  
 3 solved the overdrafts, right?  
 4 THE WITNESS: Yes.  
 5 Q Any other property that you own?  
 6 A **The development property in Park**  
 7 **Heights.**  
 8 Q Now, do you own that outright?  
 9 A **Subject to the present mortgage that we**  
 10 **got in December.**  
 11 Q How much is that mortgage?  
 12 A **300,000.**  
 13 Q Are you making any payments on that?  
 14 A **Yes.**  
 15 Q How much?  
 16 A **10 percent -- it's an interest-only**  
 17 **mortgage with the principal ballooning in three**  
 18 **years. So on 300,000, 10 percent would be, I think**  
 19 **it's 2500 a month.**  
 20 Q And are you paying that personally?  
 21 A **I'm just roughing it out. Yes.**



1 Q Any other properties?  
 2 A No.  
 3 Q What salary did you take from Crown  
 4 Motors in 1996?  
 5 A None.  
 6 Q What salary did you take in 1995?  
 7 A None.  
 8 Q What salary did you take from Crown  
 9 Motors in 1994?  
 10 A None.  
 11 Q What salary did you take from Crown  
 12 Motors in 1993?  
 13 A None.  
 14 Q 1992?  
 15 A I'm not sure if that was the last year I  
 16 took some salary or not. '91 or 2 I think. I  
 17 don't remember. I would have to look back.  
 18 Q With respect to the last time you took a  
 19 salary from Crown Motors, do you recall  
 20 approximately what it was?  
 21 A My set salary with Crown Motors for a

1 cash-producing vehicle for me and the pension.  
 2 Yes.  
 3 MS. TRUHE: That's all I have at this  
 4 time.  
 5 (Deposition suspended at 4:54 p.m.)  
 6 \* \* \* \* \*  
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1 period of six or seven years before the Hack  
 2 involvement was 200,000 a year, which I took and  
 3 paid taxes on.  
 4 Q My question to you is, I take it, and  
 5 now I'm looking at the list of properties on which  
 6 you make various monthly payments, and you have  
 7 been doing that for some time, where do you get the  
 8 money to make those payments?  
 9 A Well, before earlier in the deposition  
 10 you asked me why I owe my company so much money.  
 11 Does it start to fit in now?  
 12 Q That's exactly my question. Is that  
 13 where you get the money to make these payments,  
 14 namely from Crown Motors?  
 15 A Well, remember properties have property  
 16 taxes too.  
 17 Q And again, you're getting the money to  
 18 pay these various monthly expenses at least since  
 19 1986 from Crown Motors?  
 20 A Crown Motors is the ultimate source that  
 21 produces income or loans or whatever. It's the

1 CERTIFICATE OF DEPONENT  
 2  
 3  
 4  
 5  
 6  
 7 I hereby certify that I have read and  
 8 examined the foregoing transcript, and the same is  
 9 a true and accurate record of the testimony given  
 10 by me.  
 11 Any additions or corrections that I feel  
 12 are necessary, I will attach on a separate piece of  
 13 paper to the original transcript.  
 14  
 15 Richard Shofer  
 16  
 17  
 18  
 19  
 20  
 21

1 STATE OF MARYLAND, COUNTY OF BALTIMORE:  
2 I, Richard D. Baker, Jr., a Notary Public in  
3 and for the State of Maryland, County of Baltimore,  
4 do hereby certify the within named RICHARD SHOFER  
5 personally appeared before me at the time and place  
6 herein set out and, after having been duly sworn by  
7 me according to law, was interrogated by counsel.

8 I further certify that the examination was  
9 recorded stenographically by me and then  
10 transcribed from my stenographic notes to the  
11 within typewritten matter in a true and accurate  
12 manner. I further certify that the stipulations  
13 contained herein were entered into by counsel in my  
14 presence. I further certify that I am not of  
15 counsel to any of the parties, nor an employee of  
16 counsel, nor related to any of the parties, nor in  
17 any way interested in the outcome of this action.

18 AS WITNESS my hand and notarial seal this 11th  
19 day of April, 1997, at Baltimore, Maryland.

19

20

21

Richard D. Baker, Jr., Notary Public

1997

<b>-\$-</b>	'97 [2] 77:14 86:4	<b>200,000</b> [3] 112:7 159:21 166:2	<b>88102069/</b> [1] 1:5	<b>actuaries</b> [10] 37:7 38:12 41:17 41:18 42:6 74:16 79:21 80:1 81:4 81:19
<b>\$10,000</b> [1] 131:2	<b>-1-</b>	<b>21</b> [1] 1:15	<b>-9-</b>	<b>actuary</b> [15] 42:12 72:7 77:21 78:4 79:9 79:13 79:15 79:21 80:4 80:8 81:14 83:4 83:12 87:3 91:11
<b>\$100</b> [1] 143:19	<b>1</b> [1] 103:9	<b>210</b> [1] 1:18	<b>9</b> [1] 138:13	<b>addition</b> [1] 26:2
<b>\$130,000</b> [1] 157:13	<b>10</b> [15] 17:2 22:20 45:19 45:20 46:4 48:9 48:14 65:6 66:12 66:21 129:13 129:17 159:12 164:16 164:18	<b>23</b> [1] 161:20	<b>990</b> [4] 60:18 60:19 62:3 69:20	<b>additional</b> [18] 5:11 5:20 17:9 17:16 18:3 18:20 22:4 23:11 28:6 33:21 37:4 37:14 91:2 98:10 98:11 99:1 99:4 118:11
<b>\$2</b> [3] 143:17 158:20 159:6	<b>1099s</b> [2] 61:19 62:4	<b>24</b> [2] 22:9 22:21	<b>-A-</b>	<b>additionally</b> [2] 33:11 42:21
<b>\$2,000</b> [4] 131:3 131:4 132:12 136:15	<b>10:16</b> [1] 1:16	<b>25-year</b> [1] 159:9	<b>A-U-C-H</b> [1] 62:15	<b>additions</b> [1] 168:11
<b>\$200</b> [2] 93:4 93:17	<b>11</b> [2] 153:18 153:20	<b>2500</b> [1] 164:19	<b>a.m</b> [1] 1:16	<b>addressable</b> [1] 36:21
<b>\$200,000</b> [4] 46:12 143:19 143:21 159:13	<b>11th</b> [1] 169:18	<b>26</b> [1] 22:9	<b>ability</b> [1] 142:4	<b>adequate</b> [1] 91:4
<b>\$30,000</b> [5] 106:18 124:8 124:9 154:3 157:20	<b>12</b> [2] 22:20 142:8	<b>27</b> [1] 22:10	<b>able</b> [8] 8:1 47:4 81:5 120:5 135:13 147:7 154:18 160:19	<b>adjacent</b> [1] 58:4
<b>\$48,000</b> [1] 160:9	<b>12-page</b> [1] 17:3	<b>-3-</b>	<b>absolutely</b> [1] 78:12	<b>advertised</b> [2] 44:16 46:5
<b>\$50,000</b> [2] 123:20 133:2	<b>120,000</b> [1] 163:6	<b>3</b> [1] 155:18	<b>according</b> [2] 31:19 169:7	<b>advertising</b> [1] 44:11
<b>\$800,000</b> [6] 145:16 147:1 147:16 147:18 155:1 155:6	<b>12:30</b> [1] 96:6	<b>30</b> [2] 120:10 149:3	<b>account</b> [24] 50:6 50:8 53:10 53:15 54:9 54:15 54:17 55:12 55:18 56:14 67:20 74:7 87:11 87:13 102:12 138:10 138:20 138:21 143:1 143:10 143:12 143:16 144:5 144:14	<b>advice</b> [5] 33:14 68:12 68:18 69:12 141:5
<b>-&amp;-</b>	<b>13</b> [7] 44:9 44:15 45:7 45:19 46:2 46:3 48:12	<b>30,000</b> [1] 153:6	<b>accountant</b> [10] 57:15 57:18 57:21 59:3 59:5 62:15 65:2 69:19 70:10 72:10	<b>advise</b> [3] 25:2 32:18 153:7
<b>&amp;</b> [3] 1:10 1:17 122:12	<b>130,000</b> [1] 162:9	<b>30-some</b> [1] 148:19	<b>accounts</b> [3] 5:13 58:9 134:10	<b>affidavit</b> [2] 35:12 134:15
<b>-!-</b>	<b>138</b> [1] 3:7	<b>30-some-thousand-dollar-a-year</b> [1] 152:3	<b>accounting</b> [10] 59:6 59:7 59:8 59:12 61:7 63:7 64:21 67:6 68:1 69:10	<b>affidavits</b> [1] 134:7
<b>'60s</b> [2] 123:1 148:18	<b>170,000</b> [1] 161:16	<b>300,000</b> [2] 164:12 164:18	<b>Accounts</b> [1] 138:19	<b>afford</b> [2] 147:12 147:14
<b>'70s</b> [2] 125:9 148:18	<b>175</b> [1] 143:21	<b>30th</b> [2] 103:8 144:21	<b>accrued</b> [5] 147:20 160:11 160:13 160:14 160:19	<b>aforegoing</b> [1] 168:8
<b>'80s</b> [4] 36:18 44:17 123:3 124:12	<b>19</b> [1] 151:17	<b>35</b> [1] 123:20	<b>accruing</b> [2] 142:8 146:19	<b>afraid</b> [1] 54:2
<b>'84</b> [1] 53:20	<b>1986</b> [2] 144:21 147:6 147:11 147:15 148:3 149:3 149:7 149:12 150:8 151:4 151:11 151:17 151:18 153:6 153:15 153:21 154:21 155:15 155:21 156:17 166:19	<b>3:21</b> [1] 96:7	<b>accumulated</b> [2] 147:2 155:19	<b>again</b> [13] 12:9 12:16 25:4 29:6 29:7 84:7 105:4 122:21 140:19 146:5 150:8 150:16 166:17
<b>'85</b> [3] 152:16 152:17 152:17	<b>1987</b> [1] 146:2	<b>4</b> [2] 3:6 123:14	<b>accuracy</b> [5] 72:8 74:18 83:9 87:6 128:2	<b>against</b> [9] 44:18 45:3 46:12 47:6 98:2 98:11 112:9 115:14 118:12
<b>'86</b> [7] 148:4 148:11 149:15 149:16 151:2 151:5 154:8	<b>1988</b> [2] 146:11 146:13	<b>4,000</b> [1] 112:4	<b>accurate</b> [5] 64:8 94:2 154:15 168:9 169:11	<b>agencies</b> [1] 123:7
<b>'87</b> [1] 146:3	<b>1989</b> [3] 96:13 96:14 127:10	<b>400,000</b> [1] 155:18	<b>accurately</b> [2] 115:4 154:17	<b>agent</b> [7] 50:21 51:5 51:6 51:8 111:14 118:14 136:15
<b>'89</b> [1] 149:16	<b>1991</b> [2] 136:16 140:1	<b>48,000</b> [2] 160:20 161:3	<b>achieve</b> [2] 26:6 26:7	<b>agents</b> [2] 135:19 135:20
<b>'90</b> [2] 106:11 149:16	<b>1992</b> [1] 165:14	<b>4:54</b> [1] 167:5	<b>acquire</b> [1] 119:18	<b>ago</b> [14] 9:13 26:10 48:20 50:13 51:11 56:20 63:15 71:1 73:6 75:2 128:21 138:8 153:19 153:20
<b>'90s</b> [4] 142:15 146:4 146:21 147:13	<b>1993</b> [1] 165:12	<b>5</b> [3] 65:6 66:12 66:21	<b>action</b> [1] 169:17	<b>agree</b> [7] 69:14 69:15 93:7 93:11 93:14 94:17 98:20
<b>'91</b> [4] 60:14 136:16 149:16 165:16	<b>1994</b> [4] 100:8 103:8 104:14 165:9	<b>50</b> [2] 27:8 158:10	<b>actions</b> [1] 21:20	<b>agreed</b> [9] 4:2 66:17 66:21 88:17 94:1 94:20 95:2 98:3 136:15
<b>'92</b> [5] 58:1 58:11 60:14 60:14 106:12	<b>1995</b> [15] 4:18 6:12 7:8 7:13 9:20 16:1 19:1 21:9 22:6 26:14 34:7 36:12 38:8 100:11 165:6	<b>50,000</b> [2] 124:12 124:13	<b>active</b> [1] 6:15	
<b>'93</b> [5] 106:12 123:14 160:16 160:17 160:17	<b>1996</b> [3] 66:7 160:7 165:4	<b>505</b> [1] 1:17	<b>activities</b> [1] 134:11	
<b>'94</b> [8] 103:9 106:2 115:6 131:3 136:16 159:16 159:18 160:12	<b>1997</b> [3] 1:16 77:13 169:18	<b>-5-</b>	<b>acts</b> [1] 19:15	
<b>'94's</b> [1] 160:14	<b>1998</b> [2] 115:8 115:8	<b>-6-</b>	<b>actual</b> [4] 33:18 56:1 61:1 87:11	
<b>'95</b> [18] 16:18 18:2 19:7 22:9 26:12 26:18 26:19 26:19 29:4 112:14 118:20 125:4 125:5 138:14 152:14 152:14 159:20 160:10	<b>-2-</b>	<b>-7-</b>	<b>actuarial</b> [3] 61:4 78:2 83:8	
<b>'96</b> [11] 26:17 115:7 115:8 117:3 118:20 119:1 120:1 120:3 130:20 160:8 160:8	<b>2</b> [2] 93:19 165:16	<b>7</b> [3] 44:11 46:2 149:12		
	<b>2,000</b> [3] 112:3 112:6 162:14	<b>70</b> [1] 159:19		
	<b>20</b> [5] 46:20 46:21 47:3 126:17 126:18	<b>75</b> [1] 27:8		
	<b>20-some</b> [1] 161:20	<b>-8-</b>		
		<b>8</b> [3] 44:11 46:2 149:13		
		<b>8-and-a-half-by-11</b> [1] 85:5		
		<b>80</b> [1] 27:10		
		<b>80,000</b> [2] 159:19 162:9		
		<b>80-some</b> [1] 118:12		
		<b>85</b> [1] 27:10		

agreeing [1] 41:6	119:19 137:15 152:19	112:9 112:13 118:7	average [1] 163:14	155:17 156:9 157:3
agreement [24] 5:2	apiece [1] 153:6	118:8 118:11	avoidance [1] 150:7	159:11 160:8
67:17 88:7 88:7	apparent [1] 49:10	assessment [1] 98:11	avoiding [1] 150:3	better [5] 8:2
88:12 93:4 93:10	appeal [7] 40:16	asset [3] 74:10 74:11	aware [6] 6:10	32:3 39:1 94:15
93:15 93:20 94:5	40:19 99:9 107:12	102:1	6:13 8:16 18:3	120:18
94:18 95:3 100:8	109:14 109:15 109:16	assigned [2] 102:11	29:17 50:1	between [17] 29:11
100:9 100:12 103:11	appealed [1] 98:4	138:20	away [2] 11:11	36:17 46:2 51:15
103:19 103:20 103:21	appealing [1] 109:13	assist [1] 68:4	85:8	55:17 67:19 73:7
105:17 119:10 132:18	APPEARANCES [1] 2:1	assistance [1] 43:8	awful [1] 73:16	74:3 119:12 124:15
144:9 144:17	appeared [1] 169:5	Associates [2] 122:12		136:16 139:9 142:6
agreements [1] 105:7	appellant [2] 109:18	126:3	-B-	142:9 143:6 144:3
ahead [3] 131:7	110:10	assume [4] 32:2	background [2] 73:17	144:10
131:14 139:8	applicable [1] 35:20	72:4 72:4 130:6	78:3	beyond [6] 6:7
ahold [1] 136:7	application [2] 45:1	assumed [1] 129:17	backup [2] 38:14	7:19 20:3 36:9
air [1] 43:12	45:3	assuming [2] 4:21	38:14	64:21 70:9
alert [1] 31:4	apply [1] 46:9	72:12	38:14	be——[1] 7
alike [1] 95:16	appointments [1] 29:11	assumption [1] 97:5	bad [7] 53:8 53:14	big [4] 81:15 105:15
Allen [7] 107:11	appraisal [6] 121:6	attach [3] 53:9	53:17 74:10 74:11	121:10 121:13
107:11 107:21 120:14	121:15 121:15 121:18	143:1 168:12	74:12 142:11	bigger [1] 107:19
120:14 129:11 131:1	122:2 122:7	attached [6] 53:14	Baker [4] 1:19	bill [4] 99:19 99:20
allow [4] 30:17	appraise [1] 111:16	69:5 74:7 143:15	1:21 169:2 169:21	129:11 129:12
30:18 54:2 135:2	appraised [1] 122:10	144:14 154:4	balance [2] 60:18	billed [4] 15:12
allowed [1] 111:18	appraiser [2] 111:16	attaching [1] 67:20	60:21	106:18 130:2 158:5
almost [1] 129:10	122:10	attack [1] 63:15	ballooned [1] 45:10	billing [2] 130:3
alone [2] 130:11	appreciate [1] 32:18	attention [1] 85:20	ballooning [1] 164:17	134:9
153:4	approach [3] 38:16	attorney [14] 14:10	ballpark [4] 94:15	bills [15] 64:19 66:4
along [2] 77:3	41:17 94:15	17:14 20:8 33:2	146:16 156:9 163:13	127:17 127:19 128:6
99:12	appropriate [6] 59:11	40:21 41:5 41:8	Baltimore [7] 1:4	129:11 130:14 132:6
alternate [1] 83:10	66:18 68:11 68:13	114:3 114:8 114:9	80:4 81:4 116:14	133:13 133:15 134:12
alternative [1] 87:7	77:2 114:14	120:12 140:20 141:1	169:1 169:3 169:18	134:13 141:12 158:6
always [7] 14:10	appropriately [1] 68:5	141:2	bank [12] 44:10	158:7
83:21 117:8 118:4	approve [1] 45:2	attorney's [1] 96:10	44:13 44:15 44:20	bit [2] 111:20 139:7
149:20 149:21 150:5	approximate [1] 127:2	attorneys [4] 14:20	46:8 47:13 47:14	black [1] 14:19
amended [5] 68:12	April [2] 135:10	17:3 101:7 114:4	47:15 54:1 54:15	bleeding [1] 142:13
69:13 70:20 97:6	169:18	attorneys' [2] 157:8	116:13 163:6	blessing [1] 105:19
109:8	arduous [1] 139:15	157:10	bankruptcy [1] 152:2	blocks [1] 29:10
among [1] 5:2	area [5] 39:5 55:16	Auch [18] 62:14	based [8] 37:10	Blum [8] 6:15
amount [11] 65:4	60:6 77:21 114:16	62:20 65:4 66:1	46:4 47:1 65:10	7:1 111:13 115:14
65:10 91:4 99:6	areas [7] 11:16	66:7 67:4 101:11	65:12 96:10 99:1	120:20 120:21 133:6
112:16 129:16 131:1	36:14 36:15 36:21	101:11 101:12 108:5	129:18	157:9
132:15 133:18 148:6	57:17 73:19 87:13	108:10 108:15 129:14	basic [1] 100:8	board [2] 14:5
160:15	argue [2] 32:11	129:16 135:8 139:12	basis [2] 140:13 158:7	26:11
amounts [2] 45:4	35:4	139:13 139:19	bear [1] 16:5	boiling [1] 132:5
91:3	arrangement [3] 132:7 140:7 142:2	auction [1] 74:14	bearing [1] 159:8	bookkeeper [3] 59:18
analysis [4] 28:1	arrive [1] 132:11	audited [1] 120:10	became [6] 43:7	59:21 62:13
64:2 87:3 127:15	arrived [1] 129:15	audit [20] 96:21	50:1 59:4 69:21	bookkeeping [6] 59:18 62:6 62:9
analyze [1] 89:20	articles [1] 17:4	97:3 97:8 97:11	125:16 152:21	119:16 119:17 139:14
animosity [1] 116:1	articulate [1] 32:1	97:13 97:17 97:18	become [6] 43:15	books [10] 59:15
annual [1] 161:2	articulated [1] 29:15	97:19 98:1 98:3	57:21 106:20 108:5	59:16 119:4 119:5
answer [19] 6:4	aspect [3] 15:19	98:19 104:12 106:6	140:2 141:3	119:7 119:8 119:17
21:4 30:11 31:8	42:21 84:3	107:3 108:12 109:7	becoming [3] 58:9	119:20 121:12 122:3
32:20 32:20 33:3	aspects [1] 23:6	109:8 130:6 136:19	59:2 59:3	Bornhorst [16] 14:9
47:8 47:9 61:13	assemblage [1] 135:6	142:14	began [1] 104:18	40:21 100:21 101:4
98:6 113:3 117:11	assemble [2] 135:5	audited [1] 96:12	begin [1] 154:15	104:3 104:13 131:3
128:2 134:17 134:21	135:14	audits [10] 106:15	2:2	131:5 131:11 131:20
136:11 150:18 155:11	assembling [1] 120:5	106:17 106:19 107:9	2:4 2:6 23:10	132:6 132:8 132:19
answered [2] 28:8	assessed [9] 98:2	107:10 108:6 108:10	behind [2] 119:4	133:1 133:11 157:17
47:17	99:12 99:14 109:20	108:17 108:20 108:20	119:9	borrow [7] 119:2
answering [1] 65:19	assessing [1] 120:5	August [1] 34:21	behind——it's [1] 19:8	119:3 145:5 148:2
answers [2] 32:3	assessing [1] 120:5	available [8] 5:10	Bernie [2] 111:13	149:17 153:9 153:11
137:12	assessing [1] 120:5	37:2 45:21 46:6	114:16	borrowed [14] 145:8
anticipated [1] 6:3	assessing [1] 120:5	80:13 82:5 88:17	best [16] 13:20 17:15	145:10 145:12 148:13
anxious [2] 45:17	assessing [1] 120:5	105:1	22:6 23:1 32:18	149:12 150:14 150:15
115:21	assessing [1] 120:5	Avenue [1] 1:18	32:19 58:1 114:15	151:3 153:21 154:6
anyway [4] 118:21	assessing [1] 120:5	avenues [1] 46:19	135:7 141:5 154:5	154:10 155:14 155:20
				157:4

<b>borrowing</b> [16] 147:4 147:8 148:9 148:15 149:4 149:6 149:13 149:14 149:15 149:18 149:20 150:9 150:10 150:19 150:21 155:1	94:12 96:1	<b>charged</b> [3] 133:8 133:9 134:8	<b>company</b> [26] 1:4 1:6 54:5 54:6 62:21 66:8 67:5 73:8 74:3 74:4 74:6 102:10 119:12 123:4 125:19 126:1 139:14 143:6 148:15 148:19 151:20 152:10 154:1 159:1 159:2 166:10	<b>conducted</b> [1] 35:14
<b>borrowings</b> [3] 110:17 155:5 155:6	<b>calendar</b> [1] 66:7	<b>charges</b> [5] 70:5 70:7 111:12 128:7 132:11	<b>comparatively</b> [1] 108:2	<b>conference</b> [2] 8:20 82:8
<b>bought</b> [8] 113:8 124:4 124:5 151:18 151:21 152:12 152:14 153:2	<b>calls</b> [1] 7:10	<b>charging</b> [1] 64:5	<b>compared</b> [1] 63:11	<b>confidence</b> [1] 76:7
<b>breached</b> [2] 34:15 35:21	<b>cancelled</b> [3] 132:20 133:6 133:10	<b>chart</b> [1] 128:3	<b>complete</b> [12] 6:4 97:17 97:18 116:21 119:19 119:20 120:2 120:4 127:7 139:16 144:7 146:10	<b>confirmed</b> [1] 44:21
<b>bring</b> [2] 64:7	<b>cannot</b> [3] 12:10 72:13 82:14	<b>check</b> [1] 100:13	<b>completed</b> [6] 5:14 52:12 60:13 92:21 100:14 125:12	<b>conflict</b> [2] 82:6 84:1
<b>bringing</b> [1] 152:6	<b>capacity</b> [1] 20:8	<b>checks</b> [5] 60:20 132:20 133:6 133:10 133:18	<b>completely</b> [4] 24:1 42:19 110:15 125:17	<b>conformed</b> [1] 75:18
<b>brings</b> [1] 137:19	<b>card</b> [4] 58:19 126:12 155:7 155:8	<b>chief</b> [1] 62:13	<b>completing</b> [1] 85:16	<b>confused</b> [1] 135:13
<b>broke</b> [2] 151:21 152:10	<b>care</b> [5] 34:15 35:20 35:21 139:13 163:11	<b>Chinese</b> [1] 58:14	<b>complex</b> [3] 69:21 70:1 119:15	<b>confusing</b> [1] 134:14
<b>brought</b> [1] 38:2	<b>carry</b> [1] 45:6	<b>chose</b> [3] 82:15 82:16 114:19	<b>compliance</b> [1] 100:13	<b>conjunction</b> [1] 97:10
<b>build</b> [1] 119:10	<b>case</b> [58] 1:5 6:1 7:7 7:15 10:15 11:1 11:14 11:15 15:9 15:19 15:21 17:5 17:10 18:2 18:4 19:15 20:17 20:19 21:9 23:6 24:2 24:9 26:5 28:7 29:19 32:5 33:5 33:19 34:6 36:4 36:10 36:16 37:1 38:9 40:12 40:13 41:3 41:6 42:17 43:14 54:21 55:6 55:11 55:14 57:13 57:17 57:19 71:17 72:3 72:15 72:19 73:14 76:17 77:18 78:11 78:15 118:16 134:19	<b>chronological</b> [2] 13:20 23:15	<b>complicated</b> [6] 49:4 49:7 54:3 74:15 119:13 163:15	<b>connection</b> [10] 64:2 64:20 67:9 69:3 71:9 102:2 127:16 129:3 133:13 162:11
<b>building</b> [10] 50:5 50:5 54:6 55:7 55:8 119:15 122:16 123:2 123:21 142:6	<b>cases</b> [2] 127:3 128:9	<b>chronologically</b> [1] 67:12	<b>complicated—-but</b> [1] 119:8	<b>consequences</b> [1] 21:20
<b>built</b> [1] 123:9	<b>cash</b> [2] 147:13 159:11	<b>CIRCUIT</b> [1] 1:2	<b>complications</b> [1] 49:13	<b>consequential</b> [1] 24:20
<b>business</b> [27] 27:17 48:4 60:9 60:12 61:21 62:7 62:10 63:10 63:11 63:20 65:1 66:2 66:14 69:20 96:12 97:8 97:12 103:3 103:4 118:3 119:12 125:7 139:3 140:6 153:14 154:6 162:18	<b>cash-producing</b> [1] 167:1	<b>city</b> [2] 1:4 141:2	<b>compound</b> [2] 142:8 142:11	<b>conservative</b> [1] 66:18
<b>busy</b> [2] 29:9 120:13	<b>catastrophic</b> [2] 25:3 25:5	<b>CL79993</b> [1] 1:6	<b>compounded</b> [1] 148:1	<b>considered</b> [1] 132:1
<b>buy</b> [3] 50:18 53:2 53:5	<b>categories</b> [2] 156:18 157:3	<b>claiming</b> [3] 64:6 134:19 135:3	<b>comprehensive</b> [2] 17:4 68:16	<b>construed</b> [1] 62:1
<b>buying</b> [2] 74:14 152:19	<b>category</b> [3] 159:3 159:3 160:1	<b>clarification</b> [1] 34:11	<b>comprise</b> [1] 105:18	<b>consult</b> [2] 59:10 60:5
<b>-C-</b>	<b>caused</b> [1] 119:16	<b>clarify</b> [1] 32:3	<b>comprised</b> [1] 109:8	<b>consultant</b> [8] 6:7 27:4 27:5 28:15 28:16 28:19 33:9 33:10
<b>C-A-N</b> [1] 113:17	<b>centered</b> [1] 12:19	<b>clear</b> [4] 29:14 65:16 98:6 124:21	<b>computer</b> [8] 37:19 80:15 80:20 85:1 119:11 119:15 125:6 125:10	<b>contact</b> [4] 8:3 8:5 14:14 81:12
<b>calculable</b> [1] 46:6	<b>central</b> [1] 13:10	<b>cleared</b> [1] 67:18	<b>computers</b> [1] 125:8	<b>contacted</b> [3] 7:18 7:20 102:9
<b>calculate</b> [2] 39:12 134:20	<b>century</b> [1] 36:19	<b>clearest</b> [1] 37:10	<b>conceded</b> [1] 40:11	<b>contained</b> [2] 81:1 169:13
<b>calculation</b> [7] 40:3 40:7 43:4 43:5 43:18 65:9 66:16	<b>certain</b> [7] 21:20 24:17 34:1 36:14 83:6 95:18 99:2	<b>Clerk</b> [1] 4:3	<b>concentrating</b> [1] 87:14	<b>content</b> [2] 21:11 84:15
<b>calculations</b> [26] 36:13 37:5 37:20 38:3 41:16 42:3 42:6 42:11 43:9 43:20 43:21 44:2 44:5 46:1 64:12 72:7 83:7 87:4 87:7 88:3 89:6 89:8 89:11 90:6	<b>category</b> [3] 159:3 159:3 160:1	<b>client</b> [5] 30:20 31:2 31:7 31:9 32:18	<b>concern</b> [1] 87:9	<b>context</b> [1] 117:12
	<b>certainly</b> [4] 36:2 94:12 103:20 127:2	<b>clients</b> [4] 54:7 57:2 63:4 140:5	<b>concerned</b> [1] 27:17	<b>contingency</b> [1] 132:9
	<b>CERTIFICATE</b> [1] 168:1	<b>close</b> [7] 58:21 118:12 125:17 131:6 133:1 143:19 159:21	<b>conclusion</b> [2] 26:9 66:11	<b>continue</b> [4] 31:4 49:18 98:17 144:7
	<b>certify</b> [5] 168:7 169:4 169:8 169:12 169:14	<b>closest</b> [1] 11:4	<b>conclusions</b> [1] 70:20	<b>continued</b> [1] 49:17
	<b>chance</b> [1] 11:12	<b>closing</b> [1] 115:5	<b>condition</b> [1] 122:3	<b>continuing</b> [2] 106:13 116:1
	<b>change</b> [2] 152:18 152:20	<b>CO</b> [1] 1:10	<b>condo</b> [9] 113:8 113:9 113:10 113:11 113:12 152:4 152:4 152:8 152:19	<b>contractor</b> [6] 63:3 63:9 63:20 66:2 66:14 139:21
	<b>changed</b> [3] 34:16 48:13 126:18	<b>comfortable</b> [1] 78:5	<b>condominiums</b> [6] 151:12 151:12 151:14 151:19 152:12 154:3	<b>controller</b> [2] 63:8 63:12
	<b>characterize</b> [2] 153:16 153:18	<b>coming</b> [3] 76:21 95:17 137:3	<b>condos</b> [5] 152:20 153:2 153:5 153:5 156:19	<b>conversation</b> [32] 9:2 9:12 9:16 10:1 10:3 10:5 10:10 10:13 10:14 11:3 12:6 12:11 12:12 13:2 13:4 13:5 18:16 30:15 48:2 48:21 49:15 58:7 71:19 76:13 80:11 84:12 89:14 90:1 92:6 92:19 93:1 93:17
	<b>charge</b> [2] 79:4 133:16	<b>commencing</b> [1] 1:16		
		<b>comment</b> [1] 41:10		
		<b>commentary</b> [1] 83:18		
		<b>comments</b> [2] 25:14 32:13		
		<b>commercial</b> [5] 117:8 118:3 122:15 126:9 126:14		
		<b>communicate</b> [1] 12:18		
		<b>communication</b> [3] 15:15 19:8 106:19		
		<b>communications</b> [3] 27:15 101:21 136:1		
		<b>companies</b> [1] 105:8		

conversations [22] 6:21 9:6 9:13 11:1 11:21 13:1 13:8 15:20 16:17 18:8 18:20 19:3 25:6 25:7 25:10 29:2 48:6 48:18 82:2 86:17 87:19 90:14	39:18 46:15 109:14 109:15 109:19 110:6 110:7 110:9 110:10 cover [2] 71:3 157:6 covered [1] 29:3 covers [2] 22:9 103:15 CPA [1] 63:5 created [1] 144:11 credentials [2] 73:16 76:5 credibility [1] 95:19 credible [1] 91:5 credit [9] 39:14 39:14 46:19 47:10 126:11 126:12 142:3 155:7 155:8 cross [1] 123:19 crossed [1] 45:6 Crown [70] 53:4 67:19 119:12 140:16 140:17 140:18 141:7 141:17 141:20 142:1 142:4 142:6 142:9 142:13 142:15 142:18 142:19 143:1 143:8 143:14 143:16 143:17 144:10 144:12 145:5 145:8 145:10 145:12 145:14 145:18 146:12 146:18 147:3 147:5 147:8 148:2 148:9 148:15 149:5 149:6 149:18 149:20 150:9 150:19 150:21 151:4 153:9 153:12 154:6 154:10 155:1 155:14 155:21 157:4 159:4 159:9 160:5 162:20 163:16 163:18 163:20 164:1 165:3 165:8 165:11 165:19 165:21 166:14 166:19 166:20	43:15 56:13 64:6 64:12 65:14 87:5 87:8 95:13 95:17 129:3 134:19 134:20 Dan [1] 79:7 data [1] 80:5 date [10] 5:1 8:10 9:19 56:11 71:1 119:6 137:19 145:2 146:2 157:9 days [4] 85:21 90:12 104:20 120:10 deadline [2] 85:15 86:2 deadlines [1] 85:17 deal [7] 14:6 76:4 100:15 118:16 120:15 154:10 163:15 dealing [5] 105:6 131:9 139:9 139:10 139:17 dealt [4] 44:21 135:16 136:3 136:5 Deborah [1] 2:5 debt [24] 67:18 67:20 73:7 74:2 74:5 74:10 74:11 74:12 126:12 141:6 141:7 142:6 142:7 142:11 142:18 143:1 143:6 143:9 143:14 152:5 155:7 155:8 159:6 159:7 debts [2] 102:11 124:14 decades [1] 150:2 December [4] 115:7 115:8 117:2 164:10 decided [6] 15:10 26:5 29:13 78:6 85:18 97:8 decimated [1] 144:5 decision [4] 14:9 25:15 26:2 153:8 decreased [1] 142:4 deeply [2] 58:17 108:6 Defendant [2] 1:11 2:6 Defendants [1] 1:5 Defendants/ [1] 2:4 deficiency [2] 96:18 96:19 degree [3] 74:17 95:19 100:21 delay [2] 119:16 119:16 delinquent [1] 53:2 demonstration [1] 57:3 Denick [9] 111:13 114:16 114:17 115:1 115:2 115:3 115:13 115:18 115:21 dental [1] 92:18	department [35] 27:15 27:19 47:2 47:17 52:21 53:1 53:21 64:13 64:14 67:18 100:2 100:17 101:3 101:6 101:10 101:13 101:19 102:2 102:15 103:2 103:12 104:12 104:17 105:6 105:8 105:15 106:11 119:10 131:8 131:10 131:12 132:16 136:5 138:9 142:17 Department's [1] 106:13 depleted [2] 55:19 87:11 DEPONENT [1] 168:1 deposed [1] 145:11 deposition [19] 1:14 4:3 5:3 5:13 18:12 31:3 32:12 32:14 36:1 36:2 56:3 56:11 96:6 96:7 138:1 149:4 155:9 166:9 167:5 depositions [2] 4:15 145:4 describe [1] 87:10 described [1] 38:10 designated [1] 107:13 designation [1] 31:17 designed [2] 126:5 126:6 despite [1] 4:18 detail [4] 24:5 28:4 55:14 90:16 details [2] 27:14 56:10 determination [1] 98:4 determine [5] 65:12 73:6 74:16 79:3 135:2 determined [3] 53:7 73:12 98:21 determining [2] 70:13 99:7 develop [1] 125:15 developing [4] 120:9 122:13 122:14 122:19 development [2] 122:15 164:6 device [1] 53:16 dialogue [1] 49:13 died [1] 63:15 differ [2] 92:13 95:14 differed [1] 92:10 difference [3] 36:17 46:2 55:16 differences [2] 57:4 115:3 different [27] 11:15 11:16 46:9 62:8	64:9 68:17 82:2 83:11 83:14 85:15 85:18 89:10 92:6 92:14 94:13 95:9 95:12 96:20 100:9 105:17 116:12 123:7 123:10 129:18 132:8 133:3 135:20 difficult [2] 49:20 152:21 difficulties [1] 114:18 dilemma [1] 14:20 dipped [1] 153:13 directly [1] 131:12 disagree [1] 99:5 disagreed [1] 95:4 disagreement [1] 121:10 disappears [1] 11:11 discounted [1] 75:15 discover [1] 74:19 discovery [7] 4:17 4:21 5:8 73:14 77:2 84:5 105:3 discuss [7] 16:15 26:14 41:18 49:12 59:2 70:14 92:4 discussed [19] 9:1 15:18 17:13 24:7 28:5 28:13 38:11 38:11 43:1 55:13 56:7 56:9 65:11 71:16 72:2 82:17 87:18 92:5 110:10 discussing [2] 23:18 25:9 discussion [13] 13:14 21:12 29:1 39:1 42:18 55:3 58:10 58:12 77:5 78:13 90:7 91:20 127:21 discussions [50] 4:18 7:12 8:12 8:18 10:7 18:9 19:11 20:17 21:7 21:10 22:5 22:8 23:1 23:11 23:14 27:1 28:2 31:20 32:1 32:2 34:6 38:7 38:18 39:4 41:15 42:20 53:21 55:21 56:16 57:8 72:13 72:18 73:1 76:16 77:17 78:9 84:4 84:9 84:17 85:1 86:7 86:10 86:12 89:1 91:15 91:18 92:1 92:10 92:11 101:10 dispute [4] 97:15 102:3 102:4 102:5 disqualification [1] 100:4 distributed [3] 143:16 144:1 144:1 distribution [4] 53:12 74:8 74:9 102:13
--	---	--	--	--

**-D-**

D [4] 1:19 1:21 169:2 169:21	40:3 40:11 40:20 41:3 42:16 50:7 55:18 66:20 87:12 87:12	39:14 14:13 20:3 24:21 33:12 36:15 36:15 36:21 37:3 39:5 40:15 40:17 43:10
---------------------------------	---	--

<b>District</b> [1] 110:7	58:20 73:20 100:11	<b>estate</b> [16] 46:14	147:21 152:3 153:4	<b>factual</b> [1] 36:5
<b>document</b> [5] 39:7	118:21 142:14 148:10	47:17 48:16 49:1	153:5 154:4 154:9	<b>fair</b> [7] 12:8 12:14
49:4 103:15 110:20	148:20 151:18 152:13	49:6 49:11 49:18	154:13 157:5	55:20 56:7 72:3
128:15	<b>duties</b> [8] 6:6	50:2 50:4 50:5	<b>expenses</b> [13] 114:13	78:8 130:6
<b>documentation</b> [17]	21:15 27:4 28:15	50:14 52:11 55:7	149:10 149:10 149:10	<b>fairly</b> [2] 114:21
5:12 64:11 72:8	28:18 33:9 65:13	55:16 111:15 114:15	153:1 153:10 153:14	140:10
105:6 113:4 126:19	65:14	<b>estimate</b> [1] 94:7	154:7 155:2 155:3	<b>faith</b> [1] 76:4
127:1 128:6 128:17	<b>duty</b> [4] 31:16 34:15	<b>estimates</b> [1] 95:13	156:21 157:2 166:18	<b>fall</b> [2] 100:10 119:21
130:4 130:5 131:18	35:21 58:4	<b>Europe</b> [1] 135:8	<b>expensive</b> [3] 37:8	<b>familiar</b> [1] 98:13
132:21 135:1 136:12	-E-	<b>evaluation</b> [2] 102:9	58:9 106:16	<b>family</b> [1] 49:5
137:19 138:2	<b>early</b> [7] 77:14 86:3	102:14	<b>experiences</b> [1] 156:20	<b>far</b> [3] 26:6 109:17
<b>documentations</b> [1] 133:7	118:20 135:9 142:15	<b>event</b> [2] 17:7	<b>expert</b> [42] 17:11	127:8
<b>documented</b> [1] 94:21	146:21 151:17	99:6	19:19 20:9 20:16	<b>faster</b> [1] 107:4
<b>documents</b> [11] 37:4	<b>earth</b> [1] 117:5	<b>events</b> [5] 25:3	23:6 23:12 24:8	<b>fathomable</b> [1] 39:21
37:14 61:20 89:2	<b>earthly</b> [1] 32:3	85:15 99:17 117:10	24:9 24:14 25:8	<b>favorable</b> [1] 47:5
96:1 103:10 106:1	<b>easier</b> [1] 131:17	122:5	25:10 25:12 25:12	<b>fax</b> [1] 89:9
109:2 112:15 112:20	<b>east</b> [1] 116:14	<b>eventually</b> [4] 146:20	25:16 26:2 26:16	<b>faxed</b> [3] 88:8
137:8	<b>educate</b> [2] 31:7	150:6 152:7 154:9	30:2 31:17 33:6	88:10 93:3
<b>doesn't</b> [6] 62:5	31:9	<b>everybody</b> [1] 87:2	36:5 46:14 54:21	<b>February</b> [9] 4:17
76:12 81:8 90:5	<b>Edward</b> [1] 34:16	<b>ex-banker</b> [1] 73:16	55:2 56:4 71:17	6:12 7:8 9:20
116:18 140:10	<b>effect</b> [2] 39:11	<b>ex-IRS</b> [1] 120:21	71:21 72:2 72:5	36:11 77:10 77:12
<b>dollars</b> [8] 68:16	39:13	<b>exact</b> [4] 30:5 81:10	72:14 72:19 73:9	86:4 138:14
78:19 118:12 130:12	<b>effects</b> [1] 17:4	103:8 129:12	73:18 76:17 77:16	<b>federal</b> [3] 109:15
143:13 158:9 161:20	<b>eight</b> [2] 116:12 126:14	<b>exactly</b> [9] 29:20	78:15 79:5 85:17	112:10 135:20
163:19	<b>either</b> [9] 27:3	30:14 57:14 95:16	88:20 91:2 91:5	<b>fee</b> [2] 78:14 79:3
<b>Don</b> [2] 48:15 48:16	27:18 42:15 45:11	127:3 129:4 130:16	93:8 93:12	<b>feeling</b> [2] 55:15
<b>done</b> [32] 6:18	72:6 73:19 83:9	133:9 166:12	<b>experts</b> [7] 26:8	78:5
21:21 22:1 23:10	83:18 95:4	<b>examination</b> [6] 3:5 4:7 4:10	31:21 32:4 32:7	<b>feelings</b> [2] 24:11
38:2 42:9 42:10	<b>elderly</b> [1] 117:4	5:10 138:6 169:8	32:8 38:15 73:10	116:3
43:4 44:2 50:8	<b>element</b> [2] 40:3	<b>examined</b> [1] 168:8	<b>explain</b> [2] 30:17	<b>feels</b> [2] 24:17 140:8
50:17 55:18 56:13	43:10	<b>except</b> [4] 8:8	104:16	<b>fees</b> [8] 107:8 129:3
59:20 64:17 67:9	<b>elements</b> [7] 64:12	98:4 98:20 106:12	<b>explained</b> [2] 93:5	152:4 157:8 157:10
68:5 69:16 81:18	65:14 87:8 98:3	<b>exception</b> [1] 106:7	114:17	157:17 157:21 158:3
89:6 94:5 94:13	100:9 100:12 105:17	<b>excess</b> [1] 157:13	<b>explaining</b> [1] 115:2	<b>fell</b> [2] 99:13 100:10
100:15 102:15 103:17	<b>eliciting</b> [2] 20:15	<b>excise</b> [8] 112:12	<b>explanation</b> [2] 79:19	<b>felt</b> [3] 44:14 59:11
105:20 106:17 119:14	36:6	118:5 118:7 118:8	87:15	120:18
120:2 134:10 135:7	<b>Ellen</b> [1] 40:12	118:11 118:13 118:15	<b>explicit</b> [1] 29:1	<b>few</b> [8] 26:10 48:20
137:15	<b>elsewhere</b> [1] 48:4	118:17	<b>exposure</b> [1] 100:5	112:5 133:15 137:17
<b>Doug</b> [8] 30:16	<b>employed</b> [1] 66:13	<b>excluded</b> [2] 40:15	<b>exposures</b> [1] 108:3	140:5 156:1 163:10
111:4 114:5 121:3	<b>employee</b> [4] 63:13	40:18	<b>expressed</b> [1] 58:8	<b>field</b> [1] 6:7
121:3 130:19 130:20	140:2 140:4 169:15	<b>excuse</b> [6] 34:9	<b>expressing</b> [1] 36:3	<b>figure</b> [1] 156:9
136:4	<b>end</b> [1] 118:20	48:1 98:5 147:18	<b>extended</b> [1] 149:9	<b>file</b> [3] 11:11 11:13
<b>Douglas</b> [1] 2:2	<b>ended</b> [4] 50:3	148:14 160:13	<b>extension</b> [1] 46:20	118:16
<b>down</b> [22] 44:15	154:11 154:12 154:13	<b>exhaust</b> [1] 13:15	<b>extensive</b> [2] 50:1	<b>filed</b> [1] 97:6
45:21 46:21 47:3	<b>engineer</b> [1] 123:4	<b>existed</b> [1] 117:9	75:17	<b>files</b> [1] 11:16
54:8 56:10 65:17	<b>engineering</b> [1] 123:4	<b>existence</b> [1] 54:18	<b>extent</b> [13] 6:3	<b>filing</b> [4] 4:3
81:10 104:19 114:8	<b>enjoy</b> [1] 86:15	<b>existing</b> [1] 144:3	17:14 24:5 28:4	68:12 69:13 70:20
114:9 114:13 117:5	<b>enlighten</b> [1] 128:13	<b>exists</b> [2] 54:19	29:21 30:1 32:13	<b>fill</b> [1] 154:1
117:8 117:18 121:3	<b>entered</b> [4] 94:18	143:5	35:19 39:12 76:20	<b>Filling</b> [1] 134:6
131:6 131:21 144:5	105:7 142:2 169:13	<b>expand</b> [2] 26:6	78:21 85:2 88:15	<b>final</b> [6] 67:17 97:19
144:6 152:20 162:13	<b>entirely</b> [2] 13:16	26:6	-F-	100:14 105:17 108:12
<b>downtown</b> [1] 141:1	31:3	<b>expect</b> [2] 33:13	<b>F</b> [1] 73:4	109:6
<b>dozen</b> [3] 27:6	<b>entrance</b> [1] 123:18	37:3	<b>face-to-face</b> [1] 7:8	<b>finalizes</b> [1] 59:15
27:7 63:14	<b>environment</b> [1] 53:13	<b>expectation</b> [1] 95:13	<b>faced</b> [1] 153:1	<b>finally</b> [6] 98:20
<b>dramatic</b> [1] 57:4	<b>envision</b> [1] 36:4	<b>expectations</b> [1] 56:6	<b>facility</b> [2] 53:6	112:1 119:21 123:12
<b>dropped</b> [1] 44:9	<b>equity</b> [3] 142:20	<b>expected</b> [1] 29:18	54:8	142:13 142:16
<b>dropping</b> [1] 44:12	162:9 162:12	<b>expects</b> [3] 23:5	<b>fact</b> [19] 12:12 23:9	<b>financial</b> [5] 46:12
<b>due</b> [1] 77:9	<b>Especially</b> [1] 95:19	56:3 56:4	23:12 23:13 24:15	67:6 119:7 120:5
<b>duly</b> [2] 4:7 169:6	<b>Esquire</b> [3] 2:2	<b>expedition</b> [1] 92:18	25:17 25:19 25:21	122:3
<b>Dundalk</b> [1] 63:10	2:3 2:5	<b>expense</b> [18] 39:6	25:21 30:20 35:17	<b>financially</b> [1] 119:14
<b>Dunstins</b> [1] 162:4	<b>essence</b> [1] 144:17	42:16 43:2 64:2	44:17 46:5 51:17	<b>financing</b> [3] 113:8
<b>duplicative</b> [2] 34:17		70:13 70:15 111:20	58:8 65:3 88:9	142:2 142:12
34:20		127:15 132:13 142:9	108:11 126:16	<b>finding</b> [1] 84:11

<b>finds</b> [1] 33:6	<b>forseeability</b> [2] 35:9 35:11	54:11 62:14 73:5	157:19	<b>heavily</b> [6] 145:5 145:8 149:4 149:6 150:14 150:15
<b>fine</b> [5] 14:3 15:3 73:16 105:20 121:16	<b>forth</b> [2] 12:19 105:16	<b>Giampetro</b> [49] 18:21 19:4 19:8 19:11 19:15 20:2 20:7 20:12 21:8 21:12 21:17 22:17 22:21 23:9 24:7 25:16 26:15 27:1 27:12 27:13 27:17 28:2 28:5 28:11 28:14 28:17 29:2 29:10 29:17 30:3 30:6 30:13 33:5 33:16 33:18 34:17 35:2 35:5 35:18 76:2 76:10 76:14 100:20 101:17 104:2 104:4 108:15 129:10 131:9	<b>H-A-N-N-A-H-S</b> [1] 48:15	<b>heavy</b> [3] 149:13 149:14 149:15
<b>fingers</b> [1] 45:5	<b>forum</b> [1] 110:6		<b>Habertson</b> [4] 86:8 86:11 86:19 87:1	<b>Heights</b> [3] 120:8 162:19 164:7
<b>finish</b> [3] 22:11 41:13 65:18	<b>forward</b> [2] 90:9 127:11		<b>Hack</b> [31] 1:4 1:4 1:6 1:7 17:20 21:15 23:4 24:18 25:2 26:21 27:10 28:12 34:14 35:20 44:19 68:11 69:13 82:5 82:7 82:10 89:4 96:11 133:4 133:5 143:20 157:11 157:17 158:11 158:15 158:17 166:1	<b>held</b> [1] 47:18
<b>finished</b> [6] 30:2 50:16 64:15 108:10 125:15 125:17	<b>found</b> [3] 16:21 26:8 80:3		<b>Hack's</b> [3] 29:3 33:7 68:18	<b>help</b> [9] 5:19 7:21 9:4 60:7 64:10 128:1 135:7 135:11 137:12
<b>finishing</b> [1] 22:12	<b>four</b> [6] 51:16 51:20 62:8 80:10 82:1 135:20		<b>hadn't—and</b> [1] 144:6	<b>Henn</b> [1] 126:3
<b>firm</b> [5] 81:15 114:10 140:21 141:1 157:9	<b>fraction</b> [2] 130:1 131:4		<b>hand</b> [1] 169:18	<b>hereby</b> [4] 4:2 4:4 168:7 169:4
<b>first</b> [38] 9:11 9:15 9:17 9:18 9:19 9:21 13:21 41:13 48:21 51:3 52:3 56:20 60:11 60:13 67:11 67:13 67:14 85:12 108:5 117:7 119:6 120:11 123:3 146:1 148:17 149:5 149:11 150:9 150:16 150:18 151:8 155:4 155:6 159:4 159:14 160:21 162:8 163:3	<b>fractured</b> [1] 133:15	<b>Giampetro's</b> [9] 19:18 20:16 20:18 29:5 29:9 31:1 34:12 35:7 36:1	<b>handles</b> [2] 62:3 66:4	<b>herein</b> [2] 169:6 169:13
<b>five</b> [7] 19:7 19:12 45:10 63:1 80:10 123:11 130:18	<b>frame</b> [1] 25:9	<b>Giampetro</b> [1] 101:5	<b>handling</b> [4] 6:15 50:17 75:15 107:12	<b>hey</b> [1] 121:18
<b>five-day</b> [1] 86:1	<b>frankly</b> [1] 158:7	<b>given</b> [8] 42:3 42:14 69:8 72:20 89:18 97:4 104:6 168:9	<b>hands</b> [4] 6:17 123:3 131:2 135:11	<b>higher</b> [1] 39:16
<b>five-year</b> [2] 123:6 125:3	<b>free</b> [1] 124:21	<b>giving</b> [5] 31:2 37:14 49:8 79:4 156:18	<b>handed</b> [2] 35:5 50:21	<b>hire</b> [3] 62:20 63:2 139:19
<b>flexible</b> [1] 140:7	<b>frequent</b> [1] 19:8	<b>glance</b> [1] 6:18	<b>handle</b> [2] 62:5 106:21	<b>hired</b> [2] 106:14 139:11
<b>Florida</b> [1] 113:7	<b>frequently</b> [1] 150:1	<b>glanced</b> [1] 6:21	<b>handles</b> [2] 62:3 66:4	<b>hold</b> [1] 121:5
<b>flow</b> [1] 159:11	<b>friend</b> [1] 82:7	<b>goal</b> [1] 26:7	<b>hand</b> [1] 169:18	<b>holding</b> [1] 114:13
<b>fluctuates</b> [1] 163:10	<b>frightened</b> [1] 45:9	<b>goes</b> [8] 18:5 54:14 62:17 62:18 124:12 140:8 148:18 162:13	<b>handle</b> [2] 62:5 106:21	<b>hole</b> [1] 14:19
<b>flux</b> [1] 7:20	<b>front</b> [1] 113:4	<b>gone</b> [6] 24:1 44:14 70:5 109:17 116:12 117:16	<b>handled</b> [2] 35:5 50:21	<b>Hollander</b> [2] 40:13 41:1
<b>focus</b> [2] 11:17 110:2	<b>full</b> [13] 6:3 17:14 21:11 29:21 30:1 30:6 65:13 73:11 73:13 76:7 76:20 79:1 88:15	<b>good</b> [8] 31:15 63:13 76:5 80:1 96:5 105:2 121:18 154:10	<b>handles</b> [2] 62:3 66:4	<b>home</b> [6] 49:12 157:1 162:1 162:5 162:9 162:12
<b>focused</b> [1] 78:1	<b>full-time</b> [2] 140:2 140:4	<b>government</b> [2] 112:10 123:10	<b>handling</b> [4] 6:15 50:17 75:15 107:12	<b>honestly</b> [3] 16:12 18:11 71:18
<b>focusing</b> [1] 149:1	<b>fuller</b> [1] 79:19	<b>Grabush</b> [13] 1:10 101:9 106:17 107:1 107:5 108:7 108:15 129:9 129:15 130:2 130:3 139:5 139:11	<b>hands</b> [4] 6:17 123:3 131:2 135:11	<b>hope</b> [1] 11:5
<b>follow</b> [1] 109:21	<b>fully</b> [6] 24:2 78:7 88:16 89:20 90:2 90:8	<b>great</b> [4] 14:6 76:4 106:4 127:14	<b>Hannahs</b> [16] 48:15 48:16 48:19 48:20 50:11 50:14 50:19 51:3 51:9 51:13 51:20 51:21 54:4 54:10 54:20 55:21	<b>hopes</b> [1] 57:2
<b>follow-up</b> [1] 15:7	<b>functional</b> [2] 125:16 125:17	<b>greater</b> [2] 5:17 90:15	<b>happy</b> [7] 80:12 87:20 87:21 88:2 92:20 104:19 144:8	<b>Hopkins</b> [3] 116:13 116:13 116:13
<b>followed</b> [1] 68:18	<b>functions</b> [1] 139:5	<b>Gregory</b> [9] 91:10 91:16 92:10 92:14 93:7 93:15 94:19 95:6 95:21	<b>Harbertson</b> [22] 79:8 79:16 80:11 82:15 82:20 84:5 84:11 84:13 84:16 84:18 85:13 87:17 90:9 90:17 90:20 91:6 91:8 91:20 92:5 92:11 93:6 95:10	<b>hotel</b> [1] 153:2
<b>following</b> [1] 15:2	<b>fund</b> [1] 31:21	<b>Gregory's</b> [1] 95:8	<b>hard</b> [3] 80:1 93:2 107:15	<b>hour</b> [3] 78:20 93:5 93:18
<b>follows</b> [1] 4:9	<b>funds</b> [2] 111:18 142:4	<b>gross</b> [2] 65:4 133:18	<b>hardship</b> [1] 121:13	<b>hourly</b> [7] 66:3 78:17 93:4 94:9 94:21 140:7 140:13
<b>food</b> [1] 58:14	<b>furnished</b> [1] 151:19	<b>ground</b> [1] 119:2	<b>head</b> [1] 7:3	<b>Hubbell</b> [1] 115:1
<b>foresee</b> [1] 21:19	<b>future</b> [9] 14:13 33:21 49:6 50:6 53:3 55:12 77:1 144:12 144:16	<b>groups</b> [1] 87:4	<b>heard</b> [1] 15:10	<b>hundred</b> [6] 78:19 156:1 156:10 156:15 158:9 161:20
<b>foreseeability</b> [3] 21:18 23:21 33:12	<b>-G-</b>	<b>Guatemala</b> [1] 92:17	<b>hearing</b> [4] 34:21 35:1 35:14 41:1	<b>hybrid</b> [1] 132:9
<b>foreseeable</b> [2] 24:21 25:3	<b>Gables</b> [3] 113:20 113:20 113:21	<b>guess</b> [8] 55:4 69:7 85:14 118:12 127:18 145:2 155:17	<b>hearts</b> [1] 63:15	<b>-I-</b>
<b>forgiven</b> [1] 124:14	<b>gambling</b> [1] 151:7		<b>heat</b> [1] 132:16	<b>idea</b> [6] 32:3 96:5 121:6 121:8 121:20 123:1
<b>forgot</b> [1] 75:8	<b>gather</b> [1] 105:16		<b>heating</b> [1] 132:4	<b>identified</b> [1] 107:7
<b>form</b> [3] 30:19 62:5 147:16	<b>gathered</b> [1] 26:5		<b>heavier</b> [1] 149:16	<b>identify</b> [1] 93:11
<b>formation</b> [1] 30:4	<b>gathering</b> [1] 14:16			<b>identifying</b> [1] 33:16
<b>formed</b> [1] 139:12	<b>general</b> [2] 70:12 154:21			<b>identity</b> [3] 47:12 83:19 83:21
<b>former</b> [1] 18:1	<b>generalize</b> [1] 44:6			<b>imagine</b> [3] 26:17 69:1 95:11
<b>forms</b> [4] 22:11 22:12 62:2 69:20	<b>generally</b> [5] 29:10 33:15 38:10 39:8 55:15			<b>impacting</b> [1] 14:12
<b>formula</b> [3] 70:12 70:15 99:7	<b>generate</b> [1] 133:12			<b>impatient</b> [1] 120:7
<b>formulas</b> [1] 83:14	<b>generated</b> [1] 61:20			
	<b>gentleman</b> [4] 54:7			





37:7	37:9	37:9	<b>Liberty</b> [1]	162:19	41:3	51:14	92:16	139:2	139:10	139:16	<b>mental</b> [1]	89:14
37:9	37:11	38:19	<b>liens</b> [9]	44:17	100:6			141:4			<b>mention</b> [1]	62:4
55:4	89:16	90:12	45:3	46:12	47:2	<b>look</b> [16]	11:4	11:12	<b>Martucci's</b> [2]	70:6	<b>mentioned</b> [6]	69:9
112:6	116:11	120:3	47:6	111:18	117:9	11:16	11:18	66:10	76:3		93:17	93:18
124:18	125:2	125:3	118:5			74:10	78:3	119:1	<b>Maryland</b> [8]	1:18	138:7	141:15
125:15	125:18	144:20	<b>life</b> [7]	50:17	50:18	128:13	129:13	130:15	30:17	112:11	<b>Mertin</b> [1]	17:5
145:4	145:11	149:2	50:20	51:1	51:1	130:19	149:11	154:17	163:5	169:1	<b>Mertins</b> [3]	14:9
150:19	156:11	159:13	51:21	52:10		158:7	165:17		169:18		14:11	14:12
160:20	165:15	165:18	<b>lifestyle</b> [1]	69:5	<b>looked</b> [5]		11:20		<b>material</b> [5]	16:20	<b>mess</b> [2]	54:1
<b>late</b> [8]	44:16	55:4	<b>light</b> [1]	35:4	99:9	104:16	114:21	129:16	104:6	104:9	<b>met</b> [14]	22:16
112:6	112:13	123:1	<b>liked</b> [1]	58:14	129:16				128:21		48:20	49:8
123:14	124:12	125:8	<b>likelihood</b> [1]	74:12	<b>looking</b> [17]	9:3			<b>materials</b> [5]	6:19	51:3	52:3
<b>lavish</b> [1]	151:6		<b>likely</b> [2]	21:19	14:16	15:16	22:19		6:20	15:8	63:12	73:17
<b>law</b> [7]	1:16	20:10	72:9		28:3	29:16	30:5		89:12		82:16	108:9
68:2	152:13	152:20	<b>limit</b> [1]	73:9	73:12	73:13	89:8		<b>matter</b> [24]	10:8	<b>methodology</b> [4]	
157:9	169:7		20:4	87:15	89:11	94:9	110:2		14:11	14:17	83:10	83:11
<b>laws</b> [2]	68:17	75:18	<b>limitation</b> [1]	137:10	127:20	158:8	158:10		19:1		95:12	
<b>lawsuit</b> [3]	115:14		<b>limited</b> [3]	16:8	166:5				21:8	22:7	<b>methods</b> [1]	37:17
115:17	116:3		20:4	87:15	<b>looks</b> [2]	7:19			35:5	57:19	<b>Michelle</b> [2]	62:11
<b>lawyer</b> [2]	68:4		<b>limiting</b> [1]	19:14	121:18				65:3	75:6	67:3	
75:9			<b>line</b> [2]	31:14	121:13	<b>lose</b> [2]	11:6	121:13	85:20	88:9	<b>middle</b> [2]	118:21
<b>lawyer's</b> [1]	68:5		<b>lines</b> [1]	46:19	<b>loss</b> [2]	143:12	152:7		133:4	133:5	120:1	
<b>lawyers</b> [1]	107:6		<b>list</b> [16]	64:18	99:11	99:18			157:11	157:18	<b>might</b> [15]	8:1
<b>lead</b> [1]	52:20		80:8	80:10	<b>lots</b> [6]	122:16	122:18		158:12	169:11	8:20	13:9
<b>leading</b> [2]	8:1		85:17	100:19	123:2	123:5	123:13		<b>matters</b> [10]	19:14	22:13	22:20
84:4			116:17	116:21	134:10				19:16	20:13	78:3	86:16
<b>leads</b> [1]	15:2		127:2	136:2	<b>low</b> [1]	44:16			49:10	64:9	94:15	117:20
<b>leaped</b> [1]	65:14		158:18	166:5	<b>lower</b> [3]	45:18			104:17	133:13	128:12	132:2
<b>learn</b> [1]	97:2		<b>listed</b> [3]	71:20	45:21	48:8			<b>may</b> [34]	8:9	<b>million</b> [7]	143:13
<b>leased</b> [1]	159:2		73:8	127:17	<b>lowered</b> [4]	45:19			20:17	26:19	143:14	143:17
<b>leases</b> [1]	160:6		<b>listen</b> [1]	155:10	45:20	47:19	48:14		27:12	30:19	144:6	158:20
<b>least</b> [10]	22:17		<b>lists</b> [1]	72:8	48:7	47:21			34:20	37:16	<b>mind</b> [8]	14:20
35:19	43:12	43:12	<b>litigation</b> [49]	10:8	<b>lowering</b> [2]	47:21			40:19	42:16	17:6	23:4
53:13	87:4	107:13	19:1	20:5	48:7				67:13	67:14	105:14	126:18
137:12	160:18	166:18	22:7	22:13	<b>ludicrous</b> [4]	24:18			73:14	73:18	<b>minds</b> [1]	29:13
<b>leaving</b> [1]	92:17		23:13	48:19	26:21	28:13	33:7		80:17	80:17	<b>mine</b> [1]	164:1
<b>led</b> [3]	15:2	84:11	49:14	49:16	<b>lump</b> [1]	112:6			83:13	85:6	<b>minimize</b> [1]	62:18
84:18			64:6	64:10	<b>lunch</b> [1]	58:7			92:21	98:17	<b>minute</b> [3]	37:9
<b>left</b> [5]	6:16	107:21	66:15	66:20					105:7	116:21	138:13	145:21
107:21	135:8	143:19	68:9	68:10	<b>-M-</b>				134:14	160:14	<b>misquoting</b> [1]	39:3
<b>legal</b> [7]	68:1	75:14	69:4	69:7	<b>M</b> [1]	2:3			<b>mean</b> [18]	10:17	<b>misunderstood</b> [1]	51:2
133:13	149:9	157:17	70:2	70:4	<b>M-U-N-S-O-N</b> [1]	62:11			10:18	36:20		
157:21	158:3		70:13	70:16					48:6	61:14	<b>modest</b> [1]	132:13
<b>lend</b> [2]	121:19	142:1	71:13	71:14	<b>magnificent</b> [2]	100:21			81:7	81:8	<b>moment</b> [7]	16:2
<b>lender</b> [1]	120:6		75:6	83:5	101:2				93:9	94:8	16:12	81:9
<b>lenders</b> [10]	47:1		83:19	83:20	<b>mail</b> [1]	15:5			97:14	97:17	101:15	128:13
47:3	116:6	116:8	86:20	89:4	<b>maintained</b> [1]	68:11			125:11	147:4	158:19	
116:12	116:16	117:8	154:13	156:20	<b>makes</b> [2]	25:14			<b>meaning</b> [1]	40:7	<b>monetary</b> [1]	87:12
118:3	126:15	126:20	158:14	158:16	60:17				<b>meaningful</b> [1]	133:17	<b>money</b> [47]	43:14
<b>lending</b> [1]	141:20		<b>living</b> [1]	157:2	<b>man</b> [3]	120:20	120:21		<b>means</b> [4]	10:20	45:4	49:6
<b>length</b> [1]	74:11		<b>loan</b> [16]	67:16	150:17				81:8	90:6	55:17	56:18
<b>less</b> [7]	19:8	119:18	119:5	144:2	<b>man's</b> [1]	54:12			<b>meant</b> [1]	139:14	57:4	65:4
139:15	139:15	145:16	144:20	145:4	<b>managed</b> [1]	147:15			<b>meantime</b> [1]	120:6	74:6	91:3
145:20	147:20		147:2	149:2	<b>manner</b> [1]	169:12			<b>mechanical</b> [1]	53:16	94:20	118:3
<b>letter</b> [6]	24:18		158:20	159:4	<b>March</b> [1]	1:15			<b>meet</b> [10]	19:5	119:3	121:20
26:21	28:12	33:7	163:17	164:2	<b>market</b> [3]	151:20			23:17	29:9	123:21	132:14
71:3	115:2		<b>loans</b> [14]	99:3	152:1	153:3			59:1	79:10	138:17	147:3
<b>letters</b> [3]	103:16	103:17	103:3	103:5	<b>marketable</b> [1]	123:17			141:9	144:12	148:2	148:15
<b>level</b> [6]	76:7	99:10	106:2	126:9	<b>Martindale</b> [1]	114:21			<b>meeting</b> [4]	51:7	150:6	150:11
109:18	110:10	110:11	143:18	143:20	<b>Martucci</b> [23]	57:12			52:1	64:3	151:3	153:21
143:21			145:18	145:19	61:5	62:17	67:8		<b>meetings</b> [11]	7:6	154:16	156:4
<b>liability</b> [7]	6:6		166:21		67:10	68:8	68:14		7:8	7:16	156:17	157:1
16:10	17:12	23:21	<b>local</b> [3]	47:3	69:2	69:16	70:14		22:20	27:7	159:15	159:16
24:12	34:13	35:11	118:2	54:1	70:18	71:8	71:16		27:11	27:13	166:8	166:10
			<b>located</b> [2]	162:3	75:9	101:18	108:9		101:21		166:17	
			162:21		129:20	130:6	130:13		<b>members</b> [2]	49:5	<b>monitor</b> [1]	119:11
			<b>longer</b> [8]	8:15					<b>memory</b> [3]	13:16	<b>month</b> [15]	37:10
			9:14	22:9					127:21	128:17	37:11	37:14
			40:13								112:4	

112:5 135:9 136:15	135:15 139:16	needs [3] 37:19	135:8 140:5 142:19	82:14
137:3 161:17 162:10	<b>Ms</b> [76] 3:6 3:7	139:14 147:11	145:19 152:11 153:1	<b>office</b> [7] 11:8
162:14 163:7 163:14	4:10 5:4 5:12	<b>negative</b> [2] 142:19	154:15 164:8 166:5	11:9 59:1 62:5
163:19 164:19	19:21 20:20 30:16	143:17	166:11	62:14 63:13 141:10
<b>monthly</b> [2] 166:6	31:11 31:15 32:10	<b>neighborhood</b> [1] 162:14	<b>number</b> [8] 46:18	<b>offices</b> [2] 1:16
166:18	34:9 34:21 35:8	<b>neither</b> [1] 30:3	63:10 81:12 83:7	107:2
<b>months</b> [11] 8:6	35:16 39:2 39:7	<b>net</b> [2] 142:19 143:17	111:20 127:13 129:18	<b>Officially</b> [1] 52:14
8:14 9:13 11:14	40:5 40:5 40:9	<b>never</b> [11] 40:2	135:19	<b>old</b> [4] 29:12 39:2
12:1 22:9 22:10	40:10 40:17 41:11	55:13 79:11 82:16	<b>numbers</b> [13] 36:14	148:19 152:13
22:21 119:1 120:3	61:5 62:17 67:8	104:11 110:2 120:13	36:19 36:20 38:12	<b>once</b> [5] 5:12 10:14
125:16	67:10 68:8 68:14	120:20 122:5 146:20	38:14 55:13 56:21	73:17 82:5 150:16
<b>monumental</b> [1] 120:15	69:2 69:15 70:6	151:8	69:6 72:8 72:10	<b>one</b> [61] 5:16 14:18
<b>mortgage</b> [35] 44:10	70:14 70:18 71:8	<b>new</b> [8] 24:14 37:6	83:6 83:14 85:6	15:7 18:15 19:6
44:13 44:15 45:6	71:16 75:9 76:3	44:16 118:14 119:10	<b>numerous</b> [3] 19:2	22:17 22:18 31:16
45:12 46:10 46:13	86:3 96:3 96:5	125:10 125:11 152:17	20:12 21:10	31:19 33:13 41:5
47:19 111:17 111:19	96:8 97:9 98:15	<b>Newman</b> [12] 1:10		46:3 46:11 46:15
113:5 113:6 114:2	104:10 105:2 105:10	101:9 106:17 107:5	<b>-O-</b>	54:6 67:10 67:11
114:11 115:5 115:10	105:21 106:4 111:4	108:7 108:15 129:9	<b>object</b> [4] 19:13	67:12 78:18 80:11
116:6 117:3 119:5	111:14 115:14 115:18	129:15 130:2 130:3	30:10 30:18 32:15	81:9 82:3 82:4
119:19 124:5 124:8	116:5 116:20 117:3	139:5 139:11	<b>objection</b> [6] 5:6	82:6 82:16 83:7
124:10 124:11 124:19	117:4 118:14 121:19	<b>Newman's</b> [1] 107:2	31:2 31:7 32:16	86:17 87:3 92:15
125:4 157:1 161:13	126:8 129:1 129:6	<b>next</b> [4] 36:19 100:11	97:9 105:1	98:4 98:5 98:7
161:18 162:5 162:14	129:8 130:13 134:4	104:20 160:1	<b>objectionable</b> [1] 30:20	98:17 98:19 99:7
163:6 164:9 164:11	134:16 137:9 137:17	<b>nice</b> [3] 80:11 84:12	<b>objections</b> [2] 5:9	103:14 103:18 106:7
164:17	137:21 138:6 139:2	92:19	75:20	106:17 107:12 107:13
<b>mortgages</b> [3] 124:2	139:10 141:4 146:9	<b>Nicholas</b> [2] 18:21	<b>obligation</b> [6] 32:7	108:12 109:13 110:3
124:18 162:8	164:2 167:3	100:20	73:7 75:16 159:10	113:12 122:17 123:3
<b>most</b> [17] 6:16	<b>Munson</b> [2] 62:11	<b>Nick</b> [2] 131:8 131:8	163:16 163:18	124:20 126:16 128:18
6:16 6:20 17:1	67:4	<b>ninth</b> [1] 144:20	<b>obligations</b> [4] 135:18	130:11 134:17 134:18
17:6 27:16 27:19	<b>Murrell</b> [1] 2:5	<b>nobody</b> [1] 40:6	142:5 144:13 144:13	141:15 145:3 145:19
87:9 89:13 89:17	<b>must</b> [1] 51:2	<b>none</b> [5] 126:14 165:5	<b>obtain</b> [2] 116:5	148:10 151:19 157:6
90:4 101:2 106:12	<b>mysterious</b> [1] 74:15	165:7 165:10 165:13	116:9	159:4 161:12
108:11 135:17 137:11		<b>nor</b> [4] 36:3 169:15	<b>obtained</b> [1] 113:5	<b>ones</b> [2] 91:19 129:12
140:17	<b>-N-</b>	169:16 169:16	<b>occasion</b> [2] 22:17	<b>ongoing</b> [2] 27:14
<b>mostly</b> [2] 101:17	<b>name</b> [30] 4:12	<b>notarial</b> [1] 169:18	22:18	46:4
157:5	54:11 54:12 54:13	<b>Notary</b> [3] 1:19	<b>occasionally</b> [1] 15:5	<b>onto</b> [1] 40:9
<b>motion</b> [3] 39:7	54:16 63:19 64:1	169:2 169:21	<b>occasions</b> [4] 15:7	<b>open</b> [2] 99:15 107:13
40:18 40:19	68:6 76:19 77:7	<b>note</b> [12] 69:12 74:13	19:12 20:12 30:12	<b>operated</b> [1] 38:13
<b>motions</b> [3] 34:21	77:16 79:5 79:17	75:15 85:2 102:9	<b>occur</b> [2] 115:6	<b>operation</b> [1] 59:2
35:1 35:3	79:20 81:10 81:11	102:14 137:7 141:8	144:10	<b>opinion</b> [8] 29:18
<b>Motors</b> [51] 53:4	81:13 81:18 82:3	142:20 159:7 159:12	<b>occurred</b> [6] 8:13	39:19 39:20 41:7
67:19 119:12 140:16	88:18 88:19 91:12	159:17	18:16 115:7 117:13	67:1 69:12 75:14
140:17 140:18 141:17	91:14 113:15 114:4	<b>notes</b> [13] 10:12	121:20 153:18	78:10
141:21 142:1 145:5	126:4 136:17 140:21	10:16 10:17 10:19	<b>occurring</b> [1] 99:17	<b>opinions</b> [42] 5:21
145:9 145:10 145:12	163:17 163:18	10:21 11:13 11:21	<b>off</b> [15] 49:21 71:20	6:11 6:14 7:14
145:15 146:12 146:18	<b>named</b> [3] 62:14	18:14 18:17 18:19	80:5 80:15 101:1	7:17 17:9 17:16
147:3 147:5 147:9	83:21 169:4	74:17 84:21 169:10	103:2 103:5 106:1	18:1 18:1 18:3
148:3 148:9 148:15	<b>namely</b> [1] 166:14	<b>nothing</b> [4] 4:8	110:15 112:1 113:6	18:9 20:19 22:4
149:5 149:6 149:19	<b>names</b> [10] 81:20	40:4 160:11 160:13	114:7 124:6 124:17	24:8 25:8 27:2
149:21 150:9 150:19	82:11 82:14 82:20	<b>Notice</b> [1] 1:14	132:16	28:6 28:6 28:18
150:21 151:4 153:9	83:1 84:10 85:6	<b>notices</b> [5] 96:17	<b>off-island</b> [1] 47:5	30:2 31:1 33:6
153:12 154:6 154:11	86:2 127:2 136:8	96:19 96:20 137:2	<b>offer</b> [20] 7:14	33:8 33:17 33:18
155:1 155:14 155:21	<b>national</b> [2] 63:8	137:3	7:18 17:10 17:17	34:1 34:2 36:3
157:4 159:5 160:5	163:6	<b>now</b> [48] 5:5 15:8	18:4 24:8 27:2	36:9 36:10 38:9
162:20 163:18 163:20	<b>nature</b> [5] 76:20	15:16 22:10 22:15	28:7 29:19 33:7	55:5 55:10 56:13
165:4 165:9 165:12	79:1 82:17 88:15	23:12 35:18 36:16	33:19 36:9 36:10	56:17 57:13 68:1
165:19 165:21 166:14	93:6	36:18 39:9 42:3	38:9 55:6 55:11	72:18 72:20 73:2
166:19 166:20	<b>necessarily</b> [2] 5:19	45:20 50:17 51:16	57:13 72:19 77:18	77:17 95:8
<b>move</b> [7] 32:21	107:18	51:18 54:13 64:1	<b>offered</b> [2] 35:18	<b>opposed</b> [6] 24:9
34:9 36:6 53:10	<b>necessary</b> [4] 49:14	69:5 72:4 73:19	95:9	24:15 25:16 25:18
107:4 131:7 143:2	60:6 149:17 168:12	82:3 87:9 90:3	<b>offering</b> [2] 34:17	76:2 133:5
<b>moved</b> [1] 138:21	<b>need</b> [10] 4:14	93:21 96:9 97:7	46:20	<b>ordeal</b> [1] 123:6
<b>moving</b> [2] 67:21	5:14 37:16 46:14	100:5 100:15 101:12	<b>offhand</b> [2] 81:11	<b>order</b> [4] 13:20
131:14	65:18 87:5 114:9	107:14 109:20 110:15		23:15 119:4 154:7
<b>Mrs</b> [13] 39:2 98:12	137:12 137:21 140:9	117:17 118:15 118:16		<b>organization</b> [3] 79:14 79:15 80:9
114:12 117:13 117:16	<b>needed</b> [7] 49:2	120:6 127:21 129:11		<b>original</b> [4] 20:20
120:7 121:4 121:8	64:11 67:21 83:3			21:4 44:10 168:13
121:17 122:1 122:6	102:13 114:11 123:17			

originally [3] 36:11 151:13 152:12	<b>Park</b> [2] 120:8 164:6	111:21 112:9	<b>periods</b> [1] 150:1	<b>plus</b> [3] 112:12 155:18 156:1
<b>otherwise</b> [1] 153:8	<b>part</b> [26] 4:16 13:10 20:2 39:1 49:2	<b>pending</b> [1] 5:11	<b>Permanent</b> [1] 116:15	<b>point</b> [6] 5:8 7:5 34:12 57:14 57:17 141:15
<b>outcome</b> [1] 169:17	49:15 52:21 58:10 69:5 77:14 92:17	<b>Pennsylvania</b> [1] 1:18	<b>permission</b> [3] 76:19 77:15 79:5	<b>policy</b> [8] 51:8 51:9 51:10 51:14 51:17 51:18 52:6 52:10
<b>outline</b> [1] 134:7	99:20 102:15 102:19 102:21 106:12 106:16	<b>pension</b> [86] 6:7 19:16 20:10 21:15	<b>person</b> [16] 6:7 21:15 21:19 47:13	<b>portion</b> [1] 134:11
<b>outright</b> [1] 164:8	108:11 111:7 118:20 124:13 124:15 135:10	21:19 27:3 27:4 27:18 28:14 28:15	47:18 54:4 62:13 72:9 76:8 81:9	<b>portions</b> [1] 100:14
<b>outside</b> [1] 74:14	138:8 144:8 144:17	28:18 33:9 33:9 49:7 50:6 50:8	86:14 114:15 120:19 120:20 120:21 141:10	<b>position</b> [5] 20:9 20:16 119:3 119:18 152:8
<b>overdrafts</b> [1] 164:3	<b>participant</b> [3] 8:17 143:12 144:3	53:3 53:4 53:10 53:11 53:14 55:8	<b>person's</b> [1] 82:3	<b>possession</b> [2] 109:1 112:16
<b>overlap</b> [1] 34:20	<b>participants</b> [3] 53:15 53:17 143:11	55:12 55:18 56:14 57:9 59:9 60:16	<b>personal</b> [21] 8:11 15:15 25:8 45:2	<b>possibility</b> [1] 59:2
<b>owe</b> [5] 28:16 145:14 157:14 157:21 166:10	<b>participate</b> [2] 57:16 153:8	60:17 60:20 61:2 61:4 61:21 67:17	45:3 49:5 53:9 61:11 67:15 67:20	<b>possible</b> [1] 73:11
<b>owed</b> [6] 27:4 74:5 74:6 103:3 110:16 141:17	<b>participated</b> [1] 68:3	67:19 67:21 69:20 74:5 74:5 74:7	76:4 97:11 98:3 101:20 139:4 147:11	<b>potential</b> [10] 14:12 20:18 27:20 31:20 33:3 72:14 73:11 76:17 77:16 77:17
<b>owes</b> [6] 33:10 142:18 143:16 158:21 159:1 159:5	<b>participation</b> [2] 6:4 73:12	75:16 75:17 87:11 96:12 99:2 99:3	149:10 153:5 153:14 155:2 155:5	<b>practical</b> [2] 26:8 68:2
<b>own</b> [23] 29:13 40:20 53:9 55:14 58:5 67:20 70:12 72:10	<b>particular</b> [9] 11:17 11:18 15:11 55:14	100:3 102:11 102:12 102:12 102:16 103:1	<b>personally</b> [16] 59:10 61:6 61:17 69:19	<b>practically</b> [1] 142:21
83:11 83:14 87:7 94:12 95:11 143:10	72:21 103:19 134:2 148:7 148:20	103:4 105:11 110:17 119:13 138:19 138:21	96:21 97:3 100:1 107:3 118:13 135:16	<b>precisely</b> [1] 115:4
155:5 159:2 161:10 161:12 162:1 162:15 162:18 164:5 164:8	<b>parties</b> [5] 83:20 91:5 95:20 169:15 169:16	139:4 141:6 141:18 141:20 142:2 142:5	136:3 136:6 140:15 162:16 164:20 169:5	<b>predecessors</b> [1] 134:18
<b>owned</b> [1] 122:21	<b>party</b> [6] 1:8 1:11 2:4 2:6	142:7 142:10 142:10 142:18 143:2 143:7	<b>personnel</b> [1] 135:16	<b>predominantly</b> [1] 27:13
<b>owner</b> [1] 97:11	<b>pass</b> [2] 75:19 94:11	143:9 143:13 143:15 144:5 144:11 144:13	<b>persons</b> [5] 84:4 84:10 84:18 106:14 107:7	<b>preemption</b> [12] 7:21 8:2 9:4 12:17 12:20 14:7 14:21 15:1 16:3 16:15 16:16 16:21
<b>owners</b> [1] 45:21	<b>passes</b> [1] 163:21	144:15 144:21 149:2 150:10 150:20 158:14 158:21 158:21 159:8 167:1	<b>pertaining</b> [1] 19:14	<b>prefer</b> [3] 31:6 107:1 136:13
	<b>patient</b> [2] 31:13 118:19	<b>pension-related</b> [1] 20:2	<b>phone</b> [2] 47:17 85:6	<b>prepaid</b> [1] 44:13
	<b>patiently</b> [1] 45:13	<b>pensions</b> [1] 50:5	<b>phoned</b> [1] 106:21	<b>preparation</b> [1] 73:14
	<b>Pause</b> [5] 16:7 16:11 98:9 98:16 101:16	<b>people</b> [17] 11:1 62:9 81:18 81:21	<b>phonetic</b> [1] 162:4	<b>prepare</b> [2] 64:11 69:18
	<b>pay</b> [28] 46:20 99:3 103:2 103:5 111:21	82:2 82:4 82:12 82:15 82:21 83:3	<b>picture</b> [7] 37:11 79:2 117:15 133:17	<b>prepared</b> [7] 6:11 15:21 18:2 24:3 34:7 36:10 136:11
	112:1 113:5 124:17 143:8 147:12 147:14	83:16 95:15 95:17 101:13 101:14 127:13 140:5	144:7 154:19 154:20	<b>presence</b> [1] 169:14
	147:15 150:7 153:14 156:20 156:20 159:18	45:7 46:2 46:3 46:3 46:4 46:21	<b>piece</b> [8] 11:5 39:6 53:5 53:9 85:4	<b>present</b> [7] 35:2 36:16 37:1 57:15 58:8 114:17 164:9
	159:20 160:7 160:10 160:12 160:19 160:20	46:21 47:4 48:9 65:6 66:12 66:21	85:5 158:14 168:12	<b>presentation</b> [1] 83:8
	161:5 161:7 161:17 163:7 166:18	126:17 126:18 129:14 129:17 142:8 159:12 164:16 164:18	<b>pieces</b> [1] 11:20	<b>pressing</b> [1] 49:17
	<b>paying</b> [16] 36:17 36:18 39:15 44:9	<b>percentage</b> [7] 65:5 65:13 66:17 129:20	<b>pinpoint</b> [1] 130:17	<b>pressuring</b> [1] 118:10
	106:1 112:3 112:4 132:14 149:21 150:4	129:21 130:1 130:7	<b>piqued</b> [1] 92:19	<b>presumably</b> [1] 129:1
	152:4 153:10 159:16 160:4 162:10 164:20	<b>performed</b> [1] 139:6	<b>place</b> [15] 9:13 9:16 29:19 53:2	<b>presume</b> [1] 4:19
	<b>payment</b> [5] 111:8 111:11 118:8 125:3 164:1	<b>performing</b> [1] 60:21	55:3 91:18 92:1 100:10 100:10 117:7	<b>pretty</b> [4] 80:1 80:7 98:13 113:21
	<b>payments</b> [14] 45:13 99:2 110:20 110:21	<b>performs</b> [1] 139:2	120:1 122:1 124:1 152:11 169:5	<b>previous</b> [5] 4:15 14:10 40:12 51:2 145:3
	112:17 112:18 128:7 132:19 163:3 163:5	<b>perhaps</b> [8] 23:21 27:8 51:13 52:4	<b>Plaintiff</b> [2] 1:2 2:2	<b>previously</b> [2] 19:9
	164:13 166:6 166:8 166:13	78:6 82:1 87:6 156:15	<b>Plaintiffs</b> [2] 1:8 2:4	
	<b>payroll</b> [1] 63:2	<b>period</b> [19] 14:5 29:4 29:4 46:3	<b>plan</b> [8] 50:14 52:11 96:12 100:4 103:1	
	<b>pays</b> [2] 47:6 158:6	46:4 48:13 49:21 86:1 116:11 127:8	105:11 110:17 118:8	
	<b>peace</b> [1] 111:16	127:18 133:2 136:16 141:16 148:20 149:1	<b>planner</b> [1] 48:16	
	<b>penalties</b> [3] 111:12	159:9 161:5 166:1	<b>planning</b> [6] 37:13 49:1 49:11 49:19	
			50:2 55:16	
			<b>plans</b> [2] 49:7 137:16	
			<b>play</b> [1] 61:19	
			<b>playing</b> [1] 92:7	
			<b>pleases</b> [1] 140:8	

31:10 price [2] 124:14 124:16 primarily [1] 100:20 prime [1] 163:10 principal [2] 147:19 164:17 printed [3] 40:9 80:5 80:15 printout [10] 80:20 81:1 85:1 89:16 89:19 89:21 90:5 90:6 90:11 90:16 private [5] 113:13 113:14 116:15 117:4 117:5 privileged [1] 19:17 problem [4] 4:16 5:5 31:6 31:18 problematic [1] 4:19 problems [1] 102:6 procedure [1] 131:11 procedures [3] 59:12 69:10 141:5 proceeded [1] 145:4 proceedings [13] 16:7 16:11 98:9 98:16 100:3 100:17 101:6 101:16 101:19 102:3 102:16 104:12 131:5 process [20] 45:1 68:3 70:1 70:3 74:15 96:20 99:10 110:14 111:7 111:17 111:19 114:2 114:11 115:11 122:21 123:5 123:11 131:9 131:10 142:13 produce [2] 87:7 112:20 produced [2] 102:10 132:15 produces [1] 166:21 producing [1] 73:10 productive [1] 52:20 professional [5] 17:19 25:1 107:8 129:3 153:7 professionals [11] 107:6 108:4 108:16 111:8 111:10 111:15 111:20 114:1 127:17 128:7 134:1 proffer [5] 20:3 35:7 37:2 37:2 73:20 program [12] 119:11 119:15 119:16 119:19 120:1 125:6 126:6 151:20 152:1 152:9 152:9 152:10 progression [2] 117:10 122:4 prohibited [14] 27:16 53:4 53:7 67:15 69:11 102:19 105:18	130:8 143:4 143:5 144:2 144:4 144:9 144:16 prohibitive [2] 81:17 88:5 project [8] 71:15 79:2 94:8 94:10 130:10 130:11 130:12 135:11 projects [4] 58:6 69:8 71:14 72:21 proper [2] 36:14 73:7 properly [1] 49:20 properness [1] 75:14 properties [5] 153:2 154:8 165:1 166:5 166:15 property [37] 39:6 39:16 45:16 46:17 47:11 47:20 48:9 111:16 120:8 120:8 121:6 121:9 121:15 121:16 122:11 122:13 122:20 123:1 123:12 123:18 124:3 124:5 124:7 124:9 124:18 124:20 159:1 160:5 161:10 161:13 162:15 162:18 163:2 163:17 164:5 164:6 166:15 propose [1] 66:19 proposed [2] 32:4 78:10 protect [1] 53:16 prove [2] 121:9 121:14 provide [19] 17:2 28:15 33:11 33:16 33:17 59:5 60:7 60:15 61:5 75:12 79:20 80:18 83:18 89:2 89:5 90:10 95:18 120:6 122:3 provided [26] 4:20 4:21 15:3 16:19 33:8 37:6 52:12 52:17 54:7 59:8 64:20 66:13 68:8 68:19 69:3 69:16 70:10 70:18 71:9 73:21 75:14 89:9 89:12 90:16 95:3 95:21 provider [1] 24:21 provides [1] 71:12 providing [8] 36:20 49:3 52:9 58:15 58:18 65:1 67:5 86:2 Public [3] 1:19 169:2 169:21 pulling [1] 134:13 purchase [3] 124:13 124:15 152:5 purchased [2] 124:6 151:13	pure [1] 78:2 purist [2] 78:4 78:4 purpose [9] 23:18 80:13 89:19 90:19 108:7 122:14 147:3 150:3 153:9 purposes [4] 50:4 55:7 88:20 152:13 Pursuant [1] 1:14 pursue [1] 47:7 pursued [1] 110:6 pursuit [2] 13:11 68:13 put [18] 36:17 39:7 39:10 121:5 123:15 125:6 125:13 125:19 126:1 131:1 135:11 138:15 138:18 143:15 151:19 151:21 152:2 152:9 putting [3] 49:21 127:6 129:5	realize [2] 51:18 132:2 realizing [1] 49:19 really [25] 6:2 6:8 6:18 15:16 27:16 36:19 40:2 40:4 64:7 78:9 88:4 109:19 117:6 117:10 120:11 120:18 123:16 131:14 135:4 137:10 149:12 150:12 158:8 163:16 163:18 reason [4] 71:15 73:8 97:5 119:7 reasonable [4] 43:5 65:12 127:8 129:18 reasons [3] 97:2 117:9 119:8 rebuilding [1] 162:12 recapitulating [1] 134:15 receipt [1] 5:11 receivable [1] 138:19 receivables [1] 142:3 receive [1] 96:17 received [2] 96:19 96:20 receiving [1] 142:10 recent [2] 89:13 135:17 recital [1] 30:6 recited [1] 31:10 recognize [2] 99:13 99:19 recollection [12] 12:5 22:6 23:2 24:6 44:20 58:2 70:21 72:1 85:3 87:1 110:13 154:5 81:19 153:8 recommended [9] 41:21 42:2 74:20 76:6 79:13 79:15 114:15 141:4 141:9 recommending [1] 116:4 record [23] 4:12 5:6 20:7 20:14 21:1 31:12 32:15 35:6 35:15 35:17 39:10 40:10 40:14 41:2 65:16 71:20 101:1 104:16 105:5 114:7 128:19 133:10 168:9 record-keeping [4] 27:18 61:1 62:12 67:6 recorded [2] 44:18 169:9 records [16] 57:18 59:17 59:20 60:17 60:21 62:1 116:10 122:6 133:12 133:15 133:18 139:16 148:8 150:13 154:17 154:18	recoverable [1] 65:15 recovering [1] 14:13 recovery [1] 74:12 redundancy [1] 29:6 redundant [1] 137:2 reference [2] 14:15 81:10 reflect [7] 20:14 21:2 31:12 103:11 106:1 126:20 132:19 reflecting [1] 135:21 refused [1] 126:21 regard [2] 21:13 36:3 regarding [64] 7:14 7:21 10:12 11:14 11:21 15:19 17:9 17:11 21:8 22:7 23:4 23:6 23:12 23:20 24:8 24:14 25:7 27:2 27:3 27:10 28:6 28:7 28:17 28:18 29:18 31:1 31:21 33:8 33:12 38:8 39:5 42:20 43:2 46:16 48:21 50:2 50:4 50:7 52:11 55:7 55:11 56:17 56:17 57:9 58:15 59:11 64:9 64:12 69:10 70:15 70:19 72:6 72:14 72:18 73:2 73:19 76:16 77:17 83:18 102:16 108:19 130:4 141:6 157:11 regardless [2] 69:17 94:8 regular [3] 64:21 70:9 158:7 regularly [1] 11:16 regurgitate [1] 28:3 rehashing [1] 29:12 related [16] 65:7 65:7 66:15 68:8 70:8 71:12 105:11 115:18 132:14 133:4 133:15 134:12 135:4 149:10 157:17 169:16 relates [2] 19:18 20:15 relating [3] 19:16 104:11 136:18 relationship [7] 25:13 49:17 117:21 119:11 119:13 132:10 139:12 relevance [2] 11:10 11:10 relevant [5] 43:13 43:14 43:16 79:3 89:18 remaining [2] 112:8 113:11 remains [1] 107:12 remarkable [1] 16:21 remember [45] 8:4 9:15 10:18 10:20
-Q-				
qualify [1] 139:7 quality [1] 78:6 questioning [1] 31:14 questions [15] 29:15 30:21 33:1 41:12 61:14 72:21 113:3 131:18 136:10 137:10 137:13 137:14 137:18 138:3 144:18 quite [12] 16:12 18:11 24:17 57:16 78:5 86:16 111:19 111:20 115:4 135:19 138:7 158:6 quoting [1] 39:2				
-R-				
R [1] 2:2 raised [1] 20:10 randomly [1] 23:16 rate [13] 39:16 47:5 47:19 47:21 48:7 48:8 66:3 78:17 78:21 88:4 93:4 94:9 94:21 rates [7] 29:5 44:8 44:11 44:16 45:18 45:21 46:5 rather [2] 78:2 135:10 reach [1] 88:12 reached [2] 81:13 97:19 read [4] 7:4 35:6 35:14 168:7 ready [3] 23:8 131:6 131:14 real [6] 46:14 47:17 49:6 111:15 114:15 142:20				

11:4 12:21 13:5	158:12 158:13 158:14	9:21 13:13 16:14	165:8 165:11 165:16	168:12
14:1 15:8 17:1	<b>request</b> [1] 129:2	17:8 18:7 21:6	165:19 165:21	<b>separated</b> [1] 70:7
18:11 18:14 18:17	<b>require</b> [1] 53:19	26:20 33:15 36:8	<b>sale</b> [2] 45:17 152:2	<b>separately</b> [1] 158:6
18:18 18:19 19:10	<b>required</b> [4] 53:1	37:13 38:5 42:5	<b>Salkind</b> [2] 18:10	<b>September</b> [2] 144:21
22:14 29:1 30:8	72:6 103:1 103:2	42:19 44:7 52:9	18:12	149:3
38:7 43:1 44:4	<b>requirements</b> [1]	52:15 54:13 56:5	<b>Sally</b> [2] 66:5 145:17	<b>series</b> [3] 103:16
47:12 50:10 54:12	103:13	56:16 57:10 57:11	<b>Sarah</b> [1] 62:10	103:20 104:1
54:13 54:16 58:11	<b>research</b> [3] 68:14	58:13 59:4 61:13	<b>satisfied</b> [1] 86:16	<b>serve</b> [1] 93:7
71:1 81:3 81:11	70:19 75:17	62:4 69:5 71:2	<b>save</b> [1] 80:14	<b>service</b> [4] 15:4
82:3 82:11 82:14	<b>reserve</b> [1] 32:12	73:3 79:7 80:21	<b>saved</b> [1] 80:16	49:3 54:9 107:8
84:15 85:15 114:5	<b>reside</b> [1] 113:19	82:19 83:2 85:12	<b>says</b> [2] 103:19 134:18	<b>services</b> [35] 21:14
118:21 146:21 151:7	<b>residential</b> [2] 122:16	92:9 93:21 100:7	<b>scheduled</b> [2] 7:7	25:1 27:3 28:14
152:14 153:19 154:2	122:18	100:19 106:6 109:10	36:11	33:8 52:13 52:17
165:17 166:15	<b>resolution</b> [5] 97:19	110:4 111:5 111:10	<b>Schwait</b> [9] 107:11	58:16 58:19 59:5
<b>reminding</b> [1] 51:17	107:9 108:20 115:17	122:9 129:4 129:8	107:11 107:18 108:1	59:6 59:7 59:8
<b>remortgaged</b> [1]	142:17	130:14 132:3 135:8	108:14 120:14 120:15	60:15 61:4 61:5
44:15	<b>resolve</b> [1] 26:5	146:9 164:3	129:11 131:1	61:7 64:5 64:20
<b>removal</b> [3] 74:4	<b>resolved</b> [9] 104:18	<b>road</b> [2] 123:18 162:4	<b>scope</b> [5] 34:11	64:21 66:8 66:12
75:15 141:6	106:8 106:9 106:10	<b>roadblocks</b> [1] 118:4	65:13 73:11 73:13	67:6 68:7 69:2
<b>removed</b> [3] 74:8	106:11 109:13 114:19	<b>role</b> [13] 16:8 23:19	77:3	69:15 70:7 70:9
144:15 159:7	115:3 115:15	24:9 24:14 24:15	<b>Scott</b> [1] 91:10	71:8 73:21 75:12
<b>removing</b> [1] 143:10	<b>resolving</b> [2] 27:14	25:7 26:3 27:20	<b>scrap</b> [6] 11:5	83:4 88:13 139:2
<b>render</b> [2] 5:21	67:15	57:15 61:19 72:14	11:7 11:13 11:20	141:13
39:20	<b>respect</b> [6] 18:15	86:20 92:7	85:5 136:21	<b>set</b> [8] 53:8 54:2
<b>rendered</b> [4] 25:2	70:6 70:15 72:20	<b>Ron</b> [7] 68:6 75:11	<b>scrutinized</b> [1] 75:19	56:11 138:9 138:12
25:2 134:2 141:14	100:3 165:18	120:11 140:19 140:20	<b>seal</b> [1] 169:18	138:14 165:21 169:6
<b>rendering</b> [2] 30:1	<b>responded</b> [1] 30:21	141:10 141:13	<b>search</b> [2] 82:19	<b>sets</b> [2] 83:6 89:10
34:1	<b>response</b> [2] 29:15	<b>Ronald</b> [1] 75:11	84:5	<b>setting</b> [1] 53:19
<b>renew</b> [6] 45:7	43:6	<b>room</b> [1] 58:5	<b>second</b> [4] 13:2	<b>settled</b> [7] 98:1
45:9 45:11 45:11	<b>responses</b> [1] 127:4	<b>Rosenburg</b> [39] 34:5	18:15 98:5 152:8	98:18 98:20 99:21
45:12 45:14	<b>responsibility</b> [2]	34:6 34:10 36:7	<b>secondary</b> [1] 27:20	100:5 100:7 107:20
<b>renewal</b> [1] 48:13	29:3 29:8	36:8 36:9 36:13	<b>see</b> [19] 16:3 20:13	<b>settlement</b> [2] 52:21
<b>renewed</b> [1] 48:12	<b>result</b> [7] 44:4	37:5 38:18 39:3	59:1 60:20 66:4	138:8
<b>rent</b> [6] 152:11 160:14	61:21 97:13 110:16	39:3 39:4 39:11	69:14 82:7 89:13	<b>seven</b> [1] 166:1
160:17 161:2 161:6	119:9 132:15 143:20	39:18 39:21 41:14	94:14 107:17 109:10	<b>several</b> [7] 30:12
161:7	<b>results</b> [2] 109:7	41:15 43:1 43:3	113:2 118:15 128:10	46:17 81:20 100:18
<b>rental</b> [9] 151:20	109:9	43:6 43:18 43:20	130:16 130:19 137:18	112:4 120:3 125:16
151:20 152:1 152:1	<b>resumed</b> [1] 96:7	74:21 77:19 77:21	141:12 149:12	<b>sheet</b> [2] 85:4 85:7
152:9 152:9 159:1	<b>retain</b> [1] 94:1	79:20 89:6 89:9	<b>seeing</b> [1] 68:4	<b>sheltered</b> [4] 53:13
160:2 160:4	<b>retainer</b> [10] 88:6	89:12 89:16 89:18	<b>sees</b> [2] 140:9 140:9	55:17 56:17 57:5
<b>reopen</b> [2] 5:2	93:4 93:9 93:14	90:1 90:7 90:10	<b>seized</b> [2] 120:7	<b>Shiff</b> [14] 68:6
36:1	93:20 94:5 94:18	90:15 91:1 91:6	120:9	75:11 75:11 75:12
<b>repayment</b> [1] 154:14	95:2 132:9 132:18	91:8 96:1	<b>seizure</b> [3] 120:16	76:1 76:3 76:11
<b>repeat</b> [2] 12:9	<b>retaining</b> [1] 41:18	<b>Rosenburg's</b> [6]	121:5 131:3	76:11 76:14 120:11
84:7	<b>returns</b> [12] 60:9	38:15 39:19 90:4	<b>seizures</b> [1] 131:15	140:19 140:20 141:10
<b>replace</b> [1] 91:1	60:12 61:11 68:13	90:21 94:11 94:14	<b>sell</b> [5] 45:17 45:18	141:13
<b>report</b> [11] 14:18	69:13 69:19 70:20	<b>roughing</b> [1] 164:21	123:2 152:21 153:3	<b>Shofer</b> [31] 1:1
14:20 15:1 15:2	97:6 109:8 120:2	<b>roughly</b> [3] 27:7	<b>selling</b> [1] 47:20	1:15 3:4 4:6
17:3 68:15 68:17	146:2 146:10	91:19 92:8	<b>seminar</b> [10] 49:8	4:11 4:13 5:10
68:19 68:21 70:19	<b>reverse</b> [1] 131:13	<b>routinely</b> [1] 10:21	49:9 50:10 51:4	5:14 20:8 20:11
75:3	<b>review</b> [2] 60:21	<b>rule</b> [1] 70:12	51:12 52:1 52:3	21:2 22:19 31:19
<b>Reported</b> [1] 1:21	61:3	<b>rules</b> [1] 30:17	56:20 57:1 57:2	33:2 34:15 40:10
<b>reporter</b> [1] 65:17	<b>reviewed</b> [6] 38:12	<b>run</b> [3] 83:15 118:3	<b>send</b> [6] 88:6 88:8	89:4 96:9 104:19
<b>reports</b> [1] 122:3	41:16 42:7 108:12	118:4	89:18 94:4 94:20	104:20 105:8 105:21
<b>repos</b> [2] 142:7	109:18 110:9	<b>runaway</b> [1] 142:9	132:6	128:20 137:11 138:7
142:11	<b>reviewing</b> [1] 121:17	<b>ruptured</b> [1] 117:21	<b>sending</b> [2] 15:4	143:2 150:17 151:10
<b>represent</b> [5] 10:2	<b>reviews</b> [3] 59:20 62:18	<b>-S-</b>	90:2	155:9 168:15 169:4
32:17 32:19 114:11	<b>Richard</b> [12] 1:1	<b>S-H-I-F-F</b> [1] 68:6	<b>sense</b> [3] 86:13 88:4	<b>Shofer's</b> [4] 5:13
114:20	1:15 1:19 1:21	<b>S-H-O-F-E-R</b> [1]	88:5	19:16 137:20 138:1
<b>representatives</b> [1]	3:4 4:6 4:13	4:13	<b>sent</b> [11] 14:18 15:7	<b>short</b> [1] 29:10
100:18	143:2 168:15 169:2	<b>safety</b> [1] 144:12	15:12 15:17 42:11	<b>shorter</b> [1] 13:10
<b>represented</b> [7] 33:3	169:4 169:21	<b>salaries</b> [2] 146:18	71:7 89:19 89:21	<b>shortly</b> [1] 10:1
100:16 102:10 114:10	<b>right</b> [54] 6:10	146:19	93:1 93:2 93:3	<b>show</b> [6] 112:16 121:19
115:4 115:10 115:13	8:11 8:21 9:11	<b>salary</b> [12] 146:12	<b>separate</b> [5] 87:4	133:7 133:16 134:4
<b>representing</b> [6]		147:10 147:12 147:14	89:17 134:2 158:5	135:2
101:7 104:18 115:18		149:17 165:3 165:6		<b>showed</b> [3] 43:4
				43:20 99:18

showing [2] 128:1 130:4	139:21 144:11	140:6 142:6 142:8 142:9 146:19 148:14 149:4 149:6 149:13 149:15 150:9 150:19 155:7 156:18 159:16	40:18	taking [8] 10:16 18:14 18:17 18:18 132:16 146:18 147:2 149:17
Signa [1] 48:17	sound [1] 120:17	state [8] 4:11 7:20 35:17 112:5 112:10 135:19 169:1 169:3	subsequently [6] 45:15 45:19 46:1 106:20 112:13 124:6	task [1] 139:15
significant [4] 17:2 17:6 132:2 132:3	source [1] 166:20	statement [7] 12:8 12:14 20:1 55:20 56:8 72:3 78:8	substance [9] 12:10 12:16 12:16 13:1 13:5 19:10 25:6 30:14 50:9	tax [35] 27:19 44:17 45:2 45:3 46:12 47:5 60:9 60:12 61:11 61:14 62:1 68:4 68:5 69:19 70:20 75:9 98:11 99:19 99:20 107:6 109:14 109:19 117:9 118:4 120:12 120:21 135:18 141:1 141:2 141:5 146:2 146:10 152:13 152:18 152:20
similar [2] 152:8 155:2	sources [2] 158:19 161:8	statements [7] 96:10 108:13 119:7 130:16 130:18 134:2 134:7	substantial [5] 24:20 95:14 95:17 112:12 117:1	taxable [1] 99:5
simpler [1] 70:3	speak [2] 39:9 85:12	States [1] 110:7	substantially [3] 44:9 118:6 121:11	taxes [29] 36:16 36:16 36:18 36:18 87:9 87:9 110:16 111:9 111:11 111:21 112:9 112:12 112:16 112:17 113:6 118:5 118:7 118:8 118:11 118:13 118:15 118:17 118:18 150:4 154:14 156:21 157:5 166:3 166:16
simply [6] 10:18 20:6 20:14 31:6 32:14 35:14	speaking [5] 31:2 32:16 39:9 90:15 139:1	stating [2] 103:16 103:17	substantiate [2] 36:14 133:19	Taylor [63] 2:2 5:5 5:7 5:18 8:17 10:2 10:4 10:6 10:14 11:8 12:7 12:13 14:4 14:15 19:13 20:1 20:6 21:1 22:16 24:2 26:10 30:3 30:10 31:9 31:13 32:6 32:17 34:10 34:19 35:10 40:14 71:20 85:9 104:7 104:9 104:15 105:4 109:4 111:2 111:6 111:7 111:13 112:21 114:6 115:12 116:18 116:19 121:3 121:3 127:5 128:19 129:4 130:20 130:20 133:21 134:6 135:5 137:7 138:4 146:6 155:16 158:3 158:12
simultaneously [1] 65:18	special [1] 138:9	status [1] 19:18	successful [1] 44:13	tedious [1] 123:6
sit [1] 104:19	specialties [1] 78:1	stays [2] 11:9 57:5	such [10] 17:19 21:15 54:1 64:15 69:4 111:15 123:21 135:12 156:19 157:1	telephone [21] 7:10 8:18 9:1 9:6 9:11 9:12 9:15 10:3 10:13 10:14 13:2 15:20 16:17 18:7 18:16 46:7 52:19 86:7 86:12 89:1 92:2
Sitting [1] 58:4	specific [17] 14:1 15:6 23:1 55:13 57:7 57:9 59:7 59:13 64:5 64:16 69:8 71:13 72:13 78:21 87:13 97:4 103:14	stenographic [1] 169:10	suffer [1] 85:18	term [1] 51:1
situation [10] 44:19 47:1 49:16 56:1 56:2 56:7 57:7 132:17 139:4 153:18	specifically [26] 7:17 14:1 15:17 16:20 21:11 23:3 23:18 24:7 26:18 28:5 28:9 28:16 29:17 47:11 48:2 56:6 56:9 70:11 71:1 73:10 76:13 86:21 105:5 148:6 151:6 153:19	stenographically [1] 169:9	suffice [1] 143:11	terminated [1] 108:7
six [11] 8:6 8:14 9:13 11:14 12:1 19:7 19:12 63:15 116:12 126:14 166:1	specifically—but [1] 39:10	still [17] 14:7 40:15 53:12 54:18 54:19 57:6 85:7 99:15 104:14 121:7 130:8 138:3 143:19 149:16 161:7 161:10 161:12	suffered [1] 63:14	
six-year [1] 123:11	specifics [2] 33:17 56:1	stipulated [1] 4:2	suffrage [1] 135:1	
skipping [1] 67:14	speed [1] 104:10	STIPULATION [1] 4:1	suggest [2] 32:21 42:5	
slow [1] 122:21	spend [2] 43:14 127:6	stipulations [1] 169:12	suggested [1] 120:17	
small [3] 63:11 65:5 160:15	spender [1] 151:6	stood [1] 118:5	Suite [1] 1:17	
smaller [3] 129:20 129:21 130:7	spending [1] 156:17	stop [3] 85:19 131:3 131:5	sum [6] 25:6 50:8 95:16 112:6 145:17 145:18	
smoothly [1] 107:4	spent [2] 129:16 157:3	stopped [4] 108:8 146:17 150:10 152:18	summarize [1] 37:8	
society [3] 80:4 81:4 81:12	spoke [6] 47:13 81:3 82:12 82:21 83:17 139:18	stream [1] 123:19	summarized [2] 28:20 42:20	
software [5] 125:11 125:20 126:2 126:4 126:5	spouse [1] 145:17	streamline [1] 137:13	summary [2] 132:1 154:15	
sold [1] 152:6	sruck [1] 147:13	streams [2] 123:8 123:8	summer [1] 125:18	
sole [3] 23:18 34:13 97:11	St [4] 44:10 44:21 113:12 162:4	strictly [2] 20:4 36:5	supplement [4] 31:17 90:21 94:10 134:16	
solely [2] 35:9 157:17	stage [1] 73:20	stuck [1] 45:5	supplemented [3] 4:17 5:8 31:18	
solved [1] 164:3	stand [1] 94:16	stuff [1] 104:14	supplied [1] 37:5	
someone [9] 11:3 47:16 80:7 80:8 83:9 87:5 114:11 131:2 153:11	standard [2] 35:20 35:21	Stuart [7] 1:4 1:4 1:6 1:7 82:5 82:7 82:10 45:5	supply [2] 114:7 137:11	
sometime [20] 4:21 26:12 36:18 48:13 52:4 55:4 58:1 77:13 86:3 90:12 100:10 112:13 123:2 123:14 125:2 125:4 125:18 139:21 149:7 151:17	standards [2] 17:19 21:16	submit [2] 35:13 64:19	support [5] 35:3 38:12 41:17 128:6 129:2	
sometimes [2] 11:10 140:11	stands [4] 17:5 23:4 90:3 93:21	submitted [3] 127:19 130:13 141:13	supported [1] 7:2	
somewhat [1] 95:12	start [11] 65:19 96:15 96:16 120:4 122:19 129:5 131:14 146:11 148:12 149:18 166:11	submitting [2] 129:2 134:13	supposed [3] 99:9 107:11 159:8	
somewhere [6] 44:11 71:4 99:18 159:19 159:21 162:13	started [31] 10:2 15:2 49:17 54:5 63:17 81:21 85:21 89:8 89:11 96:14 107:4 119:21 121:2 123:2 131:12 139:9	subsequent [2] 7:13	surfaced [1] 135:18	
soon [1] 80:7			surrounding [1] 49:14	
sorry [1] 163:3			suspend [2] 137:14 137:18	
sort [10] 4:19 82:6 92:14 99:17 117:14 125:15 132:9 132:20			suspended [2] 96:6 167:5	
			sustain [1] 75:21	
			sworn [2] 4:7	
			system [1] 125:10	
			-T-	
			takes [1] 163:11	



<b>terms</b> [7] 66:20 72:10 134:7 146:7 154:20 156:16 157:8	<b>together</b> [7] 58:8 103:21 104:21 127:7 128:21 129:5 156:14	<b>Truhe's</b> [1] 39:2	<b>universal</b> [1] 51:1	<b>valuations</b> [1] 73:21
<b>testified</b> [4] 4:9 84:19 145:3 149:3	<b>Tom</b> [3] 100:21 104:13 157:16	<b>trust</b> [4] 54:5 54:6 54:16 116:15	<b>unknown</b> [1] 95:20	<b>value</b> [11] 50:6 55:12 66:20 73:7 73:15 73:18 74:9 102:14 121:9 152:20 163:2
<b>testify</b> [2] 32:8 35:6	<b>tomorrow</b> [1] 92:16	<b>truth</b> [4] 4:8 4:8 4:9 6:19	<b>unless</b> [2] 32:2 114:7	<b>values</b> [1] 49:6
<b>testifying</b> [2] 21:14 21:17	<b>too</b> [11] 11:15 29:9 54:3 58:9 58:17 106:5 106:20 111:2 111:8 155:10 166:16	<b>truth—I</b> [1] 40:2	<b>unlikely</b> [1] 47:4	<b>valve</b> [1] 144:12
<b>testimony</b> [13] 20:18 33:11 34:12 34:18 35:7 36:5 38:15 51:3 72:6 90:21 91:5 153:13 168:9	<b>took</b> [17] 7:3 9:16 29:19 36:2 65:5 110:17 125:14 129:12 129:19 130:1 144:20 144:20 149:2 150:20 165:16 165:18 166:2	<b>try</b> [12] 9:5 11:17 12:21 16:5 46:18 46:19 104:20 127:7 150:8 150:16 151:10 155:13	<b>unofficially</b> [1] 52:15	<b>variety</b> [1] 127:17
<b>testing</b> [1] 128:17	<b>top</b> [1] 144:19	<b>trying</b> [5] 15:14 41:5 86:13 118:2 154:1	<b>unpaid</b> [2] 142:7 143:18	<b>various</b> [5] 100:12 105:14 126:20 166:6 166:18
<b>Thank</b> [1] 30:16	<b>topic</b> [1] 157:6	<b>Tuesday</b> [1] 1:15	<b>unrelated</b> [7] 20:9 20:13 91:5 95:20 115:20 158:15 158:17	<b>Vegas</b> [2] 151:7 151:9
<b>that—and</b> [1] 39:8	<b>total</b> [4] 9:10 65:10 82:1 95:16	<b>turn</b> [3] 72:9 85:19 151:16	<b>unsettled</b> [1] 107:19	<b>vehicle</b> [1] 167:1
<b>theories</b> [1] 38:13	<b>totally</b> [4] 14:8 71:14 115:15 156:10	<b>turned</b> [7] 40:8 46:21 47:3 117:7 117:17 118:13 121:4	<b>unsheltered</b> [3] 55:17 56:18 57:5	<b>verbally</b> [1] 42:15
<b>thereabouts</b> [1] 112:14	<b>touch</b> [2] 107:17 115:1	<b>turns</b> [1] 41:13	<b>unwinding</b> [1] 130:8	<b>verbiage</b> [1] 39:8
<b>therefore</b> [1] 139:13	<b>touched</b> [1] 35:10	<b>two</b> [46] 9:9 9:10 9:12 13:8 13:12 13:13 14:20 15:7 16:16 17:3 17:7 27:8 27:12 29:8 38:19 39:1 48:11 50:12 51:15 51:19 52:5 69:9 82:3 86:9 86:17 87:4 87:13 95:15 122:16 122:17 123:1 123:13 125:2 143:14 145:17 151:11 151:15 152:11 153:1 153:4 153:5 154:3 154:7 156:16 158:4 162:8	<b>up</b> [52] 15:2 19:5 27:9 34:12 43:12 45:10 48:3 50:3 53:8 53:19 54:2 64:18 67:18 69:6 70:12 76:21 83:10 95:12 95:17 99:18 103:21 104:11 107:2 109:21 114:10 114:21 118:6 118:9 119:5 123:15 129:19 132:4 137:19 138:9 138:12 138:14 142:3 142:5 142:6 146:4 152:2 152:4 153:4 153:5 154:7 154:11 154:12 154:13 155:1 156:19 157:7 159:10	<b>versed</b> [1] 55:15
<b>thinking</b> [3] 47:20 51:16 121:2	<b>towards</b> [2] 8:1 34:15	<b>two-year</b> [1] 29:4	<b>up-in-the-air</b> [1] 43:11	<b>versus</b> [2] 56:18 89:4
<b>third</b> [6] 1:8 1:11 2:4 2:6 13:4 18:15	<b>Towers</b> [1] 1:17	<b>Tyler</b> [7] 111:14 118:14 120:7 121:5 121:17 130:21 135:15	<b>upcoming</b> [1] 8:9	<b>view</b> [2] 35:13 35:17
<b>Thomas</b> [3] 44:10 44:21 113:12	<b>Towson</b> [1] 1:18	<b>type</b> [3] 49:4 132:10 157:2	<b>update</b> [1] 37:10	<b>viewpoints</b> [2] 7:2 16:21
<b>thoroughly</b> [2] 7:4 17:13	<b>transaction</b> [6] 27:16 53:6 102:20 141:7 143:4 143:5	<b>types</b> [4] 33:16 139:5 155:2 156:16	<b>updated</b> [1] 22:15	<b>violating</b> [2] 68:2 68:18
<b>thought</b> [10] 41:12 51:3 56:12 78:20 86:14 95:18 109:12 114:18 122:5 132:13	<b>transactions</b> [10] 53:4 67:16 67:16 69:11 105:19 130:9 144:2 144:4 144:10 144:16	<b>typewritten</b> [1] 169:11	<b>updates</b> [1] 89:10	<b>Virgin</b> [9] 39:6 39:16 42:16 46:8 47:15 48:9 151:15 156:19 161:11
<b>thousand</b> [9] 68:16 118:12 130:12 156:1 156:10 156:15 158:9 163:14 163:19	<b>transcribed</b> [1] 169:10		<b>used</b> [17] 24:19 25:4 51:9 66:17 67:5 69:9 69:11 70:11 74:18 76:6 76:11 78:4 87:16 99:7 130:2 149:14 156:21	<b>Virginia</b> [5] 54:6 54:8 54:11 54:15 54:15
<b>threatening</b> [1] 48:3	<b>transcript</b> [2] 168:8 168:13		<b>uses</b> [2] 37:18 57:3	<b>virtually</b> [1] 12:17
<b>three</b> [17] 9:10 9:12 13:7 16:17 51:14 51:20 62:8 82:1 86:9 86:18 95:11 95:17 135:20 143:13 144:5 160:21 164:17	<b>transition</b> [1] 63:17		<b>using</b> [18] 56:21 76:11 77:7 77:20 79:1 86:15 88:16 88:19 90:20 90:20 95:11 108:7 130:9 130:20 149:7 150:11 150:21 155:7	<b>vitalae</b> [2] 88:11 93:2
<b>three-year</b> [1] 161:5	<b>treated</b> [1] 145:19		<b>usual</b> [1] 161:2	<b>Vivian</b> [1] 113:16
<b>through</b> [11] 11:12 11:17 70:5 80:9 89:8 99:10 130:16 134:12 137:8 141:8 163:21	<b>trial</b> [15] 5:1 6:1 6:12 7:8 8:9 9:19 15:21 18:2 18:5 23:8 34:7 36:11 37:12 37:15 37:21		<b>usually</b> [1] 11:2	<b>voluntarily</b> [1] 40:21
<b>throughout</b> [2] 68:10 150:2	<b>tried</b> [4] 30:11 32:20 46:16 47:10		<b>utilize</b> [1] 23:20	
<b>throw</b> [1] 11:11	<b>triggered</b> [1] 99:4		<b>utilized</b> [1] 56:4	
<b>thrown</b> [1] 85:8	<b>trout</b> [2] 123:8 123:19			
<b>thrust</b> [1] 131:13	<b>true</b> [6] 5:19 39:13 87:11 102:14 168:9 169:11			
<b>tightened</b> [1] 142:3	<b>Truhe</b> [27] 1:17 2:3 3:7 5:12 34:9 34:21 35:8 35:16 39:2 39:7 40:5 40:9 40:10 40:17 41:11 86:3 96:5 97:9 98:12 105:21 106:4 129:1 129:6 137:17 138:6 146:9 167:3			
<b>timely</b> [3] 5:1 99:2 99:4				
<b>times</b> [5] 19:7 25:10 46:17 46:18 127:3				
<b>today</b> [8] 34:3 34:4 72:13 82:21 96:11 120:16 137:15 158:18				



137:21 164:2 <b>whole</b> [6] 4:8 70:1 118:16 118:17 121:4 135:9 <b>wife</b> [11] 59:1 62:10 63:13 67:3 124:20 130:18 155:20 156:12 158:6 161:19 163:11 <b>wife's</b> [2] 124:7 155:6 <b>William</b> [1] 122:12 <b>willing</b> [2] 5:15 55:2 <b>withdrawn</b> [2] 41:4 41:7 <b>withdrew</b> [1] 40:21 <b>within</b> [8] 85:14 86:1 91:19 110:12 110:13 128:12 169:4 169:11 <b>without</b> [8] 68:2 73:10 122:6 128:17 148:7 150:12 158:8 158:10 <b>witness</b> [49] 3:3 6:5 6:15 16:9 16:9 17:11 19:19 20:9 20:16 21:13 23:5 23:6 23:9 23:13 23:19 23:20 24:9 24:15 24:16 25:16 25:17 25:19 25:21 25:21 26:16 27:20 30:11 30:12 34:14 35:3 35:19 41:9 46:14 50:4 50:7 56:4 71:17 85:17 86:5 88:2 88:20 90:21 91:3 93:8 105:13 106:3 114:5 164:4 169:18 <b>witnesses</b> [1] 32:9 <b>woodwork</b> [1] 99:11 <b>word</b> [4] 24:20 25:4 145:7 149:14 <b>words</b> [12] 14:2 24:11 24:13 25:1 34:17 69:17 70:2 74:10 83:12 99:7 139:17 147:10 <b>worked</b> [1] 82:4 <b>works</b> [3] 63:2 105:12 140:7 <b>worse</b> [3] 118:6 142:14 142:15 <b>worth</b> [4] 74:13 121:11 142:19 143:17 <b>worthless</b> [1] 142:21 <b>worthwhile</b> [1] 117:20 <b>wrap</b> [1] 157:7 <b>write</b> [2] 11:5 131:20 <b>writing</b> [5] 42:15 75:2 85:4 85:6 94:2 <b>written</b> [13] 4:17 4:21 5:8 6:19 6:19 17:4 35:12	39:17 75:3 94:18 128:6 131:17 132:21 <b>wrote</b> [5] 24:18 26:21 28:12 115:2 126:6  <b>-Y-</b>  <b>year</b> [30] 18:5 19:7 35:1 46:18 48:10 52:5 55:4 60:11 60:13 63:16 66:7 71:1 100:11 106:17 112:7 117:16 125:14 127:18 142:15 148:7 151:2 151:5 151:18 153:21 159:13 159:14 160:20 160:21 165:15 166:2 <b>years</b> [50] 9:9 13:12 13:13 17:7 26:10 27:8 27:12 29:8 29:8 37:7 38:19 39:2 45:10 48:11 48:20 50:13 51:11 51:14 51:15 51:16 51:19 51:20 52:5 56:20 63:1 63:10 63:14 63:15 64:18 73:6 75:2 99:16 105:16 112:4 112:5 116:11 125:2 130:18 133:2 148:10 148:19 152:7 153:18 153:20 154:21 156:11 160:18 161:1 164:18 166:1 <b>Yep</b> [1] 38:20 <b>yet</b> [17] 7:5 14:5 17:14 24:2 24:3 38:2 42:9 52:8 56:11 78:7 79:17 85:8 89:20 96:2 98:18 109:17 119:3 <b>yourself</b> [2] 7:7 108:16 <b>Yumkas</b> [8] 6:15 7:1 111:14 115:14 120:20 121:1 133:6 157:9			
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**Douglas R. Taylor**  
**Attorney at Law**  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

February 14, 1997

Janet M. Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204

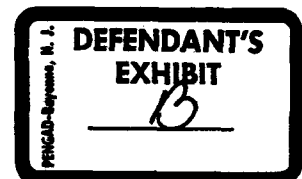
Deborah M. Whelihan, Esquire  
Jordan, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036

Re: Shofer v. Hack, et al.  
Case No. 88102069/CL79993

Dear Counsel:

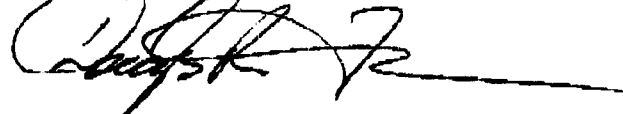
The following are the names and addresses of the expert witnesses which the plaintiff may call to testify in the presentation of his case in chief in the above captioned matter. The witnesses and their area of expertise are as follows:

1. Edward J. Kabala, Esquire  
Kabala & Geeseman  
200 First Avenue  
Pittsburgh, Pennsylvania 15222  
Pension Law and Pension Administration
2. Nicholas Giampetro, Esquire  
920 Providence Road  
Towson, Maryland 21204  
Pension Law and Pension Administration
3. Theodore Rosenberg  
5007 West Forest Park Avenue  
Baltimore, Maryland 21207  
Actuary



4. Don Hannahs, CFP, CMFC  
Cigna Financial Advisors, Inc.  
10520 Little Patuxent Parkway  
Suite 901  
Columbia, Maryland  
Estate planning
5. Wendy Martucci, C.P.A.  
or representative of firm  
Martucci & Associates, P.A.  
800 Wyandhurst Avenue  
Suite 245  
Baltimore, Maryland 21210  
Accounting
6. James F. Lasser  
Lasser, Stern, Kinde & Company, Inc.  
152 Glendale Road  
Scarsdale, New York 10583  
Asset Evaluation - Financial Analysis
7. Dan A. Harbertson, ASA, MAAA  
92 Berrywood Drive  
Severna Park, Maryland  
Actuary
8. Scott Gregory  
Annapolis, Maryland  
Actuary

Very truly yours,



Douglas R. Taylor

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DC AND MD BARS  
DIRECT DIAL (202) 496-2810

February 21, 1997

Douglas R. Taylor, Attorney at Law  
P.O. Box 4566  
Rockville, MD 20850

Re: Richard Shofer, plaintiff, v.  
Stuart Hack Co., et al., defendants.  
Case No.: 88101069-CL79993  
Our File No.: 1015.920004

Dear Doug:

I am writing in response to your letter to Ms. Truhe and I dated February 14, 1997.

Beyond that your client has an obligation to supplement all of the written discovery propounded upon him by the defendants and the third-party defendant, your letter does not comply with Maryland Rule 2-402(e)(1).

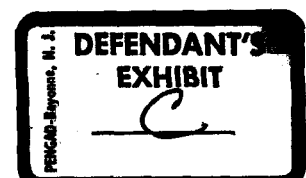
Please immediately provide Ms. Truhe and me with the subject matter on which your experts will testify, the substance of the experts' alleged findings, and the opinions to which the experts are expected to testify in accordance with Maryland Rule 2-402(e)(1).

Very truly yours,

Deborah M. Whelihan

DMW:kws

cc: Janet M. Truhe, Esquire  
g:\casel\dmw\grabush\tay2-21.ltr



1550

IN THE MATTER OF:

***RICHARD SHOFR***

**-v-**

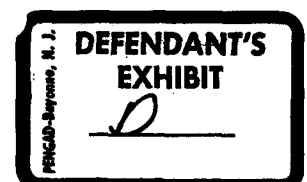
***THE STUART HACK CO., and  
STUART HACK, et al.***

---

***WENDY E. MARTUCCI  
MAY 8, 1997***

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***WALLS REPORTING, INC.  
PROFESSIONAL COURT REPORTERS  
714 PARK AVENUE  
BALTIMORE, MD 21201  
(410) 728-9020***



***CONDENSED TRANSCRIPT AND WORD INDEX***

Page 1

1 RICHARD SHOFER \* IN THE  
 2 Plaintiff \* CIRCUIT COURT  
 3 v. \* FOR  
 4 THE STUART HACK COMPANY \* BALTIMORE CITY  
 and \*  
 5 STUART HACK \* CASE NO:  
 6 Defendants \* 88102069/CL79993  
 7 \* \* \* \* \*  
 THE STUART HACK COMPANY \*  
 8 and \*  
 STUART HACK \*  
 9 Third-Party Plaintiffs \*  
 10 v. \*  
 11 GRABUSH, NEWMAN & CO., \*  
 12 P.A. \*  
 13 Third-Party Defendant \*  
 \* \* \* \* \*  
 14 Pursuant to Notice, the deposition of  
 15 WENDY E. MARTUCCI was taken on Thursday, May 8,  
 16 1997, commencing at 11:30 a.m., at Martucci &  
 17 Associates, P.A., 600 Wyndhurst Avenue, Suite 245,  
 18 Baltimore, Maryland 21210, before Richard D. Baker,  
 19 Jr. a Notary Public.  
 20  
 21 Reported by: Richard D. Baker, Jr.

Page 3

INDEX	PAGE
2 WITNESS:	
3 Wendy E. Martucci	
4 EXAMINATION:	
5 By Ms. Whelihan	4
6 By Ms. Truhe	52
7 By Mr. Taylor	71
8 By Ms. Whelihan	74
9 By Ms. Truhe	79
10 EXHIBITS:	
11 1 - CV	20
12 2 - Letter dated 6-3-93	88
13 3 - Letter dated 9-16-94	88
14	
15	
16	
17	
18	
19	
20	
21	

Page 2

1 APPEARANCES:  
 2 Douglas R. Taylor, Esquire  
 on behalf of the Plaintiff  
 3  
 Janet M. Truhe, Esquire  
 4 on behalf of the Defendant  
 Stuart Hack  
 5  
 Deborah Murrell Whelihan, Esquire  
 6 on behalf of the Third-Party Defendant  
 Grabush, Newman & Co., P.A.  
 7  
 ALSO PRESENT: Richard Shofer  
 8  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21

Page 4

1 STIPULATION  
 2 It is hereby stipulated and agreed that  
 3 the filing of this deposition with the Clerk of the  
 4 Court be and the same is hereby waived.  
 5 \*\*\*\*\*  
 6 WENDY E. MARTUCCI,  
 7 called for examination, having been duly sworn to  
 8 tell the truth, the whole truth and nothing but the  
 9 truth, testified as follows:  
 10 EXAMINATION BY MS. WHELIHAN:  
 11 Q Ms. Martucci, could you state your full  
 12 name and address for the record, please?  
 13 A Wendy Earnshaw Martucci, 600 Winehurst  
 14 Avenue, Suite 245, Baltimore, Maryland 21210.  
 15 Q Have you ever had your deposition taken  
 16 before?  
 17 A No.  
 18 Q Okay. I don't know if Mr. Taylor  
 19 explained the rules of deposition taking to you but  
 20 basically you have to answer with verbal responses.  
 21 Gestures, hands, nods, is not picked up by the

1 court reporter. If there's a question that I ask  
2 you that you do not understand, let me know and I  
3 will clarify it because the object of the game is  
4 for you to understand the questions I'm asking and  
5 be able to give verbal responses back. Did you  
6 understand everything I said so far?

7 A Yes.

8 Q All right. What did you do in  
9 preparation for your deposition today?

10 A I spoke briefly with Mr. Taylor on the  
11 telephone where he told me some of the things that  
12 you've just covered. And I asked him if I needed  
13 to do anything to prepare. And he said he was not  
14 aware of anything that needed to be done in advance  
15 and just to tell the truth and ask questions if I  
16 had questions. He also told me I could take a  
17 break at any time or consult with him or Mr. Shofer  
18 at any time.

19 Q Okay. When did the telephone conference  
20 with Mr. Taylor take place?

21 A A few days ago.

1 happened towards the end of our tax season which is  
2 why I'm not clear exactly when. Probably the first  
3 half of April.

4 Q Okay. In that conversation with Mr.  
5 Shofer, did he tell you what subject matter you  
6 were going to be testifying to?

7 A If I testified?

8 Q Yeah. If you testified did he tell you  
9 what your testimony would concern?

10 A No, no.

11 Q Did he tell you why he wanted to use you  
12 as an expert?

13 A No.

14 Q Did you know about the litigation prior  
15 to your first conversation with Mr. Taylor?

16 A Yes.

17 Q When was the first time you learned  
18 about the litigation?

19 A I learned about it when I first met Mr.  
20 Shofer at one of our earliest meetings and that  
21 would have been several years ago. Perhaps four to

1 Q Was that the first time you had spoken  
2 to Mr. Taylor?

3 A No.

4 Q How many times had you spoken to Mr.  
5 Taylor prior to that telephone conversation?

6 A Less than a half a dozen.

7 Q When was the first time that you spoke  
8 to Mr. Taylor, if you can recall?

9 A About maybe a year ago when he first  
10 began working with Mr. Shofer.

11 Q All right. When did you learn you were  
12 going to be an expert witness in this case?

13 A Within the past month and a half.

14 Q How did you learn you were going to be  
15 an expert witness?

16 A Mr. Shofer told me that he had named me  
17 as an expert but that they were not sure if they  
18 would use me as an expert.

19 Q All right. When did that conversation  
20 with Mr. Shofer take place?

21 A Within the past month and a half. It

1 five years ago.

2 Q Do you remember what it was that Mr.  
3 Shofer told you about that?

4 A Not specifically.

5 Q Okay. Do you remember the context in  
6 which that meeting occurred?

7 A I believe our first meeting was when we  
8 became acquainted at jury duty and I do not believe  
9 we discussed anything about his business in that  
10 detail. Our second meeting probably occurred at  
11 Mr. Shofer's offices and it may have come up at  
12 that meeting or within the following two or three  
13 months as we got better acquainted.

14 Q All right. When did you first become  
15 Mr. Shofer's accountant?

16 A About four or five years ago.

17 Q Any better guess as to when exactly it  
18 was you actually started to become his accountant?  
19 Do you have any kind of records that would show?

20 A Yes, I do.

21 Q Okay. I presume they are somewhere here

1 in this office.

2 A They should be.

3 Q Okay. Off the top of your head, can you  
4 give me a better estimate, a more specific date as  
5 to when you first became Mr. Shofer's accountant?

6 A No.

7 Q Okay. Do you want to take a break and  
8 maybe look at the billing records or whatever it is  
9 you're going to look at to determine when it was  
10 you first became Mr. Shofer's accountant?

11 A I will do that.

12 Q Okay.

13 (Brief recess.)

14 Q Okay. Do you know when it was that you  
15 first started doing Mr. Shofer's accounting work?

16 A We first executed an engagement  
17 agreement on September 16, 1994.

18 Q Did you perform accounting services for  
19 Mr. Shofer prior to the execution of that  
20 engagement letter?

21 A No.

1 you provide for Mr. Shofer as of June 3rd, 1993?

2 A We contracted to prepare tax returns for  
3 the company for tax years 1991 and 1992.

4 Q How about Mr. Shofer's personal returns,  
5 were you also doing those?

6 A Also his personal returns for the same  
7 years.

8 Q Any other services?

9 A An annual tax return for 1992 for the  
10 pension entity.

11 Q Anything else?

12 A No.

13 Q Were you aware at the time that you  
14 entered into an engagement letter with Mr. Shofer  
15 that he had had accountants prior to you?

16 A Yes.

17 Q Did you know who those accountants were?

18 A Yes.

19 Q What did Mr. Shofer tell you as to why  
20 he wanted to change accountants?

21 A There were a couple of reasons to the

1 Q Okay. At the time that you executed  
2 that engagement letter did you know that Mr. Shofer  
3 had prior accountants?

4 A I'm sorry. I just reread the document  
5 that I was answering from.

6 Q Okay.

7 A And I answered inaccurately. This was  
8 not our first engagement letter. It was the first  
9 one in the back of the file. The file seems to be  
10 out of order.

11 Q All right. Okay.

12 A Can I take another minute and keep  
13 looking back at history here?

14 Q Sure.

15 (Pause for document review.)

16 A Okay.

17 Q All right. Do you know when it was you  
18 first started doing Mr. Shofer's accounting work?

19 A Yes. June 3rd, 1993 was the date of our  
20 earliest engagement letter that I recollect.

21 Q Okay. And what accounting services did

1 best of my recollection. One of them being cost,  
2 particularly in connection with an IRS audit  
3 several years earlier. Another being communication  
4 and style or philosophy. I know that there is a  
5 relationship between this case and the prior  
6 accountants and I cannot recollect at what point I  
7 became aware of that but I suspect it was before  
8 this engagement letter was executed or during that  
9 process.

10 Q What did you understand Mr. Shofer to  
11 mean that you just testified to that, one of the  
12 reasons why he wanted to switch accountants was  
13 because of communication style or philosophy?

14 A That he did not always understand the  
15 positions or technical advice that he was given,  
16 had to ask a lot of questions and pull it out.  
17 Felt that he wanted a more proactive style, more  
18 involvement year round.

19 Q Do you know when it was that Mr. Shofer  
20 severed his relationship with his prior  
21 accountants?



1 A No.

2 Q Do you know Grabush, Newman & Company?

3 A Yes.

4 Q How do you know them?

5 A I'm acquainted with at least two of

6 their partners.

7 Q Which partners?

8 A Phil Matters, Barry Bondrove.

9 Q And how are you acquainted with Phil

10 Matters and Barry Bondrove?

11 A Phil Matters and I have a common area of

12 interest and we have met at seminars and

13 conferences. Barry Bondrove, I was introduced to

14 him by a joint acquaintance. We had lunch once or

15 twice.

16 Q Do you have any opinions about the

17 quality of their accounting services?

18 MR. TAYLOR: I would object but you can

19 answer the question.

20 MS. TRUHE: Objection.

21 A I have no direct knowledge of their

1 filed with the IRS and the state?

2 A At least one year's.

3 Q Okay. Do you remember what the first

4 year of his tax returns were that he brought to you

5 in '93?

6 A I don't recall.

7 Q Can you look through your file and tell

8 me what were the first returns he brought to you?

9 (Pause for document review.)

10 A It appears to be 1989. I have a

11 corporate return.

12 Q When Mr. Shofer came to you in June of

13 '93, would it be a fair statement to say that he

14 was delinquent in filing his last tax returns for

15 at least years 1991 and 1992?

16 MR. TAYLOR: I would object to the

17 question but you can answer it.

18 A That is the case for 1991. 1992 I

19 cannot answer without searching further because our

20 engagement was in the middle of a normal extension

21 period for that return.

1 accounting services.

2 Q Okay. Do you have any knowledge of

3 their reputation in the accounting community?

4 MR. TAYLOR: I would object, same

5 reasons but you can answer.

6 MS. TRUHE: Object. In general or in

7 any specific area?

8 MS. WHELIHAN: I'm talking about the

9 accounting community in this area.

10 A I have limited direct hearsay knowledge

11 and limited observation.

12 Q All right. With that qualification,

13 what knowledge do you have about their reputation

14 in the Baltimore community?

15 MR. TAYLOR: I would object to that line

16 of questioning but you can answer.

17 MS. TRUHE: Objection.

18 A Solid, no negatives, no strong

19 positives.

20 Q When Mr. Shofer came to you, did he

21 bring with him his prior tax returns that had been

1 Q Do you know whether or not Mr. Shofer

2 had filed for an extension at the time you and he

3 entered into the engagement letter?

4 A I don't know.

5 Q Okay. When you and Mr. Shofer entered

6 into the initial engagement letter in June of '93,

7 were you aware Mr. Shofer had any tax problems with

8 the IRS or the state of Maryland?

9 A I can't recall.

10 Q Okay. After the engagement letter did

11 you learn that Mr. Shofer had tax problems with the

12 IRS and the state of Maryland?

13 A Yes.

14 Q How did you learn that?

15 A He told me.

16 Q Do you remember what it was he told you?

17 A No.

18 Q In any of your discussions with Mr.

19 Shofer, did you take any notes of those

20 conversations?

21 A Yes.

1 Q Okay. Are those notes in your files?  
 2 A They are.  
 3 Q In the files that are on the table or  
 4 the personal file that's on the floor?  
 5 A I don't know.  
 6 Q Okay. Now, when you described the file  
 7 that's on the floor as a personal file, what did  
 8 you mean by that?  
 9 A Personal tax returns.  
 10 Q Being Mr. Shofer's personal tax returns?  
 11 A Yes.  
 12 Q All right. And the files that were on  
 13 the table are now in your lap and on the floor, are  
 14 the corporate tax returns?  
 15 A Corporate and the pension trust.  
 16 Q Okay. And the files that are not here  
 17 have been put in archives?  
 18 A It appears to me that some of the annual  
 19 files have been archived and that would be our  
 20 policy.  
 21 Q Well, that was my next question. When

1 mean by that?  
 2 A The rules are very strict and detailed  
 3 about related parties borrowing or fiduciaries  
 4 borrowing from a pension trust. I'm not positive  
 5 exactly which rule was breached, whether it was the  
 6 dollar amount rule or the repayment term rule or  
 7 some other rule. I think it was one of the first  
 8 two. But nevertheless, a fiduciary breach is one  
 9 of those rules, it's a prohibited transaction. My  
 10 understanding was that Mr. Shofer received advice  
 11 that led him to believe he could effect a  
 12 prohibited transaction which in effect was not  
 13 allowable.  
 14 Q Now, was it your understanding that he  
 15 took one loan or a series of loans?  
 16 A I don't know.  
 17 Q Okay. Do you have a rsum or  
 18 curriculum vitae?  
 19 A Yes.  
 20 Q Do you have it handy?  
 21 A Yes.

1 do you archive files?  
 2 A Typically we keep two years in the  
 3 office. There are exceptions and we may have more  
 4 than two years with these files.  
 5 Q Okay. What did Mr. Shofer tell you  
 6 about the litigation that we're involved in and for  
 7 which your deposition is being taken?  
 8 A He told me that it originated with  
 9 advice he received from Stuart Hack who was his  
 10 pension advisor. It related to Mr. Shofer's taking  
 11 a personal loan from the pension trust. My  
 12 understanding is that the loan was a prohibited  
 13 transaction and should never have been permitted in  
 14 the form it was taken. My recollection is that he  
 15 explained how this had a domino effect in a number  
 16 of other areas. When it was caught and corrected.  
 17 Effects including IRS disputes and department of  
 18 labor disputes regarding the pension trust.  
 19 Q Now, when you said that Mr. Shofer  
 20 should not have taken the loan from his pension  
 21 trust in the form that it was taken, what did you

1 Q Could you get it?  
 2 A Yes.  
 3 (Brief recess.)  
 4 MS. WHELIHAN: Let's mark the CV as  
 5 Deposition Exhibit Number 1. This looks pretty  
 6 current.  
 7 Q It looks like it was updated as of March  
 8 1997; is that right.  
 9 A Yes.  
 10 Q I skimmed your CV and I don't see any  
 11 speaking engagement or conferences related to  
 12 pension issues. Is that correct?  
 13 A Yes.  
 14 Q Do you have any particular expertise in  
 15 the area of pensions or ERISA?  
 16 A No.  
 17 (Exhibit 1 marked.)  
 18 Q Have you ever been qualified as an  
 19 expert witness before?  
 20 A No.  
 21 Q Ever been hired as an expert witness

1 before?

2 A Yes.

3 Q How many times?

4 A Between two and six.

5 Q Okay.

6 A Sometimes an engagement begins one way  
7 and proceeds to that.

8 Q All right. In what period of time,  
9 excuse me, have you been hired as an expert  
10 witness?

11 A Over the past two years.

12 Q Would those have been different divorce  
13 cases?

14 A Yes.

15 Q Have you ever served as an expert  
16 witness in an accounting malpractice case?

17 A No.

18 Q After your conversation with Mr. Shofer  
19 where he told you that he might use you as an  
20 expert witness, did you have any subsequent  
21 conversations with Mr. Shofer or with Mr. Taylor

1 Q Okay. How about Mr. Taylor, have you  
2 ever had a conversation with Mr. Taylor where he  
3 told you that he was going to use you as an expert  
4 witness in this litigation?

5 A Could you ask that question again or in  
6 two parts?

7 Q In your conversation with Mr. Taylor did  
8 Mr. Taylor tell you you would be an expert witness  
9 in this case?

10 A To the best of my recollection it still  
11 has not been decided. So the answer would be no.

12 Q In your discussions with Mr. Taylor did  
13 he tell you what the subject matter of your  
14 testimony would be?

15 A No.

16 Q Was there any discussions with Mr.  
17 Taylor about offering opinions as to Grabush,  
18 Newman & Company?

19 A No.

20 Q How about with Mr. Shofer, any  
21 discussions with Mr. Shofer about you offering any

1 about the fact that you would actually be an expert  
2 witness?

3 A Yes.

4 Q All right. Did you have conversations  
5 with both Mr. Shofer and Mr. Taylor?

6 A Yes.

7 Q Who did you have conversations with  
8 first after your initial conversation with Mr.  
9 Shofer?

10 A Mr. Shofer I think.

11 Q Okay. What was your understanding from  
12 your conversations with Mr. Shofer as to what the  
13 subject matter of your testimony would be in this  
14 case?

15 A That he was thinking about it and hasn't  
16 arrived at firm conclusions as to how he might use  
17 my testimony, if at all.

18 Q Okay. Did Mr. Shofer tell you that  
19 ultimately he did arrive at a firm conclusion that  
20 he would use you as an expert witness?

21 A No.

1 opinions as to Grabush, Newman & Company?

2 A None that I recollect.

3 Q In 1984 to 1987, did you have any  
4 familiarity with ERISA or pension issues?

5 A At an overview level.

6 Q Okay. What do you mean by an overview  
7 level?

8 A My familiarity was that which a CPA in  
9 general practice for someone obtaining their  
10 license would need to have, the fact that these  
11 laws were in existence, the basic reason that the  
12 laws were passed. Some passing familiarity with  
13 some of the more common prohibited transactions  
14 such as the one we discussed earlier. The types of  
15 things that one might encounter in everyday general  
16 practice.

17 Q Have you ever had clients who have taken  
18 loans from their pension plan?

19 A No.

20 Q Prior to the tax law change in 1986, if  
21 a client had come to you and indicated that they

1 had taken a loan from the pension plan and that  
 2 their pension consultant had told them that was a  
 3 nontaxable event, would you have relied upon that  
 4 pension consultant's --  
 5 MR. TAYLOR: Let me object.  
 6 MS. TRUHE: Objection.  
 7 Q -- recommendations?  
 8 MR. TAYLOR: I object for the record.  
 9 THE WITNESS: May I have the question  
 10 again please?  
 11 Q Sure. Prior to the 1986 tax change, had  
 12 a client come to you having taken loans from their  
 13 pension account, based upon advice from the pension  
 14 consultant, would you have been able to give tax  
 15 advice to your client regarding the advice given to  
 16 him by his pension consultant?  
 17 MR. TAYLOR: I object to the question.  
 18 A The second time I believe is a little  
 19 different from the first time that you asked it.  
 20 Q It is, right.  
 21 A And the stipulation of pre1986 makes it

1 great deal of continuing professional education and  
 2 journal articles. A red flag that entered my  
 3 consciousness at that point.  
 4 Q Do you remember what year it was?  
 5 A No.  
 6 Q Could it have been after 1986?  
 7 A Possibly.  
 8 Q Okay. Prior to 19, tax changes in 1986  
 9 and after 1984, were you aware that there were  
 10 circumstances where borrowing from your pension  
 11 were permissible in nontaxable events?  
 12 A Could you repeat the question please?  
 13 Q Uh-huh. After 1984, I will say after  
 14 1983, and before the tax law change of 1986, were  
 15 you aware that there were circumstances where  
 16 borrowing from your pension account was perfectly  
 17 permissible?  
 18 MS. TRUHE: Objection. From what  
 19 perspective? Something can be permissible and  
 20 still taxable.  
 21 Q And nontaxable?

1 a little difficult for me to answer because there  
 2 have been so many tax laws, there are some things I  
 3 remember about 1986 but pension law changes are not  
 4 among them. However, I typically would look  
 5 carefully at a transaction involving borrowing  
 6 money from a pension, from a client's pension fund  
 7 even given the fact that another professional had  
 8 provided advice on it.  
 9 Q Okay. And in the period prior to the  
 10 1986 tax change from 1984 to 1986, you did not have  
 11 any familiarity with the specific ERISA provisions;  
 12 is that a fair statement?  
 13 A I was very aware of the particular  
 14 danger in borrowing money from one's own pension  
 15 plan. I do not recall at what point I became  
 16 highly sensitive to that whether it was 1984 or  
 17 later.  
 18 Q Okay.  
 19 A But I heard about it whenever that  
 20 became, whenever that law passed and that became a  
 21 sensitive subject because it was the topic of a

1 MS. TRUHE: Oh, and nontaxable.  
 2 A I do not recall the years but I do  
 3 recall that the rules tightened at some point in  
 4 the '80s and prior to the rule change, the  
 5 permissible borrowing transactions were broader,  
 6 the rules were looser. It was easier to do it is  
 7 my recollection.  
 8 Q Okay. Can you tell me in the '80s under  
 9 what circumstances could you borrow from your  
 10 pension account and have it be nontaxable?  
 11 A Not without consulting my reference  
 12 books.  
 13 Q Okay. What reference books, what  
 14 particular reference books are you referring to?  
 15 A Depending on how in depth you wish to  
 16 pursue it I could either go to, I could look for  
 17 abbreviated tax guides or into the code and the  
 18 regs or into full blown service analyses.  
 19 Q Okay. So what I -- would it be a fair  
 20 statement to say you can't tell me today without  
 21 consulting a reference book or doing research as to

1 what the nontaxable events were for borrowing from  
2 the pension plan in the '80s?

3 A I cannot recall, that's correct.

4 Q Do you remember when it was that you  
5 recalled that the rules tightened in the 1980s to  
6 make borrowing from your pension plan less easy,  
7 less nontaxable?

8 A No, I don't recall.

9 Q Okay. Have you been personally involved  
10 in any negotiations with the Internal Revenue  
11 Service regarding Mr. Shofer's tax problems?

12 A No.

13 Q Okay. How about with the department of  
14 labor, have you been personally involved in any of  
15 those negotiations?

16 A No.

17 Q Have you provided assistance to any  
18 other professional in connection with Mr. Shofer's  
19 dispute with the IRS?

20 A Possibly over the years to Mr. Taylor or  
21 one of the prior attorneys that worked with Mr.

1 A Yes.

2 Q All right. How about assistance to Mr.  
3 Taylor? What assistance have you provided to Mr.  
4 Taylor?

5 A Relating to the IRS audit?

6 Q Well, relating to Mr. Shofer's dispute  
7 with the IRS, his dispute with the department of  
8 labor or this litigation.

9 A We have had discussions about the  
10 deductibility of legal fees. I cannot recall any  
11 other specific assistance at the moment.

12 Q Okay. What did you do other than just  
13 discuss generally with Mr. Taylor the deductibility  
14 of legal fees to assist Mr. Taylor?

15 A I can't recall doing anything else  
16 specifically to assist Mr. Taylor.

17 Q Okay. Did you research the issue of  
18 deductibility of legal fees or did you just discuss  
19 that with Mr. Taylor?

20 A Both.

21 Q Okay. What did you research?

1 Shofer.

2 Q Do you remember who the prior attorney  
3 was that you might have provided assistance to?

4 A I'm trying to recall his name.

5 (Pause in the proceedings.)

6 A I believe I could obtain his name from  
7 my Rolodex. I cannot recall it at this moment.

8 Q Would it have been Mr. Giampetro, does  
9 that sound familiar?

10 A You inquired about the IRS. I don't  
11 recall talking with Mr. Giampetro about the IRS.  
12 I'm trying to recall the name of Mr. Taylor's  
13 predecessor.

14 Q Mr. Bornhorst?

15 A Yes. Might have been Mr. Bornhorst.

16 Q All right. What assistance did you  
17 provide to Mr. Bornhorst?

18 A I recall doing some research about IRS  
19 penalties. May have provided other assistance but  
20 I don't recollect.

21 Q Would that be delineated in your bills?

1 A Circumstances under which they could be  
2 considered corporate versus personal deductible  
3 expense. Circumstances under which they could be  
4 deductible at all.

5 Q Is there a separate file that you keep  
6 for the bills that you have charged Mr. Shofer or  
7 Mr. Shofer's business or Mr. Shofer's pension plan?

8 A I have paid bill files with these files.

9 Q Okay.

10 A They do not include the detailed  
11 transactions. They include the cover of the bill.

12 Q Okay. Where are the documents that  
13 contain the detailed transactions that the cover  
14 goes with?

15 A Our file copy is in the office for about  
16 two years and then they go into archives.

17 Q So the last bills that you would have  
18 currently in this office would be from '95 forward;  
19 is that accurate?

20 A I think we do.

21 Q Okay. Can you tell me the total amount

1 of charges that you have charged to Mr. Shofer for  
2 his tax work since June of '93?

3 A I don't recall that number off the top  
4 of my head.

5 Q Can you give me a rough estimate as to  
6 how much he has paid you since 1993? I mean more  
7 than 5,000?

8 A Under 50,000.

9 Q Has Mr. Shofer taken deductions for  
10 legal fees paid for the litigation of this case?

11 A I don't recall.

12 Q Okay. You would have to look at the  
13 actual returns?

14 A Yes.

15 Q Could you look through his personal  
16 returns and corporate returns so we could actually  
17 determine that?

18 (Pause for document review.)

19 A I found one.

20 Q Okay. What is the year?

21 A 1994.

1 show that?

2 (Pause for document review.)

3 A Yes.

4 Q Okay. Who were those legal fees paid  
5 to?

6 A I show 5,500 to Tom Bornhorst paid by  
7 Mr. Shofer directly. And an additional amount, I'm  
8 not sure I have the payee in this file but the  
9 amount is another 44,541 paid by the company but  
10 posted as a personal expense of Mr. Shofer's.

11 Q Can you tell from looking at your file  
12 as to why that would be posted as a personal  
13 expense if it was paid by Mr. Shofer's company?

14 A It appears that the amounts paid by Mr.  
15 Shofer's company relate to the Hack case. There is  
16 a description on some of the transactions  
17 indicating that. And that would be consistent with  
18 the decision of where those legal fees were going  
19 to be deducted.

20 Q Now, when you would prepare Mr. Shofer's  
21 taxes, would he fill out a questionnaire for you?

1 Q All right. Personal deduction or  
2 corporate deduction?

3 A I show personal deduction.

4 Q Does it have an amount and a breakdown  
5 as to who the payees were?

6 A The amount is 10,041. Which is carried  
7 forward to schedule A miscellaneous, meaning he  
8 does not obtain the full value of the deduction. I  
9 may have one further caveat.

10 (Pause in the proceedings.)

11 A Furthermore, in that year he was subject  
12 to alternative minimum tax so that the portion of  
13 the legal fees that were permitted as miscellaneous  
14 deductions, are added back in the figuring of the  
15 Alt Min tax. So the benefit is somewhat complex to  
16 determine. And the description is legal fees  
17 relating to preservation of income.

18 Q On the Schedule A does it show who the  
19 legal fees were paid to?

20 A No.

21 Q Is there a supporting document that does

1 A I don't recall.

2 Q How would you get the information to  
3 prepare his tax returns?

4 A Most of the information would be  
5 organized for us by his in-house accountant.

6 Q Karl Auch?

7 A Yes.

8 Q Did you file Mr. Shofer's federal and  
9 state tax returns and the federal and state returns  
10 for his business or did you give those back to him  
11 after they were prepared for him to file?

12 A The latter.

13 Q Okay. Do you know when it was, can you  
14 tell if --

15 MS. TRUHE: I need to take a quick  
16 break.

17 (Brief recess.)

18 Q Did you do a memo for the research that  
19 you did for Mr. Taylor regarding the deductibility  
20 of legal fees?

21 A No.

1 Q Do you remember what it was you told Mr.  
2 Taylor about the deductibility of legal fees?

3 A I have not concluded on that.

4 Q Okay. In 1995, can you tell me what  
5 deductions, actually 1995, what deductions Mr.  
6 Shofer took for legal fees and who the payees were?

7 (Pause for document review. )

8 A I show a total amount deducted for legal  
9 fees of \$44,618.

10 Q Okay.

11 A Again reported as Schedule A  
12 miscellaneous so that the affected value of that  
13 deduction would not be equal to the full amount.

14 (Pause for document review.)

15 A I have located checks paid out of Mr.  
16 Shofer's personal account to Tom Bornhorst for  
17 6,500 of that amount. Shall I continue looking for  
18 the rest? I suspect it may have flowed through the  
19 company again.

20 Q Yeah, would you?

21 (Pause for document review. )

1 A I serve as an advisor and sounding board  
2 to Mr. Shofer.

3 Q As to what issues?

4 A Business, personal, financial and tax  
5 related.

6 Q Do you have Mr. Shofer sign an  
7 engagement letter every year, have you done that  
8 since 1993?

9 A No.

10 Q How many engagement letters do you have  
11 with Mr. Shofer?

12 A We have the initial engagement letter  
13 for the first tax returns that were prepared.

14 Q All right.

15 A And we have an engagement letter for  
16 some compiled financial statements that we did a  
17 couple of years ago I think. That typically would  
18 be all that we would have. I could double check  
19 the file. Typically we do an engagement letter for  
20 the first engagement, whatever it is, and we always  
21 do an engagement letter when we perform some type

1 A I have a note that there were legal fees  
2 paid to Doug Taylor paid through Crown in the  
3 neighborhood of over \$20,000.

4 (Pause for document review.)

5 Q Well, let's do this: Since June of  
6 1993, have you provided the same services to Mr.  
7 Shofer? That is you've done his returns, you've  
8 done the returns of the business and you've done  
9 the returns for the pension plan?

10 A Yes.

11 Q Okay. And is it --

12 MS. TRUHE: Did you just find something?

13 THE WITNESS: Yes.

14 Q Is it a fair statement to say the only  
15 additional services you have done on top of those  
16 accounting services has been to render some  
17 assistance to Mr. Bornhorst with research and some  
18 assistance to Mr. Taylor with research?

19 A No.

20 Q Okay. What other services have you  
21 provided?

1 of CPA accounting services be it a compilation or a  
2 review.

3 Q I would like you to check in the file  
4 for that. Before you move on what did you find out  
5 about the legal fees for 1995?

6 A I haven't located the summary schedule.  
7 I found a reference back to Mr. Shofer's personal  
8 account there was another classification area in  
9 addition to the one for Tom Bornhorst and it  
10 includes \$16,350 of expenses mostly to Blum,  
11 Yumkas.

12 Q Okay. Can I also see, while you're  
13 flipping through the file, can I see your initial  
14 engagement letter?

15 A Sure. I believe that's it.

16 Q Did you find any other engagement  
17 letters?

18 (Document tendered.)

19 A Yes.

20 Q Is this the only other engagement  
21 letter?

1 A Yes.

2 Q Okay. Maybe we could get copies of

3 these because I would like to mark these as

4 deposition exhibits. And also could you go and get

5 whatever bills you have, the supporting bill

6 information for the cover sheets that are in these

7 files you have that hasn't been archived?

8 A I can. It will take a while because

9 they are not filed by client. They are filed by

10 month with all our clients in each month. So one

11 would have to go through each.

12 Q How long would that take?

13 A Maybe 20 minutes.

14 MS. TRUHE: What do you have in the file

15 now as far as billing? Do you have copies of bills

16 submitted to --

17 THE WITNESS: Yes.

18 MS. TRUHE: Let's see what those look

19 like.

20 MS. WHELIHAN: Maybe we can go off the

21 record.

1 A In 1993 or early 1994.

2 Q Were those returns -- strike that.

3 Do you know when Mr. Shofer's 1993

4 return was prepared?

5 A Which return?

6 Q For the tax year 1993, I'm sorry.

7 A Corporate?

8 Q Corporate and personal.

9 A I could tell by looking at my file.

10 Q Okay. Look at your file.

11 (Pause for document review.)

12 A Could you repeat the year again?

13 Q 1993.

14 A Corporate return I signed on September

15 6, 1994. 1993 personal return I don't have here.

16 Q That was probably archived?

17 A I might have other sources for that

18 date. Outside of this room.

19 Q For the corporate tax return, was Mr.

20 Shofer granted extensions up to the point where he

21 had you prepare and you sent him his tax return?

1 MS. TRUHE: While we sort this out.

2 MS. WHELIHAN: Yes.

3 (Discussion held off the record.)

4 Q Is the Shofer account with you totally

5 paid up? Have you been paid for all of the

6 accounting work that you have done?

7 A I believe so.

8 Q Okay.

9 MS. TRUHE: Are these all the bills you

10 submitted since you have begun working?

11 THE WITNESS: No, there is more in this

12 folder. That's an example. I don't know if there

13 is a current open bill or not. There may be.

14 MS. TRUHE: Can I see the past ones?

15 THE WITNESS: Sure.

16 (Document tendered.)

17 Q You did prepare Mr. Shofer's 1992 and

18 1991 returns?

19 A Yes.

20 Q Do you know when those returns were

21 prepared?

1 A For what year?

2 Q For 1993.

3 A I would have to consult the file. I

4 expect so.

5 Q Okay.

6 (Pause for document review.)

7 Q While you're looking for that, could you

8 tell me what the reason given was in the extension

9 request that was beyond the automatic extension?

10 (Pause for document review.)

11 A The date of figures is within the

12 automatic extension period for a corporate return.

13 It's six months, March 15 to September 15 so there

14 is no reason necessary to be given. Yes, I have an

15 extension form timely dated.

16 Q Okay. What other sources would you look

17 for to see whether or not, for when it was he filed

18 his personal return if not in the file where you

19 were going to look?

20 A Our log.

21 Q Do you have a log that has the dates of



1 when things get given to the client?

2 A We have logs. I think I can put my  
3 hands on 1993.

4 Q How long would that take?

5 A If it's in the office it will take five  
6 minutes or less.

7 Q Okay. Will that cover all of the years  
8 1993, '94, '95?

9 A It should be all together.

10 (Brief recess.)

11 A Ready.

12 Q Okay. So when did, when was the 1993  
13 personal return filed or given to Mr. Shofer for  
14 filing?

15 A It was given to him on July 18, 1994.

16 Q How about the 1994 personal return, when  
17 was that given to Mr. Shofer to file?

18 A August 15th, '96. Could I just check  
19 that year one more time?

20 Q Sure.

21 A The year might not have been on the log.

1 some of the taxes, penalties and interest that he  
2 owed for prior tax years?

3 A Yes.

4 Q Do you know when it was that those  
5 taxes, penalties and interest were paid and in what  
6 amounts?

7 A I believe some payments have been made  
8 over a period of years. I recollect that a  
9 significant amount was paid in December, I believe  
10 that's the right one, December of '96 but I do not  
11 know amounts or how they were allocated.

12 Q Do you know where the money came from in  
13 December of 1996 to pay those outstanding taxes,  
14 interest and penalties owed to the IRS and to the  
15 state of Maryland?

16 A I do not recall.

17 Q Since you became Mr. Shofer's accountant  
18 and financial advisor, have you ever given Mr.  
19 Shofer any advice about the payment of the taxes,  
20 penalties and interest that he owed for the prior  
21 tax years?

1 I'm sorry. '96 is right because the corporate  
2 return was in '96. Yes.

3 Q Okay. In 1996?

4 A 1996?

5 Q Yeah.

6 A That's not yet been filed.

7 Q Okay. When do you anticipate filing Mr.  
8 Shofer's 1996 personal tax return?

9 A Possibly by August 15th.

10 Q Why hasn't that return been filed?

11 MR. TAYLOR: Let me just object for the  
12 record. You can answer.

13 A I don't recall.

14 Q Okay. As Mr. Shofer's financial  
15 advisor, are you aware of the taxes, penalty and  
16 interest that he owed to the IRS and to the  
17 comptroller of the treasury for the state of  
18 Maryland for the prior tax years?

19 A Not the amounts.

20 Q Okay. As Mr. Shofer's financial  
21 advisor, have you learned that Mr. Shofer has paid

1 A I believe in early discussions I would  
2 have advised the high cost of tax liabilities  
3 outstanding and discussed the advisability of  
4 retiring as soon as possible or settling them. We  
5 have not discussed it within recent memory.

6 Q Okay. Do you remember when those early  
7 discussions took place?

8 A Not within the past year and a half to  
9 two years. It would have been the first couple of  
10 years that we were on the account.

11 Q Would those discussions be referenced on  
12 the supporting information that is used to develop  
13 your cover letter bill?

14 A Possibly.

15 Q Okay. Are you aware of the amount  
16 annually that Mr. Shofer has paid for legal fees in  
17 connection with either the Hack litigation or other  
18 litigation that he has been involved in?

19 A I have had access to those amounts in  
20 reviewing the tax returns, the amounts that were  
21 reported to us as deductible.

1 Q As Mr. Shofer's financial advisor, have  
2 you ever had any discussions with him about  
3 retiring the IRS and state of Maryland debts before  
4 paying the attorneys fees or in lieu of paying the  
5 attorneys fees?

6 A No.

7 Q What types of financial advice have you  
8 given to Mr. Shofer since you became his financial  
9 advisor?

10 MR. TAYLOR: I object to the question.  
11 But you can answer it.

12 A Mr. Shofer is knowledgeable financially  
13 and tends to use me as a sounding board for  
14 strategies. One area where we spent time over the  
15 years has been obtaining financing which he has  
16 said he needed badly for his business. We also  
17 talked early on in the relationship about  
18 retirement strategies but at a fairly superficial  
19 level. Other discussions and advice centered  
20 around taxes and possible strategies. We also  
21 discussed this case and some other legal issues as

1 issues that we have discussed other than the Hack  
2 case.

3 Q Do you mean other litigation matters?

4 A Yes. And of course audits, disputes  
5 with governments.

6 Q Although as, correct me if I'm wrong, in  
7 your prior testimony you have not been personally  
8 involved in the audits; is that right?

9 A That's correct.

10 Q The other litigation matters that you  
11 discussed, are those litigation matters that have  
12 been filed and are currently being litigated by Mr.  
13 Shofer or are these claims that have not yet been  
14 brought?

15 MR. TAYLOR: I object to the question.  
16 You can answer it if you want. But I don't want to  
17 get too far afield in other matters.

18 MS. WHELIHAN: That's why I asked the  
19 question the way I did.

20 A The matter that particularly comes to  
21 mind is a dispute, a claim, I cannot recall if it's

1 relates to the financial side over the years.

2 Q Can you tell me what you discussed about  
3 this case as Mr. Shofer's financial advisor with  
4 him?

5 A Many of the mentions of this case and  
6 discussions of this case revolved around the way it  
7 has hindered him in obtaining financing for his  
8 business. We have also discussed how much of his  
9 time and energy is consumed and distracted from  
10 pursuing his business. There may have been other  
11 areas that I'm not recalling at the moment.

12 Q Okay. What legal issues have you  
13 discussed with him as relates to the financial  
14 side?

15 MR. TAYLOR: I object to the question  
16 but you can answer it if you can.

17 Q Well, let me strike the question. You  
18 had actually said that you discussed with him legal  
19 issues as they relate to the financial side. I was  
20 just wondering what you meant by that?

21 A There is one or more other pending legal

1 in litigation or not.

2 Q So there is just one other matter?

3 A That I'm remembering at the moment.

4 Q Did that involve Blum, Yumkas?

5 A I don't recall.

6 Q Okay. This is probably not a  
7 particularly fair question given your prior  
8 testimony but what opinions do you have, expect to  
9 render in this case if you testify at trial on June  
10 26 or during that trial period?

11 A I don't know.

12 MS. WHELIHAN: I don't have any further  
13 questions.

14 EXAMINATION BY MS TRUHE:

15 Q Mrs. Martucci, is that how you pronounce  
16 your name?

17 A Yes.

18 Q All right. I'm Janet Truhe and I  
19 represent Stuart Hack and The Stuart Hack Company.  
20 I just have a few questions. First of all with  
21 respect to the billing sheets which you have given

1 us, they appear to go from August 2nd of 1993 to  
2 March 1 of 1997, correct?

3 A Yes.

4 Q I note that in each of these cases on  
5 each of these bills, the bill is directed to Crown  
6 Motors, correct?

7 A Yes.

8 Q Is that who you have an  
9 accountant/client relationship with?

10 A Among others.

11 Q Who is your client in this case?

12 A In what case?

13 Q Well, I am curious. As far as your  
14 office is concerned, who is the client, Crown  
15 Motors or Richard Shofer?

16 A We have three clients. And I did not, I  
17 don't think I pulled the bill file for Richard  
18 Shofer personally. He is a client, the company is  
19 a client and the pension trust is a client.

20 Q I see. So you would bill --

21 A Separately.

1 A I do not recall.

2 Q Well, at the time you first started  
3 doing it, were you satisfied that any fees which  
4 Mr. Shofer had expended in connection with the Hack  
5 litigation were deductible?

6 A We satisfied ourselves each year on that  
7 count to the extent we were prepared to defend it  
8 if we had to.

9 Q Do you know who had paid these various  
10 lawyers such as Mr. Taylor and Mr. Bornhorst? Do  
11 you know whether Mr. Shofer personally paid their  
12 legal fees or whether Crown Motors paid their legal  
13 fees?

14 A In the two files that we just looked at  
15 it was a combination where Crown paid some of them  
16 and charged it to his personal account and Mr.  
17 Shofer had paid other fees from his personal  
18 account directly.

19 Q When you say Crown Motors charged his  
20 personal account, what do you mean?

21 A Recorded it as an advance to the owner

1 Q For those three clients?

2 A Yes.

3 Q With respect to the billing you do to  
4 Richard Shofer personally, who has paid those  
5 bills? Has Mr. Shofer paid them personally or has  
6 some person or entity paid those on his behalf?

7 A I wouldn't have direct knowledge of  
8 that.

9 Q I thought you testified earlier that  
10 with respect to the deductibility of legal fees in  
11 connection with the Stuart Hack litigation that you  
12 had not yet come to a final determination as to  
13 whether they were deductible or not?

14 A There is a question relating to a  
15 possible change in strategy about how we would  
16 deduct them that Mr. Shofer posted to me and I have  
17 not concluded on that question.

18 Q When did you first begin showing  
19 deductions for legal fees on Mr. Shofer's personal  
20 tax returns? Would that be from the outset of your  
21 relationship?

1 or personal experience of the owner that would have  
2 to be settled at the corporation.

3 Q Ultimately you regarded the legal fees  
4 as something which was the responsibility of Mr.  
5 Shofer personally to pay regardless of whether  
6 Crown Motors initially fronted the money?

7 A I'm not sure who made that determination  
8 but that's how it ended up being treated on the tax  
9 returns.

10 Q Why are legal fees deductible on a  
11 personal tax return in connection with a legal  
12 matter?

13 A If they relate to the preservation of  
14 income or the collection of income, they could be  
15 deductible. There might be other reasons.

16 Q You mentioned that reason being the  
17 preservation of income. Can you tell me what you  
18 mean by that? Whose income, first of all, is being  
19 preserved here, Mr. Shofer's or Crown Motors?

20 A If it relates to a personal item it  
21 would have to be Mr. Shofer's income.

1 Q Are those legal fees deductible?

2 A The legal fees that we deducted on his  
3 personal returns?

4 Q Let's back up. As I understand it, you  
5 have deducted or shown as deductions on certain  
6 personal tax returns of Mr. Shofer legal fees which  
7 he has paid or is going to pay in connection with  
8 the Hack litigation?

9 A He would have had to have paid them to  
10 be regarded as deductible.

11 Q Is that true even in the situation where  
12 Crown Motors has paid the bill and shown it as an  
13 expense to the owner? In other words, do you know  
14 whether Mr. Shofer has paid the debt back to Crown  
15 Motors in each case?

16 A I don't know off the top of my head.

17 Q But you're satisfied as long as its  
18 shown as a personal expense to Mr. Shofer, that it  
19 is properly deductible?

20 A I'm satisfied that our treatment was  
21 consistent during the time that we prepared the

1 A If it was deducted on a personal return  
2 our logic at that time would have had to have been  
3 that it was Mr. Shofer's income.

4 Q If I understand you correctly, if an  
5 individual spends money on legal fees to preserve  
6 his or her personal income, that those fees would  
7 be deductible?

8 A Might be. Should be looked at for that.

9 Q And what is the discussion now in  
10 connection with the deductibility of legal fees?  
11 You mentioned other strategies or opportunities for  
12 deducting legal fees. What is that all about?

13 A A question has been raised as to whether  
14 we should reexamine the strategy to look at whether  
15 the legal fees are not more appropriately a  
16 corporate expense.

17 Q And again with respect to all of your  
18 testimony in connection with legal fees, we are  
19 referring to legal fees which Mr. Shofer has paid  
20 to various lawyers in connection with the Hack  
21 litigation?

1 personal returns. We're looking at a question now  
2 as to whether the strategy has other opportunities  
3 for Mr. Shofer.

4 Q All right. I understand that. In the  
5 past the reason you showed a personal deduction for  
6 legal fees was because they were expended in  
7 connection with the quote/unquote preservation of  
8 income, correct?

9 A Correct.

10 Q What income is it that is being  
11 preserved?

12 A I would have to consult the files and  
13 look at what our write up was of the reason.

14 Q Can you do that now?

15 A I can try. It's possible that our  
16 analysis is filed with the earliest tax return that  
17 we did but I could look.

18 Q Can you remember off the top of your  
19 head whether this income everyone was trying to  
20 preserve was Crown Motors income or Mr. Shofer's  
21 income or both?

1 A That's my understanding.

2 Q You said when Mr. Shofer came to you he  
3 referred to Mr. Hack as his pension advisor,  
4 correct?

5 A Yes.

6 Q Do you know who Mr. Hack and his  
7 company's actual client was legally?

8 MR. TAYLOR: I will object to the  
9 question but you can answer it if you can.

10 A I don't have direct knowledge of that.

11 Q Was it your understanding that Mr.  
12 Shofer was personally a client of Mr. Hack and his  
13 firm or was Mr. Hack --

14 A No, that is not my understanding.

15 Q What was your understanding?

16 A I have to convey this as an assumption.  
17 From my general experience the client would be the  
18 corporation and possibly the pension trust.

19 Q Did Mr. Shofer ever discuss with you at  
20 any time the reasons why he began borrowing from  
21 the pension in the mid-'80s?

1 A Yes.

2 Q What did he tell you were the reasons?

3 A I don't recall. Excuse me. I believe

4 it related to his bank financing for the company.

5 Q Was it your understanding that the bank

6 was requesting or putting some pressure on Mr.

7 Shofer to make some progress with his line of

8 credit there?

9 A I believe so.

10 Q Do you know whether Mr. Shofer had any

11 other possible sources to turn to other than his

12 pension in order to make progress on that line of

13 credit? Did I ever discuss that issue with you?

14 A I don't recall.

15 Q Don't recall whether you discussed it or

16 don't recall whether he had other sources, which is

17 it?

18 A Both.

19 Q You mentioned earlier that you never had

20 a client who borrowed from his or her pension.

21 Let's go back to pre1986. Assume for a moment that

1 said no. I believe the reason was the limit at

2 that time was \$50,000. He pressed on and was still

3 interested. I believe there were further terms

4 that had to be repaid in a fairly short period of

5 time, like five years. I particularly remember

6 that case.

7 Q When you say the limit was \$50,000, do

8 you mean the limit he could borrow tax free or the

9 limit period?

10 A I believe so.

11 Q The limit he could borrow tax free?

12 A That wouldn't be classified as a

13 distribution.

14 Q I see.

15 A That's my recollection.

16 Q All right. And again as an accountant

17 exercising ordinary care you were able to spot that

18 issue?

19 A Yes.

20 MS. WHELIHAN: Objection.

21 Q Do you believe other accountants --

1 you did have a client come to you like Mr. Shofer

2 who had borrowed from his pension. Assume first of

3 all that he did not tell you anything with respect

4 to the taxability of any of these monies. You

5 simply knew as revealed on a summary sheet that he

6 had borrowed let's say \$200,000 from his pension.

7 And again we're speaking with reference

8 to prior to 1986. Would you as an accountant

9 exercising ordinary care at least know to flag that

10 as an issue and to do the research?

11 MR. TAYLOR: Objection. Answer if you

12 can.

13 MS. WHELIHAN: I also object.

14 Q You can answer.

15 A Actually a case almost on point with

16 that occurred in my practice. I believe it was

17 prior to 1986 and I don't know if the amount was

18 200,000 but it would have been a six-digit number

19 with a client who had a corporate pension plan. He

20 had not yet borrowed the money. He wanted to.

21 With some cursory research I got back to him and

1 strike that. I'm sorry.

2 I realize that was not a hypothetical.

3 Let's change that to something more of a

4 hypothetical. Assume that individual already

5 borrowed the six-digit amount from the pension and

6 came to you for purposes of preparing his personal

7 income tax return. Would you know, and again

8 talking pre1986, would you know the proper tax

9 treatment of that money?

10 MR. TAYLOR: Objection.

11 MS. WHELIHAN: Objection.

12 MR. TAYLOR: You can answer.

13 A May I clarify the question?

14 Q Yes.

15 A I'm preparing the 1040 personal tax

16 return?

17 Q Yes.

18 A Has the client asked me if he can, how

19 he should report this or am I supposed to pick this

20 up by picking through the documents he has given me

21 to prepare the return?

Page 65

1 Q Assume he has given you a summary sheet  
 2 in which he shows monies borrowed from the pension  
 3 and interest that he has paid back to the pension  
 4 on those monies. Would you know generally whether  
 5 there was an issue there concerning the  
 6 deductibility of any of that money?  
 7 MS. WHELIHAN: Objection.  
 8 A **I believe I would have.**  
 9 Q Do you believe other accountants in the  
 10 community in Maryland pre1986 exercising reasonable  
 11 care would have known to see that as an issue as  
 12 well?  
 13 MS. WHELIHAN: Objection.  
 14 MR. TAYLOR: Objection.  
 15 A **The basis for my being certain of my**  
 16 **answer was this case which stuck in my memory. It**  
 17 **would be hard for me to say yes or no as to what**  
 18 **other general practice accountants would pick up**  
 19 **and how much evidence it would take to flag**  
 20 **something.**  
 21 Q Assume for purposes of my question that

Page 66

1 again in each case the client has come to the  
 2 accountant with a summary sheet showing mortgage  
 3 interest for example, interest paid to pension for  
 4 loans and in the amount of X. Would other  
 5 accountants such as yourself or like yourself,  
 6 exercising reasonable care in the community in  
 7 Maryland pre1986 at least know to spot that as an  
 8 issue and perhaps do further research?  
 9 MS. WHELIHAN: Objection.  
 10 MR. TAYLOR: Objection, but you can  
 11 answer.  
 12 A **My opinion is that most CPAs probably**  
 13 **would.**  
 14 Q Thank you.  
 15 You also mentioned in response to one of  
 16 Ms. Whelihan's questions in this area that even if  
 17 a client had come to you and told you what another  
 18 professional had said regarding the tax  
 19 deductibility of a loan from a pension that you  
 20 would, nevertheless, look at it carefully yourself,  
 21 correct?

Page 67

1 MR. TAYLOR: Object.  
 2 MS. WHELIHAN: Objection.  
 3 Q Does that accurately restate your  
 4 testimony on that issue?  
 5 MS. WHELIHAN: Objection.  
 6 A **Could we go again?**  
 7 Q Sure. Assume for example -- let's take  
 8 Mr. Shofer. Let's assume in the mid-1980s prior to  
 9 1986 he had come to you and said I borrowed  
 10 \$200,000 from my pension and Mr. Hack says it's  
 11 not -- says it's all deductible or whatever or none  
 12 of it is -- let's do it this way: Let's start over  
 13 again. Assume Mr. Shofer comes to you in the  
 14 mid-1980s prior to 1986, and tells you he has  
 15 borrowed \$200,000 from his pension, and that Mr.  
 16 Hack, who is a pension administrator for the  
 17 company, has told him that none of this is taxable  
 18 income to him.  
 19 Would you have done any of your own  
 20 research at that point or would you have felt  
 21 comfortable relying completely on your client's

Page 68

1 representations as to Mr. Hack's opinion?  
 2 MR. TAYLOR: Objection.  
 3 MS. WHELIHAN: Objection.  
 4 MR. TAYLOR: You may answer if you can.  
 5 A **I would say under normal circumstances,**  
 6 **I would question it further. I might call Mr.**  
 7 **Hack.**  
 8 Q And why is that?  
 9 MS. WHELIHAN: Objection.  
 10 Q Why would an accountant in general do  
 11 that?  
 12 MS. WHELIHAN: Objection.  
 13 A **Because of a sensitivity to the**  
 14 **stringent rules imposed by ERISA and a practice**  
 15 **such as mine, a relatively small business practice,**  
 16 **the unusual nature of the transaction.**  
 17 Q Do you believe that your independently  
 18 verifying the accuracy of that opinion, is  
 19 something incumbent upon you as an accountant  
 20 legally or is that just something special to you?  
 21 MR. TAYLOR: Objection.

1 MS. WHELIHAN: Objection.  
2 Q In terms of relying on the advice of  
3 others or do you even have an opinion one way or  
4 another on that?

5 MS. WHELIHAN: Objection.  
6 A I know for sure it's something we try to  
7 do as a philosophy to be proactive. I couldn't  
8 state with certainty whether and how it's incumbent  
9 as a matter of professional practice.

10 Q But would it be fair to say that when  
11 you say it is something we try to do, it is  
12 something that accountants in general do whenever  
13 they are told the opinions of others?

14 MR. TAYLOR: Objection.

15 MS. WHELIHAN: Objection.

16 A I couldn't comment on the general  
17 practice except to the extent that most accountants  
18 don't want to get involved in a case like this and  
19 they do whatever they can, whatever they feel is  
20 reasonable to investigate in transactions. It's a  
21 judgment question.

1 MR. TAYLOR: I just had a couple  
2 questions.

3 EXAMINATION BY MR. TAYLOR:

4 Q Since 1993 when you first commenced work  
5 for Mr. Shofer, the corporation and the pension  
6 entity, have you provided any services or done any  
7 work on any issues that might be related to the  
8 loan or loans Mr. Shofer took from the pension and  
9 trust?

10 A Yes. Related to that.

11 Q Would you be able to express in  
12 percentage terms of the amount of work that you  
13 have done? In other words, if we look at the total  
14 of being 100 percent, what would be the percentage  
15 of that work that you might have attributed to any  
16 of the services related to the loans?

17 MS. WHELIHAN: Objection.

18 Q Is it possible to quantify it in that  
19 way in a percentage fashion?

20 A I have not been asked to do that and I  
21 don't think I could do it sitting here today. I'm

1 Q Do you believe that an accountant who is  
2 preparing a personal income tax return should know  
3 what is taxable and what is not?

4 MR. TAYLOR: Objection.

5 MS. WHELIHAN: Objection.

6 A An accountant is prepared and should be  
7 aware of where to raise questions and look further.  
8 However, the tax law is very complex.

9 Q Do you have any understanding or  
10 information as to how it came to be that Grabush,  
11 Newman eventually decided that there was some  
12 taxable income to Mr. Shofer as a result of his  
13 borrowing from the pension? Do you know how all of  
14 that came to pass?

15 A No.

16 MS. TRUHE: That's all I have. Thank  
17 you.

18 MS. WHELIHAN: I just have a couple. Do  
19 you want to go first?

20 MR. TAYLOR: I--

21 MS. WHELIHAN: You go first.

1 not sure how I would approach doing that at the  
2 moment.

3 Q I haven't looked at your two engagement  
4 letters which I understand will make a part of this  
5 record but do the engagement letters set forth your  
6 hourly rate that you were charging Mr. Shofer for  
7 accounting services?

8 A No.

9 Q They do not. Do your billing records  
10 reflect those hourly rates?

11 A The detail billing records which is in  
12 the files.

13 Q When you began work for Mr. Shofer or  
14 his corporation or the pension entity in 1993, what  
15 was your hourly rate, if you recall?

16 A It might have been 150 or possibly even  
17 135.

18 Q And --

19 MS. WHELIHAN: Thanks, Doug for telling  
20 us it was 150.

21 Q Did there come a time when it changed,

1 your hourly rate?

2 A Yes.

3 Q What's your present hourly rate?

4 A 160 an hour.

5 Q When did that rate go to 160 an hour?

6 A I think almost two years ago.

7 Q Okay.

8 A Maybe even earlier.

9 Q Is there anything in connection with any  
10 of the testimony that you have given up to this  
11 point that you might wish to elaborate on?

12 MS. WHELIHAN: That's an interesting  
13 question.

14 MS. TRUHE: Objection.

15 MS. WHELIHAN: Yeah, I will object to  
16 that.

17 (Pause in the proceedings.)

18 A Ms. Truhe's last question which I either  
19 answered no or I don't recall, I did have a sense  
20 afterwards that I might have known a little bit  
21 about that question. If you would like to go back,

1 invoice, would you have a record of that so you  
2 could go back and find out who paid what?

3 A Not in an organized fashion. Some of  
4 that probably exists in our back up of tax  
5 deductions taken for accounting fees. Just as I  
6 found legal fees in the 1040 files, there may be  
7 some incidental information on that. But we don't  
8 keep regular copies of checks or anything.

9 Q For Catalina do you prepare the 990-T?

10 A Yes.

11 Q Do you get any information from Pension  
12 Services Limited?

13 A Yes. We communicate with them.

14 Q Okay. In your practice when you have  
15 clients who have pension advisors or consultants,  
16 do you communicate with those pension advisors or  
17 consultants for information regarding the pension,  
18 the clients pension?

19 A The clients personal portion of the  
20 plan?

21 Q Right.

1 we could read your last question again.

2 Q I'm not sure what Ms. Truhe's last  
3 question was.

4 A I did have a sense afterwards.

5 MS. TRUHE: What was the topic?

6 THE WITNESS: It was back to Grabush,  
7 Newman filing amended returns or corrections  
8 relating to the distribution.

9 MS. TRUHE: I think my question was  
10 about how that came to pass.

11 THE WITNESS: How that came to pass.

12 MS. TRUHE: They suddenly decided there  
13 was taxable income there.

14 THE WITNESS: No. I don't know how it  
15 came to pass. That's all.

16 MR. TAYLOR: All right. I don't think I  
17 have any other questions for you.

18 REEXAMINATION BY MS. WHELIHAN:

19 Q Do you keep records of who pays your  
20 bills? In other words if Mr. Shofer paid the bills  
21 for Crown Motors or Crown Motors paid Mr. Shofer's

1 A Like Dick Shofer's account?

2 Q Right.

3 A Yes.

4 Q All right. Do you rely upon those  
5 pension consultants for the information regarding  
6 the pension?

7 MS. TRUHE: Objection. What kind of  
8 information?

9 MS. WHELIHAN: The information regarding  
10 the pension.

11 MS. TRUHE: Any type?

12 MS. WHELIHAN: Any type of information  
13 regarding the pension.

14 A We question it with a reasonableness  
15 test usually.

16 Q Okay. In the case that you had a client  
17 consider borrowing money from his pension where you  
18 did research pre1986, did you consult, as part of  
19 your research, with the pension consultant or  
20 advisor for that particular client?

21 A I may have.



1 Q But you don't remember today whether you  
2 did?

3 A I don't remember today. I remember that  
4 we did the research ourselves. We may have backed  
5 it up with a telephone call. That would be the  
6 kind of thing I would do.

7 Q When you say backed up with a telephone  
8 call, called the pension consultant or advisor to  
9 verify whether or not your research results were  
10 correct?

11 A Yes.

12 Q Okay. Earlier when Mr. Taylor was  
13 asking you if there was anything you wanted to  
14 amplify as part of your testimony, were you going  
15 to discuss anything about Mr. Shofer's amended  
16 returns and filing amended returns? Is that what I  
17 understood you to start saying?

18 A I knew and recalled a little bit about  
19 that process.

20 Q Okay.

21 A And was concerned that my no was too

1 MS. TRUHE: Objection.

2 Q As promulgated by the AICPA?

3 A My recollection is that its a standard  
4 by the IRS for tax practitioners. I believe there  
5 is a set of ethical standards.

6 Q Okay.

7 A But nevertheless, it's a standard that  
8 we must follow.

9 Q Okay.

10 MS. WHELIHAN: I don't have any other  
11 questions.

12 REEXAMINATION BY MS. TRUHE:

13 Q Do you know whether a tax payer has a  
14 legal duty to file an amended return when he has  
15 not reported income due to a mistake?

16 MR. TAYLOR: Objection. I am not sure  
17 that purports the facts.

18 Q Do you know whether a tax payer has a  
19 legal duty to file an amended tax return when he or  
20 she discovers that they have additional taxable  
21 income which was not reported due strictly to

1 blanket.

2 Q Are you aware in this litigation that  
3 Mr. Hack told Mr. Shofer not to file amended  
4 returns to identify the additional taxable income?

5 MS. TRUHE: Objection. I don't think  
6 that states the evidence quite right.

7 Q Do you have any understanding as to what  
8 advice, if any, Mr. Shofer received from Mr. Hack  
9 regarding the filing of amended returns?

10 A I have a sense that he advised or that  
11 there was discussion of just not filing the amended  
12 returns. My recollection is unclear beyond that.

13 Q Okay. As an accountant when you have a  
14 client who you discover has additional taxable  
15 income, do you ever advise that client not to file  
16 amended returns?

17 MS. TRUHE: Objection. You may answer.

18 A I always advise that you have to file an  
19 amended return in such a case.

20 Q And is that because that is the standard  
21 with respect to accountants?

1 mistake?

2 A Yes. The tax payer does have such a  
3 duty in practice depending on the amount of the  
4 mistake. Sometimes a mistake is corrected in the  
5 next year if it's picked up quickly. But yes.

6 Q Can you tell me the law or case or  
7 statute on which you're relying for that  
8 proposition?

9 A No. My recollection of where I would  
10 trace my knowledge is the tax practitioners  
11 guidelines promulgated by the IRS that I was  
12 referring to in prior questioning.

13 Q In response to Mr. Taylor's question  
14 concerning advice regarding the pension loans, did  
15 I understand your testimony correctly that you have  
16 rendered some advice in that area?

17 A I think the testimony was more have I  
18 done work related to that.

19 Q What type of work have you done related  
20 to these loans that were taken by Mr. Shofer in the  
21 mid-'80s? What has that --

1 A One example that comes to mind is I  
2 believe we did compile financial statements for the  
3 pension plan a year or two ago and had to make some  
4 accounting entries relating to the value of the  
5 plan and some footnotes explaining the DOL audit  
6 and the current status and I think the resolution  
7 at that time. That was something that came to my  
8 mind when he asked that question.

9 Q That was in connection with compiling  
10 financial statements for the pension plan?

11 A I believe so.

12 Q That was done for your client the  
13 pension plan, correct?

14 A Yes.

15 Q Would the pension plan have been billed  
16 for those services?

17 A Yes.

18 Q In connection with those general  
19 services concerning work on the pension loans which  
20 Mr. Shofer took in the mid-'80s, would the plan  
21 have been billed for anything relating to that?

1 A Because the discussions, the activity  
2 related to the department of labor audit, the  
3 pension plan, it had been a corporate audit, would  
4 have billed the company.

5 Q Is it fair to say that any service which  
6 you have rendered in connection with the pension  
7 loans has been something done for your client, the  
8 pension?

9 A I couldn't really say that without going  
10 back and looking at it and studying it.

11 Q But so far every example we talked about  
12 thus far has been work you have done on the pension  
13 loans for your client, the pension, correct? I'm  
14 talking now about the financial statement as well  
15 as the department of labor audit, those were billed  
16 to the pension?

17 A There were interrelated issues with the  
18 company and with Mr. Shofer personally.  
19 Particularly related to the DOL audit which make it  
20 impossible for me to answer with certainty that  
21 everything was billed to the pension plan. I mean

1 A Could you repeat that again?

2 Q I think we established that in  
3 connection with the financial statements which you  
4 compiled that you just spoke about, that was done  
5 for the plan and billed to the plan, correct?

6 A It should have been, yes.

7 Q Now, were there any other services that  
8 you performed in connection with these pension  
9 loans that were taken by Mr. Shofer in the mid-'80s  
10 other than his financial statements?

11 A There was considerable time and energy  
12 devoted to the department of labor settlement which  
13 was complex and I was involved along with other  
14 advisors and with Mr. Shofer in quantifying and  
15 discussing that settlement.

16 Q Did you bill for those services?

17 A Yes.

18 Q Who did you bill?

19 A I believe it would have been billed to  
20 the pension plan.

21 Q Why is that?

1 we attempted as best we could to figure the nexus  
2 of where the bill should go, the responsible  
3 entity. Without really going through four years of  
4 work files and bills, it would be hard for me to  
5 answer that question.

6 Q Would you have to see the underlying  
7 bills supporting these summaries in order to  
8 determine who was billed for any work you did in  
9 connection with the pension loans?

10 A To be certain, yes.

11 Q But in general would it be fair to say  
12 that you have been billing your client the pension  
13 for that work?

14 A There was a distribution to Mr. Shofer  
15 involved. There was a considerable amount I  
16 believe of discussion and time spent on that  
17 distribution. I do not recall how we, who we  
18 decided to charge that to.

19 Q When you say distribution, do you mean  
20 penalty or excise tax? What do you mean by  
21 distribution?

1 A No. I didn't mean penalty or excise  
2 tax. I meant that part of the department of labor  
3 settlement required a distribution of part of Mr.  
4 Shofer's account held by the pension plan.

5 Q Distribution to whom?

6 A To Mr. Shofer. Could you repeat any  
7 other part of the question?

8 Q Was this a prohibited transaction issue?

9 A I believe so.

10 MS. TRUHE: That's all I have.

11 MS. WHELIHAN: I don't have anything  
12 else. Although Doug, I would while we are still on  
13 the record, I would like to get the files that Ms.  
14 Martucci has for the three entities returns. For  
15 Catalina Enterprises, for Crown, for Mr. Shofer. I  
16 also would like to get her bills and the supporting  
17 details for those bills and to the extent that in  
18 some other separate file there are the supporting  
19 documents that show who paid what bill, I would  
20 like to get copies of that too.

21 MS. TRUHE: And for the record, I would

1 close, do you want to make these --

2 MS. WHELIHAN: I don't want to make  
3 those --

4 MR. TAYLOR: Do you want to have these  
5 marked? Here is the originals. Here is a copy of  
6 one engagement letter and here is a copy of another  
7 engagement letter. And then there are three other  
8 copies. I have retained a copy of each and here is  
9 one for Ms. Truhe. There are two there Janet, I'm  
10 not sure if you got one. And then here is a copy  
11 of the other one. And I think that will allow us  
12 then to put one into the record and everybody will  
13 have a copy.

14 MS. WHELIHAN: Why don't we mark as  
15 Deposition Exhibit Number 2 the June 3rd, 1993  
16 engagement letter from Ms. Martucci to Mr. Shofer  
17 and the, as Deposition Exhibit Number 3, the  
18 September 16, 1994 engagement letter from Ms.  
19 Martucci to Mr. Shofer.

20 Thank you, Ms. Martucci.

21 MR. TAYLOR: You have a right to review

1 like all of that as well and I believe included in  
2 that request are any tax returns which Ms. Martucci  
3 has prepared for the corporation, as well as Mr.  
4 Shofer beginning I believe with the tax year 1991,  
5 correct?

6 THE WITNESS: Correct.

7 MS. TRUHE: Thank you.

8 MR. TAYLOR: Well --

9 MS. WHELIHAN: That's what I want the  
10 return files for, each one of the entities plus the  
11 supporting data that underlies it.

12 MR. TAYLOR: I think Mr. Shofer has all  
13 of those tax returns at his office. He had  
14 indicated to me that both of you are welcome to  
15 come to the office and review those tax returns.

16 MS. WHELIHAN: See here is the best  
17 part. Take Ms. Martucci's files to some great  
18 Xeroxing place, have them copied at my expense, I  
19 will pay for it. Send them to me and we don't need  
20 to go through all this.

21 MR. TAYLOR: That's fine. Before we

1 this. Do you want to review this?

2 THE WITNESS: Yes, please.  
3 (Exhibits 2 and 3 marked.)

4 (Deposition concluded at 2:01 p.m.)

5 \* \* \* \* \*

1 CERTIFICATE OF DEPONENT

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I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate piece of paper to the original transcript.

\_\_\_\_\_  
Wendy E. Martucci

1 STATE OF MARYLAND, COUNTY OF BALTIMORE:  
2 I, Richard D. Baker, Jr., a Notary Public in  
3 and for the State of Maryland, County of Baltimore,  
4 do hereby certify the within named WENDY E.  
5 MARTUCCI personally appeared before me at the time  
6 and place herein set out and, after having been  
7 duly sworn by me according to law, was interrogated  
8 by counsel.  
9 I further certify that the examination was  
10 recorded stenographically by me and then  
11 transcribed from my stenographic notes to the  
12 within typewritten matter in a true and accurate  
13 manner. I further certify that the stipulations  
14 contained herein were entered into by counsel in my  
15 presence. I further certify that I am not of  
16 counsel to any of the parties, nor an employee of  
17 counsel, nor related to any of the parties, nor in  
18 any way interested in the outcome of this action.

19 AS WITNESS my hand and notarial seal this 22nd  
day of May, 1997, at Baltimore, Maryland.

\_\_\_\_\_  
Richard D. Baker, Jr., Notary Public



acked [2] 77:4	28:13 28:14	90:15	community [5] 14:3	conversation [8]
77:7	<b>Bornhorst</b> [8] 30:14	<b>change</b> [8] 11:20	14:9 14:14 65:10	6:5 6:19 7:4
adly [1] 49:16	30:15 30:17 35:6	24:20 25:11 26:10	66:6	7:15 21:18 22:8
aker [4] 1:18	37:16 38:17 40:9	27:14 28:4 54:15	<b>company</b> [16] 1:4	23:2 23:7
1:21 90:2 90:21	55:10	64:3	1:7 11:3 13:2	<b>conversations</b> [5]
<b>Baltimore</b> [7] 1:4	<b>borrow</b> [3] 28:9	<b>changed</b> [1] 72:21	23:18 24:1 35:9	16:20 21:21 22:4
1:18 4:14 14:14	63:8 63:11	<b>changes</b> [2] 26:3	35:13 35:15 37:19	22:7 22:12
90:1 90:3 90:19	<b>borrowed</b> [8] 61:20	27:8	52:19 53:18 61:4	<b>convey</b> [1] 60:16
<b>bank</b> [2] 61:4 61:5	62:2 62:6 62:20	<b>charge</b> [1] 84:18	67:17 83:4 83:18	<b>copied</b> [1] 86:18
<b>Barry</b> [3] 13:8	64:5 65:2 67:9	<b>charged</b> [4] 32:6	<b>company's</b> [1] 60:7	<b>copies</b> [5] 41:2
13:10 13:13	67:15	33:1 55:16 55:19	<b>compilation</b> [1] 40:1	41:15 75:8 85:20
<b>based</b> [1] 25:13	<b>borrowing</b> [12] 19:3	<b>charges</b> [1] 33:1	<b>compile</b> [1] 81:2	87:8
<b>basic</b> [1] 24:11	19:4 26:5 26:14	<b>charging</b> [1] 72:6	<b>compiled</b> [2] 39:16	<b>copy</b> [6] 32:15 87:5
<b>basis</b> [1] 65:15	27:10 27:16 28:5	<b>check</b> [3] 39:18	82:4	87:6 87:8 87:10
<b>became</b> [9] 8:8	29:1 29:6 60:20	40:3 45:18	<b>compiling</b> [1] 81:9	87:13
9:5 9:10 12:7	70:13 76:17	<b>checks</b> [2] 37:15	<b>completely</b> [1] 67:21	<b>corporate</b> [15] 15:11
26:15 26:20 26:20	<b>breach</b> [1] 19:8	75:8	<b>complex</b> [3] 34:15	17:14 17:15 32:2
47:17 49:8	<b>breached</b> [1] 19:5	<b>CIRCUIT</b> [1] 1:2	70:8 82:13	33:16 34:2 43:7
<b>become</b> [2] 8:14	<b>break</b> [3] 5:17	<b>circumstances</b> [6]	<b>comptroller</b> [1] 46:17	43:8 43:14 43:19
8:18	9:7 36:16	27:10 27:15 28:9	<b>concern</b> [1] 7:9	44:12 46:1 59:16
<b>began</b> [3] 6:10	<b>breakdown</b> [1] 34:4	32:1 32:3 68:5	<b>concerned</b> [2] 53:14	62:19 83:3
60:20 72:13	<b>Brief</b> [4] 9:13 20:3	<b>CITY</b> [1] 1:4	77:21	<b>corporation</b> [5] 56:2
<b>begin</b> [1] 54:18	36:17 45:10	<b>claim</b> [1] 51:21	<b>concerning</b> [3] 65:5	60:18 71:5 72:14
<b>beginning</b> [1] 86:4	<b>briefly</b> [1] 5:10	<b>claims</b> [1] 51:13	80:14 81:19	86:3
<b>begins</b> [1] 21:6	<b>bring</b> [1] 14:21	<b>clarify</b> [2] 5:3	<b>concluded</b> [3] 37:3	<b>correct</b> [16] 20:12
<b>begun</b> [1] 42:10	<b>broader</b> [1] 28:5	64:13	54:17 88:4	29:3 51:6 51:9
<b>behalf</b> [4] 2:2	<b>brought</b> [3] 15:4	<b>classification</b> [1]	<b>conclusion</b> [1] 22:19	53:2 53:6 58:8
2:4 2:6 54:6	<b>business</b> [9] 8:9	40:8	<b>conclusions</b> [1] 22:16	58:9 60:4 66:21
<b>benefit</b> [1] 34:15	32:7 36:10 38:8	<b>classified</b> [1] 63:12	<b>conference</b> [1] 5:19	77:10 81:13 82:5
<b>best</b> [4] 12:1 23:10	39:4 49:16 50:8	<b>clear</b> [1] 7:2	<b>conferences</b> [2] 13:13	83:13 86:5 86:6
84:1 86:16	50:10 68:15	<b>Clerk</b> [1] 4:3	20:11	<b>corrected</b> [2] 18:16
<b>better</b> [3] 8:13		<b>client</b> [27] 24:21	<b>connection</b> [18] 12:2	80:4
8:17 9:4	-C-	25:12 25:15 41:9	29:18 48:17 54:11	<b>corrections</b> [2] 74:7
<b>between</b> [2] 12:5	<b>cannot</b> [6] 12:6	45:1 53:11 53:14	55:4 56:11 57:7	89:11
21:4	15:19 29:3 30:7	53:18 53:19 53:19	58:7 59:10 59:18	<b>correctly</b> [2] 59:4
<b>beyond</b> [2] 44:9	31:10 51:21	60:7 60:12 60:17	59:20 73:9 81:9	80:15
78:12	<b>care</b> [4] 62:9 63:17	61:20 62:1 62:19	81:18 82:3 82:8	<b>cost</b> [2] 12:1 48:2
<b>bill</b> [13] 32:8 32:11	65:11 66:6	64:18 66:1 66:17	83:6 84:9	<b>counsel</b> [4] 90:8
41:5 42:13 48:13	<b>carefully</b> [2] 26:5	76:16 76:20 78:14	<b>consciousness</b> [1]	90:14 90:16 90:17
53:5 53:17 53:20	66:20	78:15 81:12 83:7	27:3	<b>count</b> [1] 55:7
57:12 82:16 82:18	<b>carried</b> [1] 34:6	83:13 84:12	<b>consider</b> [1] 76:17	<b>County</b> [2] 90:1
84:2 85:19	<b>case</b> [26] 1:5 6:12	<b>client's</b> [2] 26:6	<b>considerable</b> [2]	90:3
<b>billed</b> [8] 81:15	12:5 15:18 21:16	67:21	82:11 84:15	<b>couple</b> [5] 11:21
81:21 82:5 82:19	22:14 23:9 33:10	<b>clients</b> [7] 24:17	<b>consistent</b> [2] 35:17	39:17 48:9 70:18
83:4 83:15 83:21	35:15 49:21 50:3	41:10 53:16 54:1	57:21	71:1
84:8	50:5 50:6 51:2	75:15 75:18 75:19	<b>consult</b> [4] 5:17	<b>course</b> [1] 51:4
<b>billing</b> [7] 9:8	52:9 53:11 53:12	<b>close</b> [1] 87:1	44:3 58:12 76:18	<b>court</b> [3] 1:2
41:15 52:21 54:3	57:15 62:15 63:6	<b>Co</b> [2] 1:11 2:6	<b>consultant</b> [5] 25:2	4:4 5:1
72:9 72:11 84:12	65:16 66:1 69:18	<b>code</b> [1] 28:17	25:14 25:16 76:19	<b>cover</b> [5] 32:11
<b>bills</b> [14] 30:21 32:6	76:16 78:19 80:6	<b>collection</b> [1] 56:14	77:8	32:13 41:6 45:7
32:17 41:5 41:15	<b>cases</b> [2] 21:13 53:4	<b>combination</b> [1]	<b>consultant's</b> [1] 25:4	48:13
42:9 53:5 54:5	<b>Catalina</b> [2] 75:9	55:15	<b>consultants</b> [3] 75:15	<b>covered</b> [1] 5:12
74:20 74:20 84:4	85:15	<b>comfortable</b> [1]	75:17 76:5	<b>CPA</b> [2] 24:8 40:1
84:7 85:16 85:17	<b>caught</b> [1] 18:16	67:21	<b>consulting</b> [2] 28:11	<b>CPAs</b> [1] 66:12
<b>bit</b> [2] 73:20 77:18	<b>caveat</b> [1] 34:9	<b>commenced</b> [1] 71:4	28:21	<b>credit</b> [2] 61:8
<b>blanket</b> [1] 78:1	<b>centered</b> [1] 49:19	<b>commencing</b> [1]	<b>consumed</b> [1] 50:9	61:13
<b>blown</b> [1] 28:18	<b>certain</b> [3] 57:5	1:16	<b>contain</b> [1] 32:13	<b>Crown</b> [14] 38:2
<b>Blum</b> [2] 40:10	65:15 84:10	<b>comment</b> [1] 69:16	<b>contained</b> [1] 90:14	53:5 53:14 55:12
52:4	<b>certainty</b> [2] 69:8	<b>common</b> [2] 13:11	<b>context</b> [1] 8:5	55:15 55:19 56:6
<b>board</b> [2] 39:1	83:20	24:13	<b>continue</b> [1] 37:17	56:19 57:12 57:14
49:13	<b>CERTIFICATE</b> [1]	<b>communicate</b> [2]	<b>continuing</b> [1] 27:1	58:20 74:21 74:21
<b>Bondrove</b> [3] 13:8	89:1	75:13 75:16	<b>contracted</b> [1] 11:2	85:15
13:10 13:13	<b>certify</b> [5] 89:7	<b>communication</b> [2]		<b>curious</b> [1] 53:13
<b>book</b> [1] 28:21	90:4 90:9 90:13	12:3 12:13		<b>current</b> [3] 20:6
<b>books</b> [3] 28:12				42:13 81:6
				<b>curriculum</b> [1] 19:18

<b>cursory</b> [1] 62:21	<b>description</b> [2] 34:16	80:18 80:19 81:12	<b>estimate</b> [2] 9:4	
<b>CV</b> [3] 3:11 20:4	35:16	82:4 83:7 83:12	33:5	
20:10	<b>detail</b> [2] 8:10	<b>double</b> [1] 39:18	<b>ethical</b> [1] 79:5	
	72:11	<b>Doug</b> [3] 38:2	<b>event</b> [1] 25:3	
<b>-D-</b>	<b>detailed</b> [3] 19:2	72:19 85:12	<b>events</b> [2] 27:11	
<b>D</b> [4] 1:18 1:21	32:10 32:13	<b>Douglas</b> [1] 2:2	29:1	
90:2 90:21	<b>details</b> [1] 85:17	<b>dozen</b> [1] 6:6	<b>eventually</b> [1] 70:11	
<b>danger</b> [1] 26:14	<b>determination</b> [2]	<b>due</b> [2] 79:15 79:21	<b>everybody</b> [1] 87:12	
<b>data</b> [1] 86:11	54:12 56:7	<b>duly</b> [2] 4:7 90:7	<b>everyday</b> [1] 24:15	
<b>date</b> [4] 9:4 10:19	<b>determine</b> [4] 9:9	<b>during</b> [3] 12:8	<b>evidence</b> [2] 65:19	
43:18 44:11	33:17 34:16 84:8	52:10 57:21	78:6	
<b>dated</b> [3] 3:12	<b>develop</b> [1] 48:12	<b>duty</b> [4] 8:8 79:14	<b>exactly</b> [3] 7:2	
3:13 44:15	<b>devoted</b> [1] 82:12		8:17 19:5	
<b>dates</b> [1] 44:21	<b>Dick</b> [1] 76:1		<b>examination</b> [6]	
<b>days</b> [1] 5:21	<b>different</b> [2] 21:12	<b>-E-</b>	3:4 4:7 4:10	
<b>deal</b> [1] 27:1	25:19	<b>E</b> [5] 1:15 3:3	52:14 71:3 90:9	
<b>Deborah</b> [1] 2:5	<b>difficult</b> [1] 26:1	4:6 89:15 90:4	<b>examined</b> [1] 89:8	
<b>debt</b> [1] 57:14	<b>direct</b> [4] 13:21	<b>earliest</b> [3] 7:20	<b>example</b> [5] 42:12	
<b>debts</b> [1] 49:3	14:10 54:7 60:10	10:20 58:16	66:3 67:7 81:1	
<b>December</b> [3] 47:9	<b>directed</b> [1] 53:5	<b>early</b> [4] 43:1 48:1	83:11	
47:10 47:13	<b>directly</b> [2] 35:7	48:6 49:17	<b>except</b> [1] 69:17	
<b>decided</b> [4] 23:11	55:18	<b>Earnshaw</b> [1] 4:13	<b>exceptions</b> [1] 18:3	
70:11 74:12 84:18	<b>discover</b> [1] 78:14	<b>easier</b> [1] 28:6	<b>excise</b> [2] 84:20	
<b>decision</b> [1] 35:18	<b>discovers</b> [1] 79:20	<b>easy</b> [1] 29:6	85:1	
<b>deduct</b> [1] 54:16	<b>discuss</b> [5] 31:13	<b>education</b> [1] 27:1	<b>excuse</b> [2] 21:9	
<b>deducted</b> [5] 35:19	31:18 60:19 61:13	<b>effect</b> [3] 18:15	61:3	
37:8 57:2 57:5	77:15	19:11 19:12	<b>executed</b> [3] 9:16	
<b>deductibility</b> [9]	<b>discussed</b> [12] 8:9	<b>Effects</b> [1] 18:17	10:1 12:8	
31:10 31:13 31:18	24:14 48:3 48:5	<b>either</b> [3] 28:16	<b>execution</b> [1] 9:19	
36:19 37:2 54:10	49:21 50:2 50:8	48:17 73:18	<b>exercising</b> [4] 62:9	
59:10 65:6 66:19	50:13 50:18 51:1	<b>elaborate</b> [1] 73:11	63:17 65:10 66:6	
<b>deductible</b> [12] 32:2	51:11 61:15	<b>employee</b> [1] 90:16	<b>Exhibit</b> [4] 20:5	
32:4 48:21 54:13	<b>discussing</b> [1] 82:15	<b>encounter</b> [1] 24:15	20:17 87:15 87:17	
55:5 56:10 56:15	<b>discussion</b> [4] 42:3	<b>end</b> [1] 7:1	<b>exhibits</b> [3] 3:10	
57:1 57:10 57:19	59:9 78:11 84:16	<b>ended</b> [1] 56:8	41:4 88:3	
59:7 67:11	<b>discussions</b> [12] 16:18	<b>energy</b> [2] 50:9	<b>existence</b> [1] 24:11	
<b>deducting</b> [1] 59:12	23:12 23:16 23:21	82:11	<b>exists</b> [1] 75:4	
<b>deduction</b> [6] 34:1	31:9 48:1 48:7	<b>engagement</b> [29]	<b>expect</b> [2] 44:4	
34:2 34:3 34:8	48:11 49:2 49:19	9:16 9:20 10:2	52:8	
37:13 58:5	50:6 83:1	10:8 10:20 11:14	<b>expended</b> [2] 55:4	
<b>deductions</b> [7] 33:9	<b>dispute</b> [4] 29:19	12:8 15:20 16:3	58:6	
34:14 37:5 37:5	31:6 31:7 51:21	16:6 16:10 20:11	<b>expense</b> [7] 32:3	
54:19 57:5 75:5	<b>disputes</b> [3] 18:17	21:6 39:7 39:10	35:10 35:13 57:13	
<b>defend</b> [1] 55:7	18:18 51:4	39:12 39:15 39:19	57:18 59:16 86:18	
<b>Defendant</b> [3] 1:13	<b>distracted</b> [1] 50:9	39:20 39:21 40:14	<b>expenses</b> [1] 40:10	
2:4 2:6	<b>distribution</b> [8] 63:13	40:16 40:20 72:3	<b>experience</b> [2] 56:1	
<b>Defendants</b> [1] 1:6	74:8 84:14 84:17	72:5 87:6 87:7	60:17	
<b>delineated</b> [1] 30:21	84:19 84:21 85:3	87:16 87:18	<b>expert</b> [14] 6:12	
<b>delinquent</b> [1] 15:14	85:5	<b>entered</b> [5] 11:14	6:15 6:17 6:18	
<b>department</b> [7] 18:17	<b>divorce</b> [1] 21:12	16:3 16:5 27:2	7:12 20:19 20:21	
29:13 31:7 82:12	<b>document</b> [15] 10:4	90:14	21:9 21:15 21:20	
83:2 83:15 85:2	10:15 15:9 33:18	<b>Enterprises</b> [1] 85:15	22:1 22:20 23:3	
<b>depending</b> [2] 28:15	34:21 35:2 37:7	<b>entities</b> [2] 85:14	23:8	
80:3	37:14 37:21 38:4	86:10	<b>expertise</b> [1] 20:14	
<b>DEPONENT</b> [1]	40:18 42:16 43:11	<b>entity</b> [5] 11:10	<b>explained</b> [2] 4:19	
89:1	44:6 44:10	54:6 71:6 72:14	18:15	
<b>deposition</b> [11] 1:14	<b>documents</b> [3] 32:12	84:3	<b>explaining</b> [1] 81:5	
4:3 4:15 4:19	64:20 85:19	<b>entries</b> [1] 81:4	<b>express</b> [1] 71:11	
5:9 18:7 20:5	<b>DOL</b> [2] 81:5 83:19	<b>equal</b> [1] 37:13	<b>extension</b> [6] 15:20	
41:4 87:15 87:17	<b>dollar</b> [1] 19:6	<b>ERISA</b> [4] 20:15	16:2 44:8 44:9	
88:4	<b>domino</b> [1] 18:15	24:4 26:11 68:14	<b>extensions</b> [1] 43:20	
<b>depth</b> [1] 28:15	<b>done</b> [16] 5:14	<b>Esquire</b> [3] 2:2	<b>extent</b> [3] 55:7	
<b>described</b> [1] 17:6	38:7 38:8 38:8	2:3 2:5	69:17 85:17	
	38:15 39:7 42:6	<b>established</b> [1] 82:2		
	67:19 71:6 71:13			
				<b>-F-</b>
				<b>fact</b> [3] 22:1 24:10
				26:7
				<b>facts</b> [1] 79:17
				<b>fair</b> [8] 15:13 26:12
				28:19 38:14 52:7
				69:10 83:5 84:11
				<b>fairly</b> [2] 49:18
				63:4
				<b>familiar</b> [1] 30:9
				<b>familiarity</b> [4] 24:4
				24:8 24:12 26:11
				<b>far</b> [6] 5:6 41:15
				51:17 53:13 83:11
				83:12
				<b>fashion</b> [2] 71:19
				75:3
				<b>federal</b> [2] 36:8
				36:9
				<b>fees</b> [39] 31:10 31:14
				31:18 33:10 34:13
				34:16 34:19 35:4
				35:18 36:20 37:2
				37:6 37:9 38:1
				40:5 48:16 49:4
				49:5 54:10 54:19
				55:3 55:12 55:13
				55:17 56:3 56:10
				57:1 57:2 57:6
				58:6 59:5 59:6
				59:10 59:12 59:15
				59:18 59:19 75:5
				75:6
				<b>felt</b> [2] 12:17 67:20
				<b>few</b> [2] 5:21 52:20
				<b>fiduciaries</b> [1] 19:3
				<b>fiduciary</b> [1] 19:8
				<b>figure</b> [1] 84:1
				<b>figures</b> [1] 44:11
				<b>figuring</b> [1] 34:14
				<b>file</b> [28] 10:9 10:9
				15:7 17:4 17:6
				17:7 32:5 32:15
				35:8 35:11 36:8
				36:11 39:19 40:3
				40:13 41:14 43:9
				43:10 44:3 44:18
				45:17 53:17 78:3
				78:15 78:18 79:14
				79:19 85:18
				<b>filed</b> [10] 15:1
				16:2 41:9 41:9
				44:17 45:13 46:6
				46:10 51:12 58:16
				<b>files</b> [18] 17:1 17:3
				17:12 17:16 17:19
				18:1 18:4 32:8
				32:8 41:7 55:14
				58:12 72:12 75:6
				84:4 85:13 86:10
				86:17
				<b>filing</b> [8] 4:3
				15:14 45:14 46:7
				74:7 77:16 78:9
				78:11
				<b>fill</b> [1] 35:21







79:18 80:2	56:20 57:3 57:6	39:13 42:21 43:4		25:8 41:21 42:3
aying [2] 49:4	57:18 58:1 58:5	55:7 57:21 70:6		46:12 72:5 75:1
49:4	59:1 59:6 64:6	86:3		85:13 85:21 87:12
ayment [1] 47:19	64:15 70:2 75:19	preparing [3] 64:6		89:9
payments [1] 47:7	personally [11] 29:9	64:15 70:2		recorded [2] 55:21
pays [1] 74:19	29:14 51:7 53:18	presence [1] 90:15		90:10
penalties [5] 30:19	54:4 54:5 55:11	present [2] 2:7		records [5] 8:19
47:1 47:5 47:14	56:5 60:12 83:18	73:3		9:8 72:9 72:11
47:20	90:5	preservation [4] 34:17 56:13 56:17		74:19
penalty [3] 46:15	perspective [1] 27:19	58:7		red [1] 27:2
84:20 85:1	Phil [3] 13:8 13:9	preserve [2] 58:20		<b>REEXAMINATION</b>
pending [1] 50:21	13:11	59:5		[2] 74:18
pension [78] 11:10	philosophy [3] 12:4	preserved [2] 56:19		79:12
17:15 18:10 18:11	12:13 69:7	58:11		reexamine [1] 59:14
18:18 18:20 19:4	pick [2] 64:19 65:18	pressed [1] 63:2		reference [6] 28:11
20:12 24:4 24:18	picked [2] 4:21	pressure [1] 61:6		28:13 28:14 28:21
25:1 25:2 25:4	80:5	presume [1] 8:21		40:7 62:7
25:13 25:13 25:16	picking [1] 64:20	pretty [1] 20:5		referenced [1] 48:11
26:3 26:6 26:6	piece [1] 89:12	proactive [2] 12:17		referred [1] 60:3
26:11 27:10 27:16	place [5] 5:20 6:20	69:7		referring [3] 28:14
2 29:2 29:6	48:7 86:18 90:6	problems [3] 16:7		59:19 80:12
32:1 38:9 53:19	Plaintiff [2] 1:2	16:11 29:11		reflect [1] 72:10
60:3 60:18 60:21	2:2	proceedings [3] 30:5		regarded [2] 56:3
61:12 61:20 62:2	Plaintiffs [1] 1:9	34:10 73:17		57:10
62:6 62:19 64:5	plan [21] 24:18 25:1	proceeds [1] 21:7		regarding [11] 18:18
65:2 65:3 66:3	26:15 29:2 29:6	process [2] 12:9		25:15 29:11 36:19
66:19 67:10 67:15	32:7 38:9 62:19	77:19		66:18 75:17 76:5
67:16 70:13 71:5	75:20 81:3 81:5	professional [5] 26:7 27:1 29:18		76:9 76:13 78:9
71:8 72:14 75:11	81:10 81:13 81:15	66:18 69:9		80:14
75:15 75:16 75:17	81:20 82:5 82:5	progress [2] 61:7		regardless [1] 56:5
75:18 76:5 76:6	82:20 83:3 83:21	61:12		regs [1] 28:18
76:10 76:13 76:17	85:4	prohibited [5] 18:12		regular [1] 75:8
76:19 77:8 80:14	plus [1] 86:10	19:9 19:12 24:13		regular [1] 75:8
81:3 81:10 81:13	point [8] 12:6 26:15	85:8		relate [3] 35:15
81:15 81:19 82:8	27:3 28:3 43:20	promulgated [2] 79:2 80:11		50:19 56:13
82:20 83:3 83:6	62:15 67:20 73:11	pronounce [1] 52:15		related [13] 18:10
83:8 83:12 83:13	policy [1] 17:20	proper [1] 64:8		19:3 20:11 39:5
83:16 83:21 84:9	portion [2] 34:12	properly [1] 57:19		61:4 71:7 71:10
84:12 85:4	75:19	proposition [1] 80:8		71:16 80:18 80:19
pensions [1] 20:15	positions [1] 12:15	provide [2] 11:1		83:2 83:19 90:17
pe it [1] 71:14	positive [1] 19:4	30:17		relates [3] 50:1
percentage [3] 71:12	positives [1] 14:19	provided [8] 26:8		50:13 56:20
71:14 71:19	possible [6] 48:4	29:17 30:3 30:19		relating [7] 31:5
perfectly [1] 27:16	49:20 54:15 58:15	31:3 38:6 38:21		31:6 34:17 54:14
perform [2] 9:18	61:11 71:18	71:6		74:8 81:4 81:21
39:21	possibly [6] 27:7	provisions [1] 26:11		relationship [5] 12:5
performed [1] 82:8	29:20 46:9 48:14	Public [3] 1:19		12:20 49:17 53:9
perhaps [2] 7:21	60:18 72:16	90:2 90:21		54:21
66:8	posted [3] 35:10	pull [1] 12:16		relatively [1] 68:15
period [8] 15:21	35:12 54:16	pulled [1] 53:17		relied [1] 25:3
21:8 26:9 44:12	practice [10] 24:9	purports [1] 79:17		rely [1] 76:4
47:8 52:10 63:4	24:16 62:16 65:18	purposes [2] 64:6		relying [3] 67:21
63:9	68:14 68:15 69:9	65:21		69:2 80:7
permissible [4] 27:11	69:17 75:14 80:3	Pursuant [1] 1:14		remember [15] 8:2
27:17 27:19 28:5	practitioners [2] 79:4 80:10	pursue [1] 28:16		8:5 15:3 16:16
permitted [2] 18:13	pre1986 [6] 25:21	pursuing [1] 50:10		26:3 27:4 29:4
34:13	61:21 64:8 65:10	put [3] 17:17 45:2		30:2 37:1 48:6
person [1] 54:6	66:7 76:18	87:12		58:18 63:5 77:1
personal [40] 11:4	predecessor [1] 30:13	putting [1] 61:6		77:3 77:3
11:6 17:4 17:7	preparation [1] 5:9			remembering [1] 52:3
17:9 17:10 18:11	prepare [8] 5:13			render [2] 38:16
32:2 33:15 34:1	11:2 35:20 36:3			52:9
34:3 35:10 35:12	42:17 43:21 64:21			rendered [2] 80:16
37:16 39:4 40:7	75:9			83:6
43:8 43:15 44:18	prepared [8] 36:11			repaid [1] 63:4
45:13 45:16 46:8				
54:19 55:16 55:17				
55:20 56:1 56:11				

-Q-

qualification [1]

14:12

qualified [1] 20:18

quality [1] 13:17

quantify [1] 71:18

quantifying [1] 82:14

questioning [2] 14:16

80:12

questionnaire [1]

35:21

questions [11] 5:4

5:15 5:16 12:16

52:13 52:20 66:16

70:7 71:2 74:17

79:11

quick [1] 36:15

quickly [1] 80:5

quite [1] 78:6

quote/unquote [1]

58:7

-R-

R [1] 2:2

raise [1] 70:7

raised [1] 59:13

rate [5] 72:6 72:15

73:1 73:3 73:5

rates [1] 72:10

read [2] 74:1 89:7

Ready [1] 45:11

realize [1] 64:2

really [2] 83:9

84:3

reason [7] 24:11

44:8 44:14 56:16

58:5 58:13 63:1

reasonable [3] 65:10

66:6 69:20

reasonableness [1]

76:14

reasons [6] 11:21

12:12 14:5 56:15

60:20 61:2

recalled [2] 29:5

77:18

recalling [1] 50:11

received [3] 18:9

19:10 78:8

recent [1] 48:5

recess [4] 9:13

20:3 36:17 45:10

recollect [5] 10:20

12:6 24:2 30:20

47:8

recollection [8] 12:1

18:14 23:10 28:7

63:15 78:12 79:3

80:9

recommendations [1]

25:7

record [11] 4:12

repayment [1] 19:6	86:2 86:13 86:15	series [1] 19:15	50:3 54:19 56:19	state [12] 4:11
repeat [4] 27:12	revealed [1] 62:5	serve [1] 39:1	56:21 58:20 59:3	15:1 16:8 16:12
43:12 82:1 85:6	Revenue [1] 29:10	served [1] 21:15	74:21 76:1 77:15	36:9 36:9 46:17
report [1] 64:19	review [15] 10:15	service [3] 28:18	85:4	47:15 49:3 69:8
reported [5] 1:21	15:9 33:18 35:2	29:11 83:5	short [1] 63:4	90:1 90:3
37:11 48:21 79:15	37:7 37:14 37:21	services [18] 9:18	show [7] 8:19 34:3	statement [5] 15:13
79:21	38:4 40:2 43:11	10:21 11:8 13:17	34:18 35:1 35:6	26:12 28:20 38:14
reporter [1] 5:1	44:6 44:10 86:15	14:1 38:6 38:15	37:8 85:19	83:14
represent [1] 52:19	87:21 88:1	38:16 38:20 40:1	showed [1] 58:5	statements [5] 39:16
representations [1] 68:1	reviewing [1] 48:20	71:6 71:16 72:7	showing [2] 54:18	81:2 81:10 82:3
reputation [2] 14:3	revolved [1] 50:6	75:12 81:16 81:19	66:2	82:10
14:13	Richard [9] 1:1	82:7 82:16	shown [3] 57:5	states [1] 78:6
request [2] 44:9	1:18 1:21 2:7	set [3] 72:5 79:5	57:12 57:18	status [1] 81:6
86:2	53:15 53:17 54:4	90:6	shows [1] 65:2	statute [1] 80:7
requesting [1] 61:6	90:2 90:21	settled [1] 56:2	side [3] 50:1 50:14	stenographic [1] 90:11
required [1] 85:3	right [28] 5:8	settlement [3] 82:12	50:19	stenographically [1] 90:10
reread [1] 10:4	6:11 6:19 8:14	82:15 85:3	sign [1] 39:6	still [4] 23:10 27:20
research [15] 28:21	10:11 10:17 14:12	settling [1] 48:4	signed [1] 43:14	63:2 85:12
30:18 31:17 31:21	17:12 20:8 21:8	several [2] 7:21	significant [1] 47:9	stipulated [1] 4:2
36:18 38:17 38:18	22:4 25:20 30:16	12:3	simply [1] 62:5	stipulation [2] 4:1
62:10 62:21 66:8	31:2 34:1 39:14	severed [1] 12:20	sitting [1] 71:21	25:21
67:20 76:18 76:19	46:1 47:10 51:8	Shall [1] 37:17	situation [1] 57:11	stipulations [1] 90:13
77:4 77:9	52:18 58:4 63:16	sheet [3] 62:5 65:1	six [2] 21:4 44:13	strategies [4] 49:14
resolution [1] 81:6	74:16 75:21 76:2	66:2	six-digit [2] 62:18	49:18 49:20 59:11
respect [6] 52:21	76:4 78:6 87:21	sheets [2] 41:6	64:5	strategy [3] 54:15
54:3 54:10 59:17	Rolodex [1] 30:7	52:21	skimmed [1] 20:10	58:2 59:14
62:3 78:21	room [1] 43:18	Shofer [97] 1:1	small [1] 68:15	strict [1] 19:2
response [2] 66:15	rough [1] 33:5	2:7 5:17 6:10	Solid [1] 14:18	strictly [1] 79:21
80:13	round [1] 12:18	6:16 6:20 7:5	someone [1] 24:9	strike [3] 43:2
responses [2] 4:20	rule [5] 19:5 19:6	7:20 8:3 9:19	Sometimes [2] 21:6	50:17 64:1
5:5	19:6 19:7 28:4	10:2 11:1 11:14	80:4	stringent [1] 68:14
responsibility [1] 56:4	rules [7] 4:19 19:2	11:19 12:10 12:19	somewhat [1] 34:15	strong [1] 14:18
responsible [1] 84:2	19:9 28:3 28:6	14:20 15:12 16:1	somewhere [1] 8:21	Stuart [9] 1:4
rest [1] 37:18	29:5 68:14	16:5 16:7 16:11	soon [1] 48:4	1:5 1:7 1:8
restate [1] 67:3	résumé [1] 19:17	16:19 18:5 18:19	43:6 46:1 64:1	2:4 18:9 52:19
result [1] 70:12	-S-	19:10 21:18 21:21	sort [1] 42:1	52:19 54:11
results [1] 77:9	satisfied [4] 55:3	22:5 22:9 22:10	sorry [4] 10:4	stuck [1] 65:1
retained [1] 87:8	55:6 57:17 57:20	22:12 22:18 23:20	43:6 46:1 64:1	studying [1] 83:10
retirement [1] 49:18	55:6 57:17 57:20	23:21 30:1 32:6	sound [1] 30:9	style [3] 12:4 12:13
retiring [2] 48:4	says [2] 67:10 67:11	33:1 33:9 35:7	sounding [2] 39:1	12:17
49:3	schedule [4] 34:7	37:6 38:7 39:2	49:13	subject [5] 7:5
return [27] 11:9	34:18 37:11 40:6	39:6 39:11 42:4	sources [4] 43:17	22:13 23:13 26:21
15:11 15:21 43:4	seal [1] 90:19	43:20 45:13 45:17	44:16 61:11 61:16	34:11
43:5 43:14 43:15	searching [1] 15:19	46:21 47:19 48:16	62:7	submitted [2] 41:16
43:19 43:21 44:12	season [1] 7:1	49:8 49:12 51:13	speaking [2] 20:11	42:10
44:18 45:13 45:16	second [2] 8:10	53:15 53:18 54:4	62:7	subsequent [1] 21:20
46:2 46:8 46:10	25:18	54:5 54:16 55:4	special [1] 68:20	such [6] 24:14 55:10
56:11 58:16 59:1	see [11] 20:10 40:12	55:11 55:17 56:5	specific [4] 9:4	66:5 68:15 78:19
64:7 64:16 64:21	40:13 41:18 42:14	57:6 57:14 57:18	14:7 26:11 31:11	80:2
70:2 78:19 79:14	44:17 53:20 63:14	58:3 59:19 60:2	specifically [2] 8:4	suddenly [1] 74:12
79:19 86:10	65:11 84:6 86:16	60:12 60:19 61:7	31:16	Suite [2] 1:17 4:14
returns [40] 11:2	seminars [1] 13:12	61:10 62:1 67:8	spends [1] 59:5	summaries [1] 84:7
11:4 11:6 14:21	Send [1] 86:19	67:13 70:12 71:5	spent [2] 49:14	summary [4] 40:6
15:4 15:8 15:14	sense [3] 73:19 74:4	71:8 72:6 72:13	84:16	62:5 65:1 66:2
17:9 17:10 17:14	78:10	74:20 78:3 78:8	6:7 82:4	superficial [1] 49:18
33:13 33:16 33:16	sensitive [2] 26:16	80:20 81:20 82:9	spoken [2] 6:1	supporting [7] 34:21
36:3 36:9 36:9	26:21	82:14 83:18 84:14	6:4	41:5 48:12 84:7
38:7 38:8 38:9	sensitivity [1] 68:13	85:6 85:15 86:4	spot [2] 63:17 66:7	85:16 85:18 86:11
39:13 42:18 42:20	sent [1] 43:21	86:12 87:16 87:19	standard [3] 78:20	supposed [1] 64:19
43:2 48:20 54:20	separate [3] 32:5	8:15 9:5 9:10	79:3 79:7	suspect [2] 12:7
56:9 57:3 57:6	85:18 89:12	9:15 10:18 11:4	standards [1] 79:5	37:18
58:1 74:7 77:16	Separately [1] 53:21	17:10 18:10 29:11	start [2] 67:12 77:17	switch [1] 12:12
77:16 78:4 78:9	September [4] 9:17	29:18 31:6 32:7	9:15 10:18 55:2	
78:12 78:16 85:14	43:14 44:13 87:18	32:7 35:10 35:13		
		35:15 35:20 36:8		
		37:16 40:7 42:17		
		43:3 46:8 46:14		
		46:20 47:17 49:1		

<b>worn</b> [2] 4:7 90:7	<b>tends</b> [1] 49:13	64:9	<b>usually</b> [1] 76:15	<b>X</b> [1] 66:4
<hr/> <b>-T-</b> <hr/>	<b>term</b> [1] 19:6	<b>trial</b> [2] 52:9 52:10	<hr/> <b>-V-</b> <hr/>	<b>Xeroxing</b> [1] 86:18
<b>table</b> [2] 17:3 17:13	<b>terms</b> [3] 63:3	<b>true</b> [3] 57:11 89:9	<b>v</b> [2] 1:3 1:10	<hr/> <b>-Y-</b> <hr/>
<b>taking</b> [2] 4:19	69:2 71:12	90:12	<b>value</b> [3] 34:8	<b>year</b> [17] 6:9 12:18
<b>tax</b> [63] 7:1 11:2	<b>test</b> [1] 76:15	<b>Truhe</b> [33] 2:3	37:12 81:4	15:4 27:4 33:20
11:3 11:9 14:21	<b>testified</b> [5] 4:9	3:6 3:9 13:20	<b>various</b> [2] 55:9	34:11 39:7 43:6
15:4 15:14 16:7	7:7 7:8 12:11	14:6 14:17 25:6	59:20	43:12 44:1 45:19
16:11 17:9 17:10	54:9	27:18 28:1 36:15	<b>verbal</b> [2] 4:20	45:21 48:8 55:6
17:14 24:20 25:11	<b>testify</b> [1] 52:9	38:12 41:14 41:18	5:5	80:5 81:3 86:4
25:14 26:2 26:10	<b>testifying</b> [1] 7:6	42:1 42:9 42:14	<b>verify</b> [1] 77:9	<b>year's</b> [1] 15:2
27:8 27:14 28:17	<b>testimony</b> [13] 7:9	52:14 52:18 70:16	<b>verifying</b> [1] 68:18	<b>years</b> [26] 7:21
29:11 33:2 34:12	22:13 22:17 23:14	73:14 74:5 74:9	<b>versus</b> [1] 32:2	8:1 8:16 11:3
34:15 36:3 36:9	51:7 52:8 59:18	74:12 76:7 76:11	<b>vitae</b> [1] 19:18	11:7 12:3 15:15
39:4 39:13 43:6	67:4 73:10 77:14	78:5 78:17 79:1	<hr/> <b>-W-</b> <hr/>	18:2 18:4 21:11
43:19 43:21 46:8	80:15 80:17 89:9	79:12 85:10 85:21	<b>waived</b> [1] 4:4	28:2 29:20 32:16
46:18 47:2 47:21	<b>Thank</b> [4] 66:14	86:7 87:9	<b>welcome</b> [1] 86:14	39:17 45:7 46:18
48:2 48:20 54:20	70:16 86:7 87:20	<b>Truhe's</b> [2] 73:18	<b>Wendy</b> [6] 1:15	47:2 47:8 47:21
56:8 56:11 57:6	<b>Thanks</b> [1] 72:19	74:2	3:3 4:6 4:13	48:9 48:10 49:15
58:16 63:8 63:11	<b>thinking</b> [1] 22:15	<b>trust</b> [8] 17:15 18:11	89:15 90:4	50:1 63:5 73:6
64:7 64:8 64:15	<b>Third-Party</b> [3] 1:9 1:13 2:6	18:18 18:21 19:4	<b>Whelihan</b> [40] 2:5	84:3
66:18 70:2 70:8	<b>thought</b> [1] 54:9	53:19 60:18 71:9	3:5 3:8 4:10	<b>yet</b> [4] 46:6 51:13
75:4 79:4 79:13	<b>three</b> [5] 8:12 53:16	<b>truth</b> [4] 4:8 4:8	14:8 20:4 41:20	54:12 62:20
79:18 79:19 80:2	54:1 85:14 87:7	4:9 5:15	42:2 51:18 52:12	<b>yourself</b> [3] 66:5
80:10 84:20 85:2	<b>through</b> [9] 15:7	<b>try</b> [3] 58:15 69:6	62:13 63:20 64:11	<b>Yumkas</b> [2] 40:11
86:2 86:4 86:13	33:15 37:18 38:2	69:11	65:7 65:13 66:9	52:4
86:15	40:13 41:11 64:20	<b>trying</b> [3] 30:12 58:19	67:2 67:5 68:3	
<b>taxability</b> [1] 62:4	84:3 86:20	<b>turn</b> [1] 61:11	68:9 68:12 69:1	
<b>taxable</b> [8] 27:20	<b>Thursday</b> [1] 1:15	<b>twice</b> [1] 13:15	69:5 69:15 70:5	
67:17 70:3 70:12	<b>tightened</b> [2] 28:3	<b>two</b> [15] 8:12 13:5	70:18 70:21 71:17	
74:13 78:4 78:14	29:5	18:2 18:4 19:8	72:19 73:12 73:15	
79:20	<b>timely</b> [1] 44:15	21:4 21:11 23:6	74:18 76:9 76:12	
<b>taxes</b> [7] 35:21 46:15	<b>times</b> [2] 6:4	32:16 48:9 55:14	79:10 85:11 86:9	
47:1 47:5 47:13	21:3	72:3 73:6 81:3	86:16 87:2 87:14	
47:19 49:20	<b>today</b> [5] 5:9	<b>type</b> [4] 39:21 76:11	<b>Whelihan's</b> [1] 66:16	
<b>Taylor</b> [63] 2:2	28:20 71:21 77:1	76:12 80:19	<b>whole</b> [1] 4:8	
3:7 4:18 5:10	77:3	<b>types</b> [2] 24:14 49:7	<b>Winehurst</b> [1] 4:13	
5:20 6:2 6:5	<b>together</b> [1] 45:9	<b>typewritten</b> [1] 90:12	<b>wish</b> [2] 28:15 73:11	
6:8 7:15 13:18	<b>Tom</b> [3] 35:6 37:16	<b>typically</b> [4] 18:2	<b>within</b> [8] 6:13	
14:4 14:15 15:16	40:9	26:4 39:17 39:19	6:21 8:12 44:11	
21:21 22:5 23:1	<b>too</b> [3] 51:17 77:21	<hr/> <b>-U-</b> <hr/>	48:5 48:8 90:4	
23:2 23:7 23:8	85:20	<b>ultimately</b> [2] 22:19	90:12	
23:12 23:17 25:5	<b>took</b> [5] 19:15 37:6	56:3	<b>without</b> [5] 15:19	
25:8 25:17 29:20	48:7 71:8 81:20	<b>unclear</b> [1] 78:12	28:11 28:20 83:9	
31:3 31:4 31:13	<b>top</b> [5] 9:3 33:3	<b>under</b> [5] 28:8	84:3	
31:14 31:16 31:19	38:15 57:16 58:18	32:1 32:3 33:8	<b>witness</b> [23] 3:2	
36:19 37:2 38:2	<b>topic</b> [2] 26:21 74:5	68:5	6:12 6:15 20:19	
38:18 46:11 49:10	<b>total</b> [3] 32:21 37:8	<b>underlies</b> [1] 86:11	20:21 21:10 21:16	
50:15 51:15 55:10	71:13	<b>underlying</b> [1] 84:6	21:20 22:2 22:20	
60:8 62:11 64:10	<b>totally</b> [1] 42:4	<b>understand</b> [10] 5:2 5:4 5:6	23:4 23:8 25:9	
64:12 65:14 66:10	<b>towards</b> [1] 7:1	12:10 12:14 57:4	38:13 41:17 42:11	
67:1 68:2 68:4	<b>trace</b> [1] 80:10	58:4 59:4 72:4	42:15 74:6 74:11	
68:21 69:14 70:4	<b>transaction</b> [6] 18:13	80:15	74:14 86:6 88:2	
70:20 71:1 71:3	19:9 19:12 26:5	<b>understood</b> [1] 77:17	90:19	
74:16 77:12 79:16	68:16 85:8	<b>unusual</b> [1] 68:16	<b>wondering</b> [1] 50:20	
86:8 86:12 86:21	<b>transactions</b> [6] 24:13 28:5 32:11	<b>up</b> [14] 4:21 8:11	<b>words</b> [3] 57:13	
87:4 87:21	32:13 35:16 69:20	42:5 43:20 56:8	71:13 74:20	
<b>Taylor's</b> [2] 30:12	<b>transcribed</b> [1] 90:11	57:4 58:13 64:20	<b>worked</b> [1] 29:21	
80:13	<b>transcript</b> [2] 89:8	65:18 73:10 75:4	<b>write</b> [1] 58:13	
<b>technical</b> [1] 12:15	89:13	77:5 77:7 80:5	<b>wrong</b> [1] 51:6	
<b>telephone</b> [5] 5:11	<b>treasury</b> [1] 46:17	<b>updated</b> [1] 20:7	<b>Wyndhurst</b> [1] 1:17	
5:19 6:5 77:5	<b>treated</b> [1] 56:8	<b>used</b> [1] 48:12	<hr/> <b>-X-</b> <hr/>	
77:7	<b>treatment</b> [2] 57:20			
<b>telling</b> [1] 72:19				
<b>tells</b> [1] 67:14				
<b>tendered</b> [2] 40:18				
42:16				

IN THE MATTER OF:

***RICHARD SHOFER***

**-v-**

***THE STUART HACK CO., and  
STUART HACK, et al.***

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***NICHOLAS J. GIAMPETRO, ESQ.  
MAY 8, 1997***

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***WALLS REPORTING, INC.  
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***CONDENSED TRANSCRIPT AND WORD INDEX***

Page 1

1 RICHARD SHOFER \* IN THE  
 2 Plaintiff \* CIRCUIT COURT  
 3 v. \* FOR  
 4 THE STUART HACK COMPANY \* BALTIMORE CITY  
 and \*  
 5 STUART HACK \* CASE NO:  
 6 Defendants \* 88102069.CL79993  
 7 \* \* \* \* \*  
 8 THE STUART HACK COMPANY \*  
 and \*  
 9 STUART HACK \*  
 10 Third-Party Plaintiffs \*  
 11 v. \*  
 12 GRABUSH, NEWMAN & CO., \*  
 P.A. \*  
 13 Third-Party Defendant \*  
 \* \* \* \* \*  
 14  
 15 Pursuant to Notice, the deposition of  
 16 NICHOLAS J. GIAMPETRO, ESQUIRE was taken on  
 17 Thursday, May 8, 1997, commencing at 3:00 p.m., at  
 18 the law offices of Giampetro/Levin, 920 Providence  
 19 Road, Suite 407, Towson, Maryland 21286, before  
 20 Richard D. Baker, Jr. a Notary Public.  
 21 Reported by: Richard D. Baker, Jr.

Page 3

1 INDEX PAGE  
 2 WITNESS:  
 3 Nicholas J. Giampetro, Esquire  
 4 EXAMINATION:  
 5 By Ms. Truhe 4  
 6  
 7  
 8  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21

Page 2

1 APPEARANCES:  
 2 Douglas R. Taylor, Esquire  
 on behalf of the Plaintiff  
 3  
 4 Janet M. Truhe, Esquire  
 on behalf of the Defendant  
 Stuart Hack  
 5  
 6 Deborah Murrell Whelihan, Esquire  
 on behalf of the Third-Party Defendant  
 Grabush, Newman & Co., P.A.  
 7  
 8 ALSO PRESENT: Richard Shofer  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21

Page 4

1 STIPULATION  
 2 It is hereby stipulated and agreed that  
 3 the filing of this deposition with the Clerk of the  
 4 Court be and the same is hereby waived.  
 5 \*\*\*\*\*  
 6 NICHOLAS J. GIAMPETRO, ESQUIRE,  
 7 called for examination, having been duly sworn to  
 8 tell the truth, the whole truth and nothing but the  
 9 truth, testified as follows:  
 10 EXAMINATION BY MS. TRUHE:  
 11 Q Mr. Giampetro, have you been asked to  
 12 testify as an expert witness in this case in any  
 13 capacity?  
 14 A Yes, I have.  
 15 Q When were you asked?  
 16 A I think it was in the summer of '97,  
 17 excuse me, '96, excuse me.  
 18 Q Who approached you?  
 19 A I think it was Mr. Shofer.  
 20 Q What did he say to you on that subject?  
 21 A Asked me whether I would testify in his

1 behalf as an expert witness.

2 Q Did he say on what issue he wanted you  
3 to testify as an expert?

4 A Yes.

5 Q What was that?

6 A **On the issue of whether I, whether it  
7 was my opinion that what the advice that was given  
8 by Mr. Hack was erroneous and on the issue of  
9 damages.**

10 Q Let's focus first of all on the issue of  
11 Mr. Hack's advice. Did Mr. Shofer give you any of  
12 his opinions as to what he thought of Mr. Hack's  
13 advice at the time he asked you to be an expert?

14 A Yes.

15 Q What did he tell you?

16 A **He thought Mr. Hack's advice was  
17 erroneous.**

18 Q Did he get more specific than that?

19 A **No. I don't recall the conversation  
20 frankly. I recall generally that Mr. Shofer's  
21 opinion is that Mr. Hack's advice is erroneous.**

1 Q How about with respect to the issue of  
2 damages?

3 A **It was a general discussion. It was a  
4 three-party discussion I believe.**

5 Q Since that suggestion in the summer of  
6 1986, have you had any other discussions with  
7 either Mr. Shofer or his attorney concerning the  
8 issue of your testifying as an expert witness?

9 A **I may have intermittently had  
10 conversations about this, yes.**

11 Q With respect to the issue of Mr. Hack's  
12 advice, what opinions will you be expressing at  
13 trial?

14 A **I believe his advice was erroneous.**

15 Q Can you be more specific? What aspect  
16 of his advice was erroneous?

17 A **The aspect of his advice whereby he  
18 informed Mr. Shofer that he could borrow from his  
19 voluntary account monies which constituted both  
20 before and after, before tax contribution --  
21 actually let me start again. After tax**

1 Q With respect to the issue of damages,  
2 what specifically did Mr. Shofer want you to  
3 testify about with respect to that subject?

4 A **He wanted me to testify as to the  
5 penalties and taxes associated with the advice that  
6 was proffered by Mr. Hack.**

7 Q Other than this discussion in the summer  
8 of 1986 with Shofer when he first asked you to  
9 testify as an expert on these two issues, have you  
10 had any subsequent discussions with Mr. Shofer?

11 A **Just generally whether I was testifying.  
12 No specifics as to what I was testifying to, what  
13 type of questions would be asked of me.**

14 Q Have you spoken with any of Mr. Shofer's  
15 attorneys regarding your testimony as an expert?

16 A **In, I believe when I was discussing this  
17 in the summer with Mr. Shofer, Mr. Taylor was  
18 present.**

19 Q Did Mr. Taylor say anything to you about  
20 first of all the issue of Mr. Hack's advice?

21 A No.

1 **contribution and the interest earned on after tax  
2 contribution in a fashion whereby none of those  
3 loans would be taxable.**

4 Q What is your understanding of the  
5 question which Mr. Shofer posted to Mr. Hack in  
6 August of 1984 with reference to borrowing from the  
7 pension?

8 A **There's a letter somewhere that Mr. Hack  
9 prepared and provided to Mr. Shofer regarding  
10 borrowing from a voluntary account. And the letter  
11 I believe indicated that borrowing from a voluntary  
12 account was permissible and that there was no  
13 limitation on the amount that you could borrow from  
14 a voluntary account.**

15 Q Now, focusing just on those two aspects,  
16 that you could borrow from the voluntary account  
17 and that there was no limit, was there anything  
18 erroneous about that advice?

19 A **To the extent that amounts borrowed from  
20 a voluntary account which exceed the after tax  
21 contributions, to the extent that that excess**

Page 9

1 exceeded after tax contributions more than \$50,000,  
 2 there is a limitation. That's not permissible.  
 3 It's taxable.  
 4 Q Exactly. In other words you can do it  
 5 but there's going to be a tax consequence, correct?  
 6 A That's correct.  
 7 Q Did Mr. Hack's letter discuss the issue  
 8 of taxes in any way?  
 9 A I don't recall. I don't have a letter  
 10 in front of me. I just recall generally the letter  
 11 dealing with the voluntary account. Let me just  
 12 clarify the other question you asked. There is  
 13 more to it than simply the tax consequences of  
 14 borrowing from a voluntary account. If a plan  
 15 provides that the only amount that you can borrow  
 16 are amounts which would not result in a taxable  
 17 distribution, borrowing more than those amounts  
 18 would also violate the terms of the plan and  
 19 potentially cause the plan to be disqualified.  
 20 Q So is it fair to say that you fought Mr.  
 21 Hack's letter in that he does not, at the same time

Page 10

1 he is telling Mr. Shofer he can borrow up to 100  
 2 percent of his voluntary account, also tell Mr.  
 3 Shofer that there could be a tax consequence; is  
 4 that what you find wrong with the letter?  
 5 A Yes.  
 6 Q Do you know whether Mr. Shofer asked Mr.  
 7 Hack anything about the tax consequences regarding  
 8 borrowing from a pension when he first posed this  
 9 question to him in August of 1984?  
 10 A No, generally I don't know whether he  
 11 specifically asked the question. But if someone  
 12 were to ask me whether they could borrow from their  
 13 voluntary account, I would certainly advise them of  
 14 the tax consequences of borrowing more than the  
 15 amount permissible to be borrowed without it being  
 16 a taxable distribution.  
 17 Q What is your understanding of who Mr.  
 18 Hack's client was in August of 1984?  
 19 A Presumably he -- I assume he installed  
 20 the plan and was doing the pension administration.  
 21 In which case his client would be the plan, the

Page 11

1 corporation, and to the extent that Mr. Shofer  
 2 would be -- I mean I would perceive Mr. Shofer as  
 3 Mr. Hack's client as well.  
 4 Q Do you know who the engagement letter or  
 5 contract was with?  
 6 A No, no.  
 7 Q Would that make a difference to you?  
 8 A I'm only drawing on my own experiences.  
 9 Technically the engagement letter was only with  
 10 respect to the corporation, one could argue Mr.  
 11 Hack's only client was the corporation for example.  
 12 Q And why is that?  
 13 A Because the corporation signed the  
 14 contract with Mr. Hack. But where there is a  
 15 closely held corporation one who represents closely  
 16 held corporations that are a hundred percent owned,  
 17 managed by one party, one perceives one's advice  
 18 being not only advice to the corporation but to the  
 19 owner of the corporation. I certainly do that in  
 20 my practice as an attorney.  
 21 Q As an attorney, correct?

Page 12

1 A As an attorney, correct.  
 2 Q Do you hold yourself out to your  
 3 client's as an attorney?  
 4 A Certainly. I'm an attorney.  
 5 Q Let's clarify again the nature of your  
 6 business.  
 7 A Okay.  
 8 Q Who are you employed by?  
 9 A I'm employed by Giampetro and Levin  
 10 which is a professional association.  
 11 Q And what is the business of that  
 12 association?  
 13 A It is a law practice.  
 14 Q And the clients of that professional  
 15 association are ones you have an attorney/client  
 16 relationship with, correct?  
 17 A Correct.  
 18 Q Do you know whether Mr. Hack had an  
 19 attorney/client relationship with Mr. Shofer?  
 20 A No, I don't know.  
 21 Q Would that fact have any impact on your



1 opinion one way or another in terms of what Mr.  
 2 Hack would do for a client versus what you would do  
 3 for a client in giving pension advice?  
 4 A No.  
 5 Q Why not?  
 6 A Well, because it becomes a very blurry  
 7 line. I think someone who proffers advice in tax  
 8 areas could be an accountant, could be an attorney,  
 9 could be a pension administrator. I think the  
 10 lines become very unclear. It's difficult to  
 11 ascertain where those lines are to be drawn.  
 12 Q Do you know Edward Kabala?  
 13 A Yes.  
 14 Q How do you know him?  
 15 A I know him through his reputation as a  
 16 pension attorney in Pennsylvania. I've also met  
 17 him as a consequence of his being an expert in this  
 18 matter at one time or continuing to be an expert in  
 19 this matter at this time.  
 20 Q Have you had any discussions with him  
 21 about this case?

1 A No, I don't.  
 2 Q Do you know whether Mr. Shofer even told  
 3 Mr. Hack that he was going to borrow from the plan?  
 4 A No, I don't know.  
 5 Q Would either of those things have any  
 6 impact on whether you believe Mr. Hack should have  
 7 identified that as an issue, I mean with the  
 8 taxability of borrowing from a pension?  
 9 A Yes.  
 10 Q In what way?  
 11 A If the amount that Mr. Shofer was going  
 12 to be borrowing were within the prescribed limits,  
 13 then there wouldn't be any problem with Mr. Hack's  
 14 advice.  
 15 Q What if Mr. Shofer failed to reveal any  
 16 amount to Mr. Hack, would that have any impact on  
 17 your opinion as to whether Mr. Hack should have  
 18 flagged a tax issue?  
 19 A Had I written the letter -- do you have  
 20 a copy of the letter, may I see the letter?  
 21 Q I would like for you to answer that

1 A I did have discussions with him about  
 2 the case.  
 3 Q Tell me about those discussions.  
 4 A I have no recollection of those  
 5 discussions. They were so many years ago.  
 6 Q When was the last time you spoke to Mr.  
 7 Kabala?  
 8 A I just don't recall.  
 9 Q Do you know what opinions he will be  
 10 expressing in this case?  
 11 A No, I don't.  
 12 Q Let me see if I understand your opinion  
 13 in this case. Is it that you fault Mr. Hack for  
 14 not raising the issue of potential tax consequences  
 15 to Mr. Shofer when Mr. Shofer first inquired in  
 16 August of 1984 as to whether he could borrow from  
 17 his pension?  
 18 A Yes.  
 19 Q Do you know whether Mr. Shofer told Mr.  
 20 Hack how much he was intending to borrow from the  
 21 plan?

1 question first.  
 2 A Repeat the question please.  
 3 (The reporter read the record as requested.)  
 4 A Mr. Shofer didn't tell Mr. Hack the  
 5 amount that he was borrowing. Mr. Hack should have  
 6 told Mr. Shofer the limitations. If Mr. Shofer  
 7 told Mr. Hack the amount that he was borrowing and  
 8 the amount that he was borrowing was under the  
 9 limits, then there would be no need to disclose the  
 10 adverse tax consequences of borrowing more than the  
 11 limits. That's the way I see it.  
 12 Q What if Mr. Shofer were simply asking  
 13 Mr. Hack a number of hypothetical questions among  
 14 which was can I borrow from my pension?  
 15 MR. TAYLOR: Let me object to the  
 16 question but you may answer it.  
 17 Q Do you believe in that context that Mr.  
 18 Hack had a duty to flag a potential tax issue?  
 19 A No.  
 20 Q Let's talk about your opinion with  
 21 respect to damages. What opinions will you be

Page 17

1 expressing on that subject?  
 2 A I am not prepared to answer that  
 3 question now.  
 4 Q Why is that?  
 5 A I haven't reviewed it. It's a highly  
 6 technical question and I haven't had an opportunity  
 7 to sit down and go through the file and ascertain  
 8 all of the tax consequences and other damages that  
 9 are associated with that type of advice.  
 10 Q Can you describe for me though what it  
 11 is you would be doing if you did sit down and  
 12 review these issues?  
 13 A Yeah.  
 14 Q I'm trying to find out first of all as a  
 15 matter of general topic, what it is you're going to  
 16 be saying about the issue of damages in this case.  
 17 A I'm going to be talking about the  
 18 Internal Revenue code provisions which would  
 19 indicate the amount of expense associated with that  
 20 kind of advice and any other consequential damages  
 21 which may arise as a result of those impositions of

Page 18

1 those fines, penalties and other taxes.  
 2 Q Is it your understanding that Mr.  
 3 Shofer's accountants during this time period were  
 4 at Grabush, Newman?  
 5 A During which time period?  
 6 Q When he first borrowed from the pension  
 7 in 1984.  
 8 A I believe so.  
 9 Q Is it also your understanding that in  
 10 1985, when the accountants at Grabush, Newman sat  
 11 down to prepare his personal income tax return for  
 12 tax year 1984, that they were aware of how much he  
 13 had borrowed from the pension?  
 14 A I don't know. I don't know whether they  
 15 were aware.  
 16 Q Assuming they were aware of the amount  
 17 and assuming the amount had been treated properly  
 18 for purposes of taxable income on the 1984 return,  
 19 would Mr. Shofer have sustained any tax damage?  
 20 MS. WHELIHAN: Objection.  
 21 THE WITNESS: Would you repeat the

Page 19

1 question?  
 2 (The reporter read the record as requested.)  
 3 A If the amount were reported on the 1984  
 4 return as a taxable distribution, Mr. Shofer would  
 5 have had to pay tax on the money in 1984.  
 6 Q But other than that, would he have  
 7 sustained any other damage?  
 8 A Now once again you're asking me a  
 9 question that I'm really today not prepared to  
 10 answer.  
 11 Q But as I understand your testimony, the  
 12 main or principal damage he would have sustained in  
 13 1985 was having to pay at least some taxes on a  
 14 portion of the money he borrowed in 1984 from the  
 15 pension?  
 16 A In addition to potential  
 17 disqualification of the plan as a consequence of  
 18 violating the terms of the plan.  
 19 Q Anything else?  
 20 A My understanding is that -- I'm asking,  
 21 I'm telling you that I'm not prepared to give you

Page 20

1 all of the specifics of my, of the consequences of  
 2 borrowing more than what is permissible in the  
 3 Internal Revenue code. However, I believe and I  
 4 underscore the word believe, that there is also a  
 5 prohibited transaction excise tax associated with  
 6 that borrowing.  
 7 Q Anything else?  
 8 A I don't know.  
 9 Q At your last deposition I believe you  
 10 testified that you had worked out an installment  
 11 plan with the IRS for Mr. Shofer to pay the taxes  
 12 he owed, correct?  
 13 A Correct.  
 14 Q And I believe the terms of that were he  
 15 was paying \$500 a month?  
 16 A I don't recall.  
 17 Q Did there come a time when that  
 18 installment plan changed?  
 19 A I don't recall.  
 20 Q Now, during the time period when you  
 21 assumed responsibility for Mr. Shofer's pension

1 matters and tax troubles, were you aware that he  
 2 was pursuing litigation against Stuart Hack?  
 3 A Yes, I was.  
 4 Q Were you aware he was spending money on  
 5 legal fees?  
 6 A Yes, I was.  
 7 Q Did you give him any advice whatsoever  
 8 on the issue of whether he should be spending money  
 9 on paying down his taxes versus spending money on  
 10 legal fees?  
 11 A No.  
 12 Q Did you give him any advice at all as to  
 13 how he should go about paying his tax debt?  
 14 A I need to go off the record.  
 15 Q No, I would rather not.  
 16 A I'm going to assert an attorney/client  
 17 privilege at this point.  
 18 Q That's been waived.  
 19 A Oh, it's been waived?  
 20 MR. TAYLOR: Well, I think it's been  
 21 waived with regard to your testimony on liability

1 A Yes, I do.  
 2 Q The problem I have with that Mr.  
 3 Giampetro is that the issue of Mr. Shofer's  
 4 straightening out his tax debt and problems is  
 5 central to this case. The Court of Appeals has  
 6 determined that he may recover consequential  
 7 damages in the form of fees paid to professionals  
 8 for helping him straighten out his tax situation.  
 9 With all of that in mind, are you still taking the  
 10 position that any advice you rendered to him for a  
 11 fee is privileged?  
 12 A Repeat the question. The question that  
 13 precipitated my raising the attorney/client  
 14 privilege.  
 15 (The reporter read the record as requested.)  
 16 Q And again just for the record, excuse  
 17 me, again for the record, when I asked did you give  
 18 him any advice concerning how to pay his tax debt,  
 19 I'm referring to the time when he became a client  
 20 of your firm.  
 21 MR. TAYLOR: Well, I would object to the

1 and damages. I mean as it relates to this case  
 2 unless there is an issue that's unrelated to the  
 3 case.  
 4 A I'm asserting attorney/client privilege.  
 5 Q I don't believe you can do that.  
 6 A Go get a judge to order me to testify.  
 7 Q We have to obviously go back to Judge  
 8 Matricciani and compel an answer to that.  
 9 A Fine.  
 10 Q Let me just establish for the record,  
 11 you do have an answer, correct?  
 12 A Repeat the question.  
 13 (The reporter read the record as requested.)  
 14 A Do I have an answer to that question?  
 15 Q Yes.  
 16 A Yes, I do have an answer to the  
 17 question.  
 18 Q Is it your position sitting here today  
 19 that you will not elaborate on what that advice was  
 20 because you believe it falls within the domain of  
 21 attorney/client privilege?

1 question on perhaps the basis of how broad it is.  
 2 I am assuming that the question is directed to the  
 3 particulars of this particular case and the taxes  
 4 that may have been generated by what we have  
 5 alleged to be Mr. Hack's erroneous advice. I  
 6 assume you're limiting it to that.  
 7 MS. WHELIHAN: Absolutely.  
 8 MR. TAYLOR: The question is a fairly  
 9 broad question.  
 10 MS. TRUHE: Right. I don't care about  
 11 any tax debts question Mr. Shofer might owe for  
 12 reasons totally unrelated to Stuart Hack's advice?  
 13 THE WITNESS: I will answer the  
 14 question, repeat the question again.  
 15 (The reporter read the record as requested.)  
 16 A I don't recall.  
 17 Q Mr. Giampetro, your earlier testimony  
 18 was yes. Now it's I don't recall?  
 19 A I don't recall. I'm sitting here today,  
 20 I don't recall.  
 21 Q Two minutes ago, and again the record

Page 25

1 will reveal, that you had an answer to that  
 2 question. That indeed you did give him advice but  
 3 that you felt such advice fell within the domain of  
 4 attorney/client privilege. But is it your  
 5 testimony you don't recall whether you gave some  
 6 advice?  
 7 A **I just don't recall it. I don't recall**  
 8 **talking to him about this issue.**  
 9 Q Are you recanting your earlier testimony  
 10 that you gave him such advice?  
 11 A **Yes, I am. I'm telling you I don't**  
 12 **recall.**  
 13 Q So you're recanting that response in  
 14 which you said you did give such advice?  
 15 A **Yes.**  
 16 Q Will you be expressing any other  
 17 opinions in this case?  
 18 A **I don't know.**  
 19 Q Do you have any idea when you will know?  
 20 A **No, I don't know.**  
 21 Q Do you have any knowledge sitting here

Page 26

1 today as to how much Mr. Shofer has expended in  
 2 legal fees connected to the Hack litigation?  
 3 A **I don't know.**  
 4 Q Do you have any opinion sitting here  
 5 today as to whether the money which he has spent on  
 6 legal fees first of all could have been spent on  
 7 paying his tax debt?  
 8 MR. TAYLOR: Well, I will object to the  
 9 question but you can answer it if you can.  
 10 A **Repeat the question.**  
 11 **(The reporter read the record as requested.)**  
 12 A **No, I don't have any opinion on that.**  
 13 Q Do you know factually whether that money  
 14 could have been spent on paying the tax debt?  
 15 MR. TAYLOR: I object to the question.  
 16 A **I don't know.**  
 17 Q Assuming it could have been applied to  
 18 the tax debt, do you have any opinion sitting here  
 19 today as to whether it should have been?  
 20 MR. TAYLOR: Objection.  
 21 A **I don't know.**

Page 27

1 Q Why not?  
 2 A **I have no opinion, don't know.**  
 3 Q Well, back in 1986 when everyone  
 4 discovered there was an issue and determined  
 5 eventually that amended returns needed to be filed  
 6 disclosing additional income, Mr. Shofer had a tax  
 7 debt at that point, didn't he?  
 8 A **Yes, he did.**  
 9 Q And assuming he had paid off his tax  
 10 debt at the moment everyone determined one was due,  
 11 would he have sustained any damage after that point  
 12 taxwise?  
 13 A **Had he paid all of the tax debt at that**  
 14 **point he would have no further tax debt.**  
 15 Q But in fact Mr. Shofer did have a  
 16 continuing -- strike that.  
 17 But in fact after everyone determined  
 18 there was a tax debt due, that tax debt grew  
 19 higher, correct, because Mr. Shofer did not pay it  
 20 off immediately in full?  
 21 A **I don't know when and how he paid his**

Page 28

1 **tax debt but when one doesn't pay one's tax debt**  
 2 **interest accrues.**  
 3 Q Do you know whether Mr. Shofer has paid  
 4 his tax debt in full?  
 5 A **I don't know.**  
 6 Q Did you handle that matter for him?  
 7 A **Handle what matter for him?**  
 8 Q His negotiations with the IRS in  
 9 connection with paying off his tax debt in full?  
 10 A **Yes, I did.**  
 11 Q Then why is it you don't know whether,  
 12 sitting here today, it has been paid in full or  
 13 not?  
 14 A **Because I haven't monitored whether he's**  
 15 **paid it. I negotiated an installment sale on his**  
 16 **behalf. I'm not administering that particular**  
 17 **agreement. I don't know whether he's paid it,**  
 18 **whether there has been changes made to it. I don't**  
 19 **know the status of it right now.**  
 20 Q When did you do that?  
 21 A **Gosh, years ago. That's all I can say.**

1 Q What are you doing for Mr. Shofer and/or  
 2 his business today in terms of professional  
 3 services?  
 4 A My law firm, the law firm for whom I  
 5 provide services, is not providing any services for  
 6 Mr. Shofer at this time other than this testimony.  
 7 I also own an interest in a pension administration  
 8 firm that provides administrative services on  
 9 behalf of qualified retirement plans. That  
 10 organization continues to administer Mr. Shofer's  
 11 plan. There are some loose ends that are being  
 12 tied up by the law firm in connection with Mr.  
 13 Shofer's audit of his plan with both the Internal  
 14 Revenue Service and the department of labor that I  
 15 am intermittently involved in.  
 16 Q To this day?  
 17 A Yes.  
 18 Q So Mr. Shofer personally has not stopped  
 19 being a client of your law firm, correct?  
 20 A No, he has not. He is a client of my  
 21 law firm.

1 Shofer but I assume it's similar.  
 2 Q Do you know whether any other pension  
 3 service or administrator or consultant is rendering  
 4 any service to Catalina Enterprises pension plan  
 5 other than the one you own?  
 6 A I don't believe so but I don't know.  
 7 Q And does your pension business, the one  
 8 you have an interest in, continue to perform these  
 9 services for Catalina today?  
 10 A Yes.  
 11 Q When your pension business bills the  
 12 plan for services which it renders each year, is  
 13 the bill first of all directed to Catalina?  
 14 A The corporation, yes.  
 15 Q All right. When you say the  
 16 corporation, do you mean Crown Motors or Catalina?  
 17 A The corporation. Crown Motors.  
 18 Q I see. So any work which your pension  
 19 service does for the pension plan is billed to  
 20 Crown Motors, correct?  
 21 A Correct.

1 Q What is it your pension business does  
 2 for Mr. Shofer? First of all, let's establish who  
 3 the client is of your pension service.  
 4 A The client of the pension service is the  
 5 Catalina Enterprises retirement plan.  
 6 Q So the plan itself is the client?  
 7 A Yes, the pension plan, the pension  
 8 service, what Pension Services Limited does, which  
 9 is the name of the company, on a yearly basis,  
 10 reports to the Internal Revenue Service and to the  
 11 plan participants regarding what, how the plan is  
 12 performing and complies with whatever requirements  
 13 are applicable with regard to reporting to both the  
 14 Internal Revenue Service and plan participants.  
 15 Q Did your pension business essentially  
 16 assume all of the tasks which Mr. Hack's company  
 17 was performing for Mr. Shofer?  
 18 A I don't know whether Mr. Hack's -- I own  
 19 a company that was similar to Mr. Hack's company.  
 20 I don't know what specific services Mr. Hack's  
 21 company was performing for Mr. Shofer's plan or Mr.

1 Q Is it paid by Crown Motors?  
 2 A Yes.  
 3 Q Now, with reference to the work which  
 4 you did for Mr. Shofer in helping him straighten  
 5 out some of his tax problems, to whom were those  
 6 bills directed?  
 7 A I believe they were submitted to Crown  
 8 Motors.  
 9 Q Were they paid by Crown Motors?  
 10 A I don't know. I have to check with my  
 11 administrative people to confirm any kind of answer  
 12 to that question.  
 13 Q Well, one thing I would like to do, and  
 14 we have to go off the record for a moment in order  
 15 for you to do it, is for you to pull your billing  
 16 file for the work you did in connection with the  
 17 tax audits and department of labor and that type of  
 18 thing so that I can see copies of the bills for  
 19 services you rendered in that area.  
 20 A Attorney/client privilege.  
 21 Q Well --

Page 33

1 MS. WHELIHAN: I don't think bills are  
2 covered by the attorney/client privilege.  
3 THE WITNESS: You may not think it.  
4 When Judge Matricciani orders me to produce it,  
5 I'll produce it.

6 MS. WHELIHAN: You're aware there's case  
7 law in Maryland that says bills and fees are not  
8 covered by attorney/client privilege?

9 THE WITNESS: The bills though describe  
10 the services that are rendered. There's a  
11 description on the bills of what specifically was  
12 done in connection with the time charges and the  
13 amount. So is that not a description of the  
14 services I was performing for Mr. Shofer?

15 MS. TRUHE: I think all of that is fair  
16 game. Again, the Court of Appeals ruled in this  
17 case, which we call Shofer 1, that Mr. Shofer may  
18 recover as part of his damages in this case the  
19 fees he has paid to various professionals, lawyers,  
20 accountants, you name it, in helping him straighten  
21 out his tax troubles. So again, speaking to you

Page 34

1 attorney to attorney, if he can recover that as  
2 damage, why am I not entitled to that information  
3 which would support the damage?

4 MS. WHELIHAN: In addition, the court  
5 has also ruled that those types of billings are not  
6 covered by the attorney/client privilege.

7 THE WITNESS: Apart from the Shofer/Hack  
8 decision?

9 MS. TRUHE: Exactly.

10 MS. WHELIHAN: It's not something I  
11 necessarily agreed with. But once they ruled I do.

12 MS. TRUHE: Specifically in this case  
13 the court has said that that is a proper item of  
14 damage. So I need to see what evidence there is of  
15 that damage.

16 THE WITNESS: Well, if Mr. Shofer  
17 directs me to deliver that, then I will deliver  
18 whatever it is I'm directed.

19 MS. TRUHE: Then let's get that on the  
20 record.

21 THE WITNESS: This is on the record.

Page 35

1 MR. SHOFER: It's fine but I would like  
2 you to possibly look at the necessity of redacting  
3 anything that might specifically not be related to  
4 this that you in your own viewpoint, you feel might  
5 be privileged for other reasons.

6 THE WITNESS: Perhaps maybe it's up to  
7 the judge to decide what, maybe he should in camera  
8 decide whether things should be disclosed or not  
9 disclosed.

10 MR. SHOFER: Certainly anything related  
11 to the prohibited transactions that you have --  
12 that you have worked, work that you have done  
13 relative to this, because we're asking for that  
14 money back. So we certainly have to produce the  
15 bills.

16 THE WITNESS: Whatever Mr. Shofer  
17 directs me to do and his attorney directs me to do,  
18 I will do.

19 MS. TRUHE: I don't really want to see  
20 the substance of the bills. As far as the amounts  
21 are concerned, I'm sure there is some sorting out.

Page 36

1 MR. SHOFER: I don't mind.

2 MS. TRUHE: I just want to see who the  
3 addressee of the bill is.

4 THE WITNESS: The addressee?

5 MS. TRUHE: Uh-huh.

6 THE WITNESS: Okay.

7 MS. TRUHE: So if we could take a minute  
8 while you pull that file.

9 MS. WHELIHAN: I actually would like to  
10 see the bills. I could see those later and not  
11 spend time doing it now.

12 MS. TRUHE: Off the record.

13 (Discussion held off the record.)

14 (Brief recess.)

15 Q While we were off the record we had a  
16 discussion amongst ourselves and the firm's  
17 administrator as to how Mr. Giampetro has handled  
18 billing for the services he has rendered to Mr.  
19 Shofer in connection with straightening out his tax  
20 problems related to borrowing from the pension.  
21 Mr. Giampetro, let's just clarify first of all that

Page 37

1 any bills which your firm has generated were not  
 2 sent to Mr. Shofer personally, correct, they were  
 3 either sent to his business or to the pension plan?  
 4 A They were addressed to either his  
 5 business or the pension plan.  
 6 Q Thank you.  
 7 MS. TRUHE: And again Mr. Shofer, you  
 8 have copies of all of the bills which Mr. Giampetro  
 9 has sent to either the business or the pension plan  
 10 in connection with assisting you in straightening  
 11 out the tax problems related to the borrowing from  
 12 the pension?  
 13 MR. SHOFER: I think for the most part  
 14 they are all at my office and easy to get ahold of.  
 15 MS. TRUHE: I would like to see copies  
 16 of those as soon as possible. That's all I have.  
 17 MS. WHELIHAN: I don't have any  
 18 questions.  
 19 MR. TAYLOR: Mr. Giampetro, I don't have  
 20 any questions. I'm going to tell you you have a  
 21 right to review this deposition before it's filed.

Page 39

1 CERTIFICATE OF DEPONENT  
 2  
 3  
 4  
 5  
 6  
 7 I hereby certify that I have read and  
 8 examined the foregoing transcript, and the same is  
 9 a true and accurate record of the testimony given  
 10 by me.  
 11 Any additions or corrections that I feel  
 12 are necessary, I will attach on a separate piece of  
 13 paper to the original transcript.  
 14  
 15  
 16 \_\_\_\_\_  
 17 Nicholas J. Giampetro  
 18  
 19  
 20  
 21

Page 38

1 Would you like to review it?  
 2 THE WITNESS: Yes, I would.  
 3 MR. TAYLOR: All right.  
 4 (Deposition concluded at 3:45 p.m.)  
 5 \* \* \* \* \*  
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Page 40

1 STATE OF MARYLAND, COUNTY OF BALTIMORE:  
 2 I, Richard D. Baker, Jr., a Notary Public in  
 3 and for the State of Maryland, County of Baltimore,  
 4 do hereby certify the within named NICHOLAS J.  
 5 GIAMPETRO personally appeared before me at the time  
 6 and place herein set out and, after having been  
 7 duly sworn by me according to law, was interrogated  
 8 by counsel.  
 9 I further certify that the examination was  
 10 recorded stenographically by me and then  
 11 transcribed from my stenographic notes to the  
 12 within typewritten matter in a true and accurate  
 13 manner. I further certify that the stipulations  
 14 contained herein were entered into by counsel in my  
 15 presence. I further certify that I am not of  
 16 counsel to any of the parties, nor an employee of  
 17 counsel, nor related to any of the parties, nor in  
 18 any way interested in the outcome of this action.  
 19 AS WITNESS my hand and notarial seal this 22nd  
 20 day of May, 1997, at Baltimore, Maryland.  
 21  
 22 \_\_\_\_\_  
 23 Richard D. Baker, Jr., Notary Public

<b>-\$-</b>	<b>addition</b> [2] 19:16 34:4	<b>approached</b> [1] 4:18	35:20 36:10 37:1	<b>Co</b> [2] 1:11 2:6
<b>\$50,000</b> [1] 9:1	<b>additional</b> [1] 27:6	<b>area</b> [1] 32:19	37:8	<b>code</b> [2] 17:18 20:3
<b>\$500</b> [1] 20:15	<b>additions</b> [1] 39:11	<b>areas</b> [1] 13:8	<b>blurry</b> [1] 13:6	<b>commencing</b> [1] 1:17
<b>-&amp;-</b>	<b>addressed</b> [1] 37:4	<b>argue</b> [1] 11:10	<b>borrow</b> [10] 7:18	<b>company</b> [7] 1:4
<b>&amp;</b> [2] 1:11 2:6	<b>addressee</b> [2] 36:3 36:4	<b>arise</b> [1] 17:21	8:13 8:16 9:15	1:7 30:9 30:16
<b>-'-</b>	<b>administer</b> [1] 29:10	<b>ascertain</b> [2] 13:11 17:7	10:1 10:12 14:16	30:19 30:19 30:21
<b>'96</b> [1] 4:17	<b>administering</b> [1] 28:16	<b>aspect</b> [2] 7:15	14:20 15:3 16:14	<b>compel</b> [1] 22:8
<b>'97</b> [1] 4:16	<b>administration</b> [2] 10:20 29:7	<b>aspects</b> [1] 8:15	<b>borrowed</b> [5] 8:19	<b>complies</b> [1] 30:12
<b>-1-</b>	<b>administrative</b> [2] 29:8 32:11	<b>assert</b> [1] 21:16	10:15 18:6 18:13	<b>concerned</b> [1] 35:21
<b>1</b> [1] 33:17	<b>administrator</b> [3] 13:9 31:3 36:17	<b>asserting</b> [1] 22:4	19:14	<b>concerning</b> [2] 7:7
<b>100</b> [1] 10:1	<b>adverse</b> [1] 16:10	<b>assisting</b> [1] 37:10	<b>borrowing</b> [17] 8:6	23:18
<b>1984</b> [10] 8:6	<b>advise</b> [31] 5:7	<b>associated</b> [4] 6:5	8:10 8:11 9:14	<b>concluded</b> [1] 38:4
10:9 10:18 14:16	5:11 5:13 5:16	17:9 17:19 20:5	9:17 10:8 10:14	<b>confirm</b> [1] 32:11
18:7 18:12 18:18	5:21 6:5 6:20	<b>association</b> [3] 12:10	15:8 15:12 16:5	<b>connected</b> [1] 26:2
19:3 19:5 19:14	7:12 7:14 7:16	12:12 12:15	16:7 16:8 16:10	<b>connection</b> [6] 28:9
<b>1985</b> [2] 18:10 19:13	7:17 8:18 11:17	<b>assume</b> [4] 10:19	20:2 20:6 36:20	29:12 32:16 33:12
<b>1986</b> [3] 6:8 7:6	11:18 13:3 13:7	24:6 30:16 31:1	<b>Brief</b> [1] 36:14	36:19 37:10
27:3	15:14 17:9 17:20	<b>assumed</b> [1] 20:21	<b>broad</b> [2] 24:1	<b>consequence</b> [4] 9:5 10:3 13:17
<b>1997</b> [2] 1:17 40:19	21:7 21:12 22:19	<b>assuming</b> [5] 18:16	24:9	19:17
<b>-2-</b>	23:10 23:18 24:5	18:17 24:2 26:17	<b>business</b> [10] 12:6	<b>consequences</b> [7] 9:13 10:7 10:14
<b>21286</b> [1] 1:19	24:12 25:2 25:3	<b>attach</b> [1] 39:12	30:15 31:7 31:11	14:14 16:10 17:8
<b>22nd</b> [1] 40:19	25:6 25:10 25:14	<b>attorney</b> [11] 7:7	37:3 37:5 37:9	20:1
<b>-3-</b>	<b>advise</b> [1] 10:13	11:20 11:21 12:1	<b>-C-</b>	<b>consequential</b> [2] 17:20 23:6
<b>3:00</b> [1] 1:17	<b>advice</b> [31] 5:7	12:3 12:4 13:8	<b>camera</b> [1] 35:7	<b>constituted</b> [1] 7:19
<b>3:45</b> [1] 38:4	5:11 5:13 5:16	13:16 34:1 34:1	<b>capacity</b> [1] 4:13	<b>consultant</b> [1] 31:3
<b>-4-</b>	5:21 6:5 6:20	35:17	<b>care</b> [1] 24:10	<b>contained</b> [1] 40:14
<b>4</b> [1] 3:5	7:12 7:14 7:16	<b>attorney/client</b> [11] 12:15 12:19 21:16	<b>case</b> [17] 1:5 4:12	<b>context</b> [1] 16:17
<b>407</b> [1] 1:19	7:17 8:18 11:17	22:4 22:21 23:13	10:21 13:21 14:2	<b>continue</b> [1] 31:8
<b>-8-</b>	11:18 13:3 13:7	25:4 32:20 33:2	14:10 14:13 17:16	<b>continues</b> [1] 29:10
<b>8</b> [1] 1:17	15:14 17:9 17:20	33:8 34:6	22:1 22:3 23:5	<b>continuing</b> [2] 13:18
<b>88102069.CL79993</b>	21:7 21:12 22:19	<b>attorneys</b> [1] 6:15	24:3 25:17 33:6	27:16
[1] 1:6	23:10 23:18 24:5	<b>audit</b> [1] 29:13	33:17 33:18 34:12	<b>contract</b> [2] 11:5
<b>-9-</b>	24:12 25:2 25:3	<b>audits</b> [1] 32:17	<b>Catalina</b> [5] 30:5	11:14
<b>920</b> [1] 1:18	25:6 25:10 25:14	<b>August</b> [4] 8:6	31:4 31:9 31:13	<b>contribution</b> [3] 7:20 8:1 8:2
<b>-A-</b>	<b>advise</b> [1] 10:13	10:9 10:18 14:16	31:16	<b>contributions</b> [2] 8:21 9:1
<b>Absolutely</b> [1] 24:7	<b>advice</b> [31] 5:7	<b>aware</b> [6] 18:12	<b>central</b> [1] 23:5	<b>conversation</b> [1] 5:19
<b>according</b> [1] 40:7	5:11 5:13 5:16	18:15 18:16 21:1	<b>certainly</b> [5] 10:13	<b>conversations</b> [1] 7:10
<b>account</b> [10] 7:19	5:21 6:5 6:20	21:4 33:6	11:19 12:4 35:10	<b>copies</b> [3] 32:18
8:10 8:12 8:14	7:12 7:14 7:16	<b>-B-</b>	35:14	37:8 37:15
8:16 8:20 9:11	7:17 8:18 11:17	<b>Baker</b> [4] 1:20	<b>CERTIFICATE</b> [1] 39:1	<b>copy</b> [1] 15:20
9:14 10:2 10:13	11:18 13:3 13:7	1:21 40:2 40:21	39:1	<b>corporation</b> [10] 11:1 11:10 11:11
<b>accountant</b> [1] 13:8	15:14 17:9 17:20	<b>Baltimore</b> [4] 1:4	40:4 40:9 40:13	11:13 11:15 11:18
<b>accountants</b> [3] 18:3	21:7 21:12 22:19	40:1 40:3 40:19	40:15	11:19 31:14 31:16
18:10 33:20	23:10 23:18 24:5	<b>basis</b> [2] 24:1 30:9	<b>changed</b> [1] 20:18	31:17
<b>accrues</b> [1] 28:2	24:12 25:2 25:3	<b>became</b> [1] 23:19	<b>changes</b> [1] 28:18	<b>corporations</b> [1] 11:16
<b>accurate</b> [2] 39:9	25:6 25:10 25:14	<b>become</b> [1] 13:10	<b>charges</b> [1] 33:12	<b>correct</b> [14] 9:5
<b>action</b> [1] 40:18	<b>advise</b> [1] 10:13	<b>becomes</b> [1] 13:6	<b>check</b> [1] 32:10	9:6 11:21 12:1
	<b>advice</b> [31] 5:7	<b>behalf</b> [6] 2:2	<b>CIRCUIT</b> [1] 1:2	12:16 12:17 20:12
	5:11 5:13 5:16	2:4 2:6 5:1	<b>CITY</b> [1] 1:4	20:13 22:11 27:19
	5:21 6:5 6:20	28:16 29:9	<b>clarify</b> [3] 9:12	29:19 31:20 31:21
	7:12 7:14 7:16	<b>bill</b> [2] 31:13 36:3	12:5 36:21	37:2
	7:17 8:18 11:17	<b>billed</b> [1] 31:19	<b>Clerk</b> [1] 4:3	<b>corrections</b> [1] 39:11
	11:18 13:3 13:7	<b>billing</b> [2] 32:15	<b>client</b> [12] 10:18	<b>counsel</b> [4] 40:8
	15:14 17:9 17:20	36:18	10:21 11:3 11:11	40:14 40:16 40:17
	21:7 21:12 22:19	<b>billings</b> [1] 34:5	13:2 13:3 23:19	
	23:10 23:18 24:5	<b>bills</b> [12] 31:11 32:6	29:19 29:20 30:3	
	24:12 25:2 25:3	32:18 33:1 33:7	30:4 30:6	
	25:6 25:10 25:14	33:9 33:11 35:15	<b>client's</b> [1] 12:3	
	<b>advise</b> [1] 10:13		<b>clients</b> [1] 12:14	
	<b>advice</b> [31] 5:7		<b>closely</b> [2] 11:15	
	5:11 5:13 5:16			
	5:21 6:5 6:20			
	7:12 7:14 7:16			
	7:17 8:18 11:17			
	11:18 13:3 13:7			
	15:14 17:9 17:20			
	21:7 21:12 22:19			
	23:10 23:18 24:5			
	24:12 25:2 25:3			
	25:6 25:10 25:14			
	<b>APPEARANCES</b> [1] 2:1			
	<b>appeared</b> [1] 40:5			
	<b>applicable</b> [1] 30:13			
	<b>applied</b> [1] 26:17			



County [2] 40:1 40:3	discussing [1] 6:16 discussion [5] 6:7 7:3 7:4 36:13 36:16 discussions [6] 6:10 7:6 13:20 14:1 14:3 14:5 disqualification [1] 19:17 disqualified [1] 9:19 distribution [3] 9:17 10:16 19:4 doesn't [1] 28:1 domain [2] 22:20 25:3 done [2] 33:12 35:12 Douglas [1] 2:2 down [4] 17:7 17:11 18:11 21:9 drawing [1] 11:8 drawn [1] 13:11 due [2] 27:10 27:18 duly [2] 4:7 40:7 during [3] 18:3 18:5 20:20 duty [1] 16:18	exceed [1] 8:20 exceeded [1] 9:1 excess [1] 8:21 excise [1] 20:5 excuse [3] 4:17 4:17 23:16 expended [1] 26:1 expense [1] 17:19 experiences [1] 11:8 expert [9] 4:12 5:1 5:3 5:13 6:9 6:15 7:8 13:17 13:18 expressing [4] 7:12 14:10 17:1 25:16 extent [3] 8:19 8:21 11:1	-G- game [1] 33:16 general [2] 7:3 17:15 generally [4] 5:20 6:11 9:10 10:10 generated [2] 24:4 37:1 Giampetro [13] 1:16 3:3 4:6 4:11 12:9 23:3 24:17 36:17 36:21 37:8 37:19 39:15 40:5 Giampetro/Levin [1] 1:18 given [2] 5:7 39:9 giving [1] 13:3 Gosh [1] 28:21 Grabush [4] 1:11 2:6 18:4 18:10 grew [1] 27:18	immediately [1] 27:20 impact [3] 12:21 15:6 15:16 impositions [1] 17:21 income [3] 18:11 18:18 27:6 indeed [1] 25:2 INDEX [1] 3:1 indicate [1] 17:19 indicated [1] 8:11 information [1] 34:2 informed [1] 7:18 inquired [1] 14:15 installed [1] 10:19 installment [3] 20:10 20:18 28:15 intending [1] 14:20 interest [4] 8:1 28:2 29:7 31:8 interested [1] 40:18 intermittently [2] 7:9 29:15 Internal [5] 17:18 20:3 29:13 30:10 30:14 interrogated [1] 40:7 involved [1] 29:15 IRS [2] 20:11 28:8 issue [20] 5:2 5:6 5:8 5:10 6:1 6:20 7:1 7:8 7:11 9:7 14:14 15:7 15:18 16:18 17:16 21:8 22:2 23:3 25:8 27:4 issues [2] 6:9 17:12 item [1] 34:13 itself [1] 30:6
-D- D [4] 1:20 1:21 40:2 40:21 damage [8] 18:19 19:7 19:12 27:11 34:2 34:3 34:14 34:15 damages [10] 5:9 6:1 7:2 16:21 17:8 17:16 17:20 22:1 23:7 33:18 dealing [1] 9:11 Deborah [1] 2:5 debt [16] 21:13 23:4 23:18 26:7 26:14 26:18 27:7 27:10 27:13 27:14 27:18 27:18 28:1 28:1 28:4 28:9 debts [1] 24:11 decide [2] 35:7 35:8 decision [1] 34:8 Defendant [3] 1:13 2:4 2:6 Defendants [1] 1:6 deliver [2] 34:17 34:17 department [2] 29:14 32:17 DEPONENT [1] 39:1 deposition [5] 1:15 4:3 20:9 37:21 38:4 describe [2] 17:10 33:9 description [2] 33:11 33:13 determined [4] 23:6 27:4 27:10 27:17 difference [1] 11:7 difficult [1] 13:10 directed [4] 24:2 31:13 32:6 34:18 directs [3] 34:17 35:17 35:17 disclose [1] 16:9 disclosed [2] 35:8 35:9 disclosing [1] 27:6 discovered [1] 27:4 discuss [1] 9:7	-E- earned [1] 8:1 easy [1] 37:14 Edward [1] 13:12 either [5] 7:7 15:5 37:3 37:4 37:9 elaborate [1] 22:19 employed [2] 12:8 12:9 employee [1] 40:16 ends [1] 29:11 engagement [2] 11:4 11:9 entered [1] 40:14 Enterprises [2] 30:5 31:4 entitled [1] 34:2 erroneous [7] 5:8 5:17 5:21 7:14 7:16 8:18 24:5 Esquire [6] 1:16 2:2 2:3 2:5 3:3 4:6 essentially [1] 30:15 establish [2] 22:10 30:2 eventually [1] 27:5 evidence [1] 34:14 Exactly [2] 9:4 34:9 examination [4] 3:4 4:7 4:10 40:9 examined [1] 39:8 example [1] 11:11	-F- fact [3] 12:21 27:15 27:17 factually [1] 26:13 failed [1] 15:15 fair [2] 9:20 33:15 fairly [1] 24:8 falls [1] 22:20 far [1] 35:20 fashion [1] 8:2 fault [1] 14:13 fee [1] 23:11 fees [7] 21:5 21:10 23:7 26:2 26:6 33:7 33:19 fell [1] 25:3 felt [1] 25:3 file [3] 17:7 32:16 36:8 filed [2] 27:5 37:21 filing [1] 4:3 fine [2] 22:9 35:1 fines [1] 18:1 firm [8] 23:20 29:4 29:4 29:8 29:12 29:19 29:21 37:1 firm's [1] 36:16 first [12] 5:10 6:8 6:20 10:8 14:15 16:1 17:14 18:6 26:6 30:2 31:13 36:21 flag [1] 16:18 flagged [1] 15:18 focus [1] 5:10 focusing [1] 8:15 follows [1] 4:9 form [1] 23:7 fought [1] 9:20 frankly [1] 5:20 front [1] 9:10 full [4] 27:20 28:4 28:9 28:12	-H- Hack [26] 1:4 1:5 1:7 1:8 2:4 5:8 6:6 8:5 8:8 10:7 11:14 12:18 13:2 14:13 14:20 15:3 15:6 15:16 15:17 16:4 16:5 16:7 16:13 16:18 21:2 26:2 Hack's [18] 5:11 5:12 5:16 5:21 6:20 7:11 9:7 9:21 10:18 11:3 11:11 15:13 24:5 24:12 30:16 30:18 30:19 30:20 hand [1] 40:19 handle [2] 28:6 28:7 handled [1] 36:17 held [3] 11:15 11:16 36:13 helping [3] 23:8 32:4 33:20 hereby [4] 4:2 4:4 39:7 40:4 herein [2] 40:6 40:14 higher [1] 27:19 highly [1] 17:5 hold [1] 12:2 hundred [1] 11:16 hypothetical [1] 16:13	-J- J [5] 1:16 3:3 4:6 39:15 40:4 Janet [1] 2:3 Jr [4] 1:20 1:21 40:2 40:21 judge [4] 22:6 22:7 33:4 35:7
			-I- idea [1] 25:19 identified [1] 15:7	-K- Kabala [2] 13:12 14:7 kind [2] 17:20 32:11 knowledge [1] 25:21
			-L- labor [2] 29:14 32:17 last [2] 14:6 20:9	

law [9] 1:18 12:13 29:4 29:4 29:12 29:19 29:21 33:7 40:7	monies [1] 7:19	11:17 11:17 13:1	31:4 31:7 31:11	privileged [2] 23:11
lawyers [1] 33:19	monitored [1] 28:14	13:18 27:10 28:1	31:18 31:19 36:20	35:5
least [1] 19:13	month [1] 20:15	31:5 31:7 32:13	37:3 37:5 37:9	problem [2] 15:13
legal [4] 21:5 21:10 26:2 26:6	most [1] 37:13	one's [2] 11:17 28:1	37:12	23:2
letter [12] 8:8	Motors [6] 31:16	ones [1] 12:15	people [1] 32:11	problems [4] 23:4
8:10 9:7 9:9	31:17 31:20 32:1	opinion [10] 5:7	perceive [1] 11:2	32:5 36:20 37:11
9:10 9:21 10:4	32:8 32:9	5:21 13:1 14:12	perceives [1] 11:17	produce [3] 33:4
11:4 11:9 15:19	Ms [22] 3:5 4:10	15:17 16:20 26:4	percent [2] 10:2	33:5 35:14
15:20 15:20	18:20 24:7 24:10	26:12 26:18 27:2	11:16	professional [3]
Levin [1] 12:9	33:1 33:6 33:15	opinions [5] 5:12	perform [1] 31:8	12:10 12:14 29:2
liability [1] 21:21	34:4 34:9 34:10	7:12 14:9 16:21	performing [4] 30:12	professionals [2]
limit [1] 8:17	34:12 34:19 35:19	25:17	30:17 30:21 33:14	23:7 33:19
limitation [2] 8:13 9:2	36:2 36:5 36:7	opportunity [1] 17:6	perhaps [2] 24:1	proffered [1] 6:6
limitations [1] 16:6	36:9 36:12 37:7	order [2] 22:6	35:6	proffers [1] 13:7
Limited [1] 30:8	37:15 37:17	32:14	period [3] 18:3	prohibited [2] 20:5
limiting [1] 24:6	Murrell [1] 2:5	orders [1] 33:4	18:5 20:20	35:11
limits [3] 15:12	-N-	organization [1]	permissible [4] 8:12	proper [1] 34:13
16:9 16:11	name [2] 30:9	29:10	9:2 10:15 20:2	properly [1] 18:17
line [1] 13:7	33:20	original [1] 39:13	personal [1] 18:11	provide [1] 29:5
lines [2] 13:10 13:11	named [1] 40:4	ourselves [1] 36:16	personally [3] 29:18	provided [1] 8:9
litigation [2] 21:2	nature [1] 12:5	outcome [1] 40:18	37:2 40:5	Providence [1] 1:18
26:2	necessarily [1] 34:11	owe [1] 24:11	piece [1] 39:12	provides [2] 9:15
loans [1] 8:3	necessary [1] 39:12	owed [1] 20:12	place [1] 40:6	29:8
look [1] 35:2	necessity [1] 35:2	own [5] 11:8 29:7	Plaintiff [2] 1:2	providing [1] 29:5
loose [1] 29:11	need [3] 16:9 21:14	30:18 31:5 35:4	2:2	provisions [1] 17:18
-M-	34:14	owned [1] 11:16	Plaintiffs [1] 1:9	Public [3]
M [1] 2:3	needed [1] 27:5	owner [1] 11:19	plan [26] 9:14 9:18	40:2 40:21
main [1] 19:12	negotiated [1] 28:15	-P-	9:19 10:20 10:21	pull [2] 32:15 36:8
managed [1] 11:17	negotiations [1] 28:8	P.A [2] 1:12 2:6	14:21 15:3 19:17	purposes [1] 18:18
manner [1] 40:13	Newman [4] 1:11	p.m [2] 1:17 38:4	19:18 20:11 20:18	Pursuant [1] 1:15
Maryland [5] 1:19	2:6 18:4 18:10	PAGE [1] 3:1	29:11 29:13 30:5	pursuing [1] 21:2
33:7 40:1 40:3	Nicholas [5] 1:16	paid [11] 23:7 27:9	30:6 30:7 30:11	
40:19	3:3 4:6 39:15	27:13 27:21 28:3	30:11 30:14 30:21	-Q-
Matricciani [2] 22:8	40:4	28:12 28:15 28:17	31:4 31:12 31:19	qualified [1] 29:9
33:4	none [1] 8:2	32:1 32:9 33:19	37:3 37:5 37:9	questions [4] 6:13
matter [6] 13:18	nor [3] 40:16 40:17	paper [1] 39:13	plans [1] 29:9	16:13 37:18 37:20
13:19 17:15 28:6	notarial [1] 40:19	part [2] 33:18 37:13	point [4] 21:17 27:7	
28:7 40:12	Notary [3] 1:20	participants [2] 30:11	27:11 27:14	-R-
matters [1] 21:1	40:2 40:21	30:14	portion [1] 19:14	R [1] 2:2
may [10] 1:17 7:9	notes [1] 40:11	particular [2] 24:3	posed [1] 10:8	raising [2] 14:14
15:20 16:16 17:21	nothing [1] 4:8	particulars [1] 24:3	position [2] 22:18	23:13
23:6 24:4 33:3	Notice [1] 1:15	parties [2] 40:16	23:10	rather [1] 21:15
33:17 40:19	now [8] 8:15 17:3	40:17	possible [1] 37:16	read [7] 16:3 19:2
mean [4] 11:2	19:8 20:20 24:18	party [1] 11:17	possibly [1] 35:2	22:13 23:15 24:15
15:7 22:1 31:16	28:19 32:3 36:11	pay [6] 19:5 19:13	posted [1] 8:5	26:11 39:7
met [1] 13:16	number [1] 16:13	20:11 23:18 27:19	potential [3] 14:14	really [2] 19:9
might [3] 24:11	-O-	28:1	16:18 19:16	35:19
35:3 35:4	object [4] 16:15	paying [6] 20:15	potentially [1] 9:19	reasons [2] 24:12
mind [2] 23:9 36:1	23:21 26:8 26:15	21:9 21:13 26:7	practice [2] 11:20	35:5
minute [1] 36:7	Objection [2] 18:20	26:14 28:9	12:13	recanting [2] 25:9
minutes [1] 24:21	26:20	penalties [2] 6:5	precipitated [1] 23:13	25:13
moment [2] 27:10	obviously [1] 22:7	18:1	prepare [1] 18:11	recess [1] 36:14
32:14	off [8] 21:14 27:9	Pennsylvania [1]	prepared [4] 8:9	recollection [1] 14:4
money [8] 19:5	27:20 28:9 32:14	13:16	17:2 19:9 19:21	record [18] 16:3
19:14 21:4 21:8	36:12 36:13 36:15	pension [32] 8:7	prescribed [1] 15:12	19:2 21:14 22:10
21:9 26:5 26:13	office [1] 37:14	10:8 10:20 13:3	presence [1] 40:15	22:13 23:15 23:16
35:14	offices [1] 1:18	13:9 13:16 14:17	present [2] 2:7	23:17 24:15 24:21
	once [2] 19:8 34:11	15:8 16:14 18:6	6:18	26:11 32:14 34:20
	one [11] 11:10 11:15	18:13 19:15 20:21	Presumably [1] 10:19	34:21 36:12 36:13
		29:7 30:1 30:3	principal [1] 19:12	36:15 39:9
		30:4 30:7 30:7	privilege [9] 21:17	recorded [1] 40:10
		30:8 30:15 31:2	22:4 22:21 23:14	recover [3] 23:6
			25:4 32:20 33:2	33:18 34:1
			33:8 34:6	

redacting [1] 35:2	34:5 34:11	specific [3] 5:18	23:4 23:8 23:18	33:21
reference [2] 8:6		7:15 30:20	24:11 26:7 26:14	true [2] 39:9 40:12
32:3		specifically [5] 6:2	26:18 27:6 27:9	Truhe [15] 2:3
referring [1] 23:19		10:11 33:11 34:12	27:13 27:14 27:18	3:5 4:10 24:10
regard [2] 21:21		35:3	27:18 28:1 28:1	33:15 34:9 34:12
30:13		specifics [2] 6:12	28:4 28:9 32:5	34:19 35:19 36:2
regarding [4] 6:15		20:1	32:17 33:21 36:19	36:5 36:7 36:12
8:9 10:7 30:11		spend [1] 36:11	37:11	37:7 37:15
related [5] 35:3		spending [3] 21:4	taxability [1] 15:8	truth [3] 4:8 4:8
35:10 36:20 37:11		21:8 21:9	taxable [6] 8:3	4:9
40:17		spent [3] 26:5	9:3 9:16 10:16	trying [1] 17:14
relates [1] 22:1		26:6 26:14	18:18 19:4	two [3] 6:9 8:15
relationship [2] 12:16		spoke [1] 14:6	taxes [7] 6:5 9:8	24:21
12:19		spoken [1] 6:14	18:1 19:13 20:11	type [3] 6:13 17:9
relative [1] 35:13		start [1] 7:21	21:9 24:3	32:17
rendered [4] 23:10		State [2] 40:1 40:3	taxwise [1] 27:12	types [1] 34:5
32:19 33:10 36:18		status [1] 28:19	Taylor [12] 2:2	typewritten [1] 40:12
rendering [1] 31:3		stenographic [1] 40:11	6:17 6:19 16:15	
renders [1] 31:12		stenographically [1] 40:10	21:20 23:21 24:8	-U-
repeat [6] 16:2		still [1] 23:9	26:8 26:15 26:20	unclear [1] 13:10
18:21 22:12 23:12		stipulated [1] 4:2	37:19 38:3	under [1] 16:8
24:14 26:10		STIPULATION [1] 4:1	technical [1] 17:6	underscore [1] 20:4
reported [2] 1:21		stipulations [1] 40:13	Technically [1] 11:9	understand [2] 14:12
19:3		stopped [1] 29:18	telling [3] 10:1	19:11
reporter [6] 16:3		straighten [3] 23:8	19:21 25:11	unless [1] 22:2
19:2 22:13 23:15		32:4 33:20	terms [5] 9:18	unrelated [2] 22:2
24:15 26:11		straightening [3] 23:4 36:19 37:10	13:1 19:18 20:14	24:12
reporting [1] 30:13		strike [1] 27:16	29:2	up [3] 10:1 29:12
reports [1] 30:10		Stuart [7] 1:4	testified [2] 4:9	35:6
represents [1] 11:15		1:5 1:7 1:8	20:10	
reputation [1] 13:15		2:4 21:2 24:12	testify [7] 4:12	-V-
requested [6] 16:3		subject [3] 4:20	4:21 5:3 6:3	v [2] 1:3 1:10
19:2 22:13 23:15		6:3 17:1	6:4 6:9 22:6	various [1] 33:19
24:15 26:11		submitted [1] 32:7	testifying [3] 6:11	versus [2] 13:2
requirements [1] 30:12		subsequent [1] 6:10	6:12 7:8	21:9
respect [6] 6:1		substance [1] 35:20	testimony [8] 6:15	viewpoint [1] 35:4
6:3 7:1 7:11		such [3] 25:3 25:10	19:11 21:21 24:17	violate [1] 9:18
11:10 16:21		25:14	25:5 25:9 29:6	violating [1] 19:18
response [1] 25:13		suggestion [1] 7:5	39:9	voluntary [10] 7:19
responsibility [1] 20:21		Suite [1] 1:19	Thank [1] 37:6	8:10 8:11 8:14
result [2] 9:16		summer [4] 4:16	Third-Party [3] 2:6	8:16 8:20 9:11
17:21		6:7 6:17 7:5	thought [2] 5:12	9:14 10:2 10:13
retirement [2] 29:9		support [1] 34:3	5:16	
30:5		sustained [4] 18:19	three-party [1] 7:4	-W-
return [3] 18:11		19:7 19:12 27:11	through [2] 13:15	waived [4] 4:4
18:18 19:4		sworn [2] 4:7	17:7	21:18 21:19 21:21
returns [1] 27:5		taking [1] 23:9	Thursday [1] 1:17	whatsoever [1] 21:7
reveal [2] 15:15		tasks [1] 30:16	tied [1] 29:12	Whelihan [9] 2:5
25:1		tax [45] 7:20 7:21	today [9] 19:9	18:20 24:7 33:1
Revenue [5] 17:18		8:1 8:20 9:1	22:18 24:19 26:1	33:6 34:4 34:10
20:3 29:14 30:10		9:5 9:13 10:3	26:5 26:19 28:12	36:9 37:17
30:14		10:7 10:14 13:7	29:2 31:9	
review [3] 17:12		14:14 15:18 16:10	topic [1] 17:15	whereby [2] 7:17
37:21 38:1		16:18 17:8 18:11	totally [1] 24:12	8:2
reviewed [1] 17:5		18:12 18:19 19:5	Towson [1] 1:19	whole [1] 4:8
Richard [6] 1:1		20:5 21:1 21:13	transaction [1] 20:5	within [5] 15:12
1:20 1:21 2:7			transactions [1] 35:11	22:20 25:3 40:4
40:2 40:21			transcribed [1] 40:11	40:12
right [5] 24:10			transcript [2] 39:8	without [1] 10:15
31:15 37:21 38:3			39:13	witness [17] 3:2
Road [1] 1:19			treated [1] 18:17	4:12 5:1 7:8
ruled [3] 33:16			trial [1] 7:13	18:21 24:13 33:3
			troubles [2] 21:1	33:9 34:7 34:16
				34:21 35:6 35:16

36:4 36:6 38:2 40:19 word [1] 20:4 words [1] 9:4 worked [2] 20:10 35:12 written [1] 15:19 wrong [1] 10:4				
<hr/> <b>-Y-</b> <hr/>				
year [2] 18:12 31:12 yearly [1] 30:9 years [2] 14:5 28:21 yourself [1] 12:2				

RICHARD SHOFER

Plaintiff

vs.

THE STUART HACK COMPANY, et al.

Defendants

IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

Case No. 88102069/CL79993

SUPPLEMENTAL ANSWERS TO THIRD-PARTY  
DEFENDANT'S INTERROGATORIES  
TO PLAINTIFF

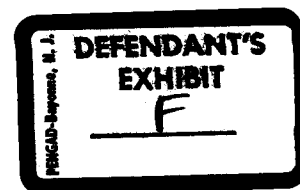
Richard Shofer, Plaintiff, by his attorneys, files these Supplemental Answers to the Third-Party Defendant's Interrogatories to Plaintiff:

a. The information supplied in these Supplemental Answers is not based solely on the knowledge of the executing party, but includes the knowledge of the party, agents, representatives and attorneys unless privileged.

b. The word usage and sentence structure may be that of the attorney assisting in the preparation of these Supplemental Answers and thus does not necessarily purport to be the precise language of the executing party.

SUPPLEMENTAL ANSWERS

Interrogatory No. 2: Identify in accordance with Instruction E all persons known to you to have personal knowledge of any allegation, fact, event, transaction, or occurrence on which you rely or which forms a basis for your Answers to these Interrogatories or which is in any other manner relevant to this case, including in your Answer an identification of the particular subject matter or areas of their knowledge.



Supplemental Answer No. 2:

1. Edward J. Kabala, Esquire  
Kabala & Geeseman  
200 First Avenue  
Pittsburgh, PA 15222  
Pension Law and Pension Administration
2. Nicholas Giampetro, Esquire  
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Towson, MD 21204  
Pension Law and Pension Administration
3. Theodore Rosenberg  
5007 West Forest Park Avenue  
Baltimore, MD 21207  
Actuary
4. Don Hannahs, CFP, CMFC  
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5. Wendy Martucci, CPA  
or Representative of Firm  
Martucci & Associates, P.A.  
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Accounting
6. Dan Harbertson, ASA, MAAA  
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Severna Park, MD  
Actuary
7. R. Scott Gregory  
329 Martins Cove Road  
Annapolis, MD 21401  
Actuary

8. Karl Auch  
Crown Motors  
5000 Liberty Heights Avenue  
Baltimore, Maryland 21207
9. Thomas Bornhorst  
2236 Southland Road  
Woodlawn, Maryland
10. Thomas Bowden  
Blum Yumkas, Millman, Gutzman & Denick  
2 Hopkins Plaza  
Baltimore, Maryland
11. Lera Tyler  
Internal Revenue Service  
Baltimore, Maryland

Interrogatory No. 3: Identify in accordance with Instruction E any experts whom you propose to call as witnesses with regard to any matter or issue relating to this action, including in your Answer the nature of each expert's specialty, the subject matter of each expert's testimony, the substance of the findings and opinions to which each expert is expected to testify, the facts upon which each expert's opinions are based, and a summary of the grounds for each opinion. Attach to your Answers a copy of any and all expert opinions.

Supplemental Answer No. 3: In addition to Edward Kabala, Esquire, whose name, area of expertise and subject matter of testimony has been previously supplied, Plaintiff proposes to call the following experts as witnesses:

1. Nicholas J. Giampetro, Esq.  
920 Providence Road  
Suite 407  
Towson, Maryland 21286

The subject matter of the testimony offered by Mr. Giampetro will include the standard care of an attorney and of a competent pension adviser and the extent to which the conduct of Stuart Hack and the Stuart Hack Company fell short of that standard. Mr. Giampetro will also testify concerning the defendants' breach of their agreement to create and maintain a pension plan which would result in tax savings and build wealth for the owner and employees of Crown Motors.

Mr. Giampetro will also testify to the work he did to undo the results of the defendant's negligence and will further offer testimony regarding the issue of foreseeability and damages which occurred as a direct and proximate result of the defendants' negligence and breach of contract. Mr. Giampetro has not provided any written reports.

2. Theodore Rosenberg  
5007 W. Forest Park Avenue  
Baltimore, Maryland

Mr. Rosenberg is an actuary who will testify with respect to Plaintiff's monetary losses occasioned by his having to take involuntary withdrawals from his pension account pursuant to advice from defendants. Mr. Rosenberg will testify with respect to the monetary losses sustained on the payment of taxes at the time of the withdrawal of money from the pension account in comparison with the taxes due at the time the money is paid at retirement.

Mr. Rosenberg will also testify with respect to the cost of money (interest) paid by Plaintiff as a result of the loss of credit directly and proximately caused by the defendants' negligence.

Mr. Rosenberg's report is attached hereto as well as his Curriculum Vitae.

3. Dan A. Harbertson, ASA, MAAA, EA  
Consulting Actuary  
92 Berrywood Drive  
Severna Park, Maryland 21146

Mr. Harbertson is an actuary who will testify to the same issues as Mr. Rosenberg as set forth herein. Mr. Harbertson's report is attached hereto as well as his Curriculum Vitae.

4. R. Scott Gregory, FSA  
R. Scott Gregory, Inc.  
Actuarial and Retirement Consulting  
329 Martins Cove Road  
Annapolis, Maryland 21401

Mr. Gregory is an actuary who, if called to testify, will testify concerning the same issues as Mr. Rosenberg will testify to. Mr. Gregory has not given Plaintiff a report. Mr. Gregory's Curriculum Vitae is attached, hereto and incorporated herein.

5. Wendy Martucci, CPA  
Martucci & Associates, P.A.  
800 Wyndhurst Avenue  
Suite 245  
Baltimore, Maryland 21210



Wendy Martucci is a Certified Public Accountant whose speciality is tax and accounting. Ms. Martucci will testify concerning work she performed for Plaintiff with respect to preparation of his tax return and returns for the pension trust and Plaintiff's corporation. She will also provide testimony with regard to her charges for work related to undoing damages due to the negligence of defendants' and to accounting practices generally. No report has been received from Ms. Martucci, but her Curriculum Vitae is attached hereto.

Interrogatory No. 10: Itemize in detail all damages you claim in this action.

Supplemental Answer No. 10

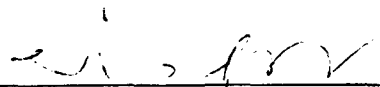
The damages which Plaintiff claims in this action include federal and state income taxes, excise taxes, penalties and interest; fees paid to professionals for services attributable to loans taken pursuant to Hack's advice; loss of personal income and corporate profits; loss of the value of Plaintiff's stock and ownership interest in his corporation; tax liens; loss of credit; loss of tax sheltered earnings and savings; loss of interest and earnings on investments, and punitive damages.

By order of the court of November 7, 1996, Plaintiff has been limited to recovery of federal and state income taxes, penalties and interest therein and professional fees incurred, as a result of defendant's negligence and breach of contract.

With respect to damages allowed to be presented in this case, Plaintiff has itemized those on the schedule denominated "Itemization of Damages", attached hereto and included herein.

**VERIFICATION**

I SOLEMNLY AFFIRM under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information and belief.

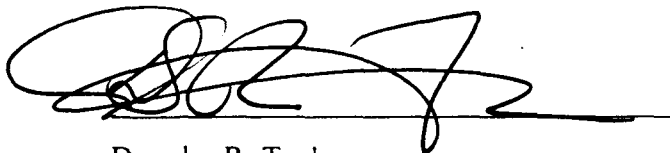
  
\_\_\_\_\_  
Richard Shofer

CERTIFICATE OF SERVICE

I hereby certify that on this 23<sup>rd</sup> day of May, 1997, I ~~mailed~~ *hand delivered*, by U.S. Mail, postage prepaid, a copy of the foregoing Supplemental Answers to the following:

Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204

John Tremain May, Esquire  
Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036



Douglas R. Taylor

RICHARD SHOFER

Plaintiff

vs.

THE STUART HACK COMPANY, et al.

Defendants

IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

Case No. 88102069/CL79993

**SUPPLEMENTAL ANSWERS TO INTERROGATORIES  
PROPOUNDED BY STUART HACK**

The Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, submits the following Supplemental Answers to Interrogatories propounded by Stuart Hack:

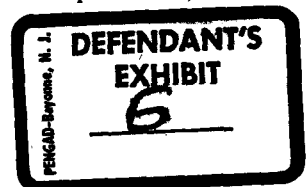
a. The information supplied in these Supplemental Answers is not based solely on the knowledge of the executing party, but includes the knowledge of the party, agents, representatives and attorneys unless privileged.

b. The word usage and sentence structure may be that of the attorney assisting in the preparation of these Supplemental Answers and thus does not necessarily purport to be the precise language of the executing party.

**SUPPLEMENTAL ANSWERS**

Interrogatory No. 9: State with particularity the amount and kind of each and every item of damage or loss resulting from the occurrence which were incurred by you or on your behalf.

Supplemental Answer No. 9: The damages which Plaintiff claims in this action include federal and state income taxes, excise taxes, penalties and interest; fees paid to professionals for services attributable to loans taken pursuant to Hack's advice; loss of personal income and corporate profits; loss of the value of Plaintiff's stock and ownership interest in his corporation;



1584

tax liens; loss of credit; loss of tax sheltered earnings and savings; loss of interest and earnings on investments, and punitive damages.

By order of the court of November 7, 1996, Plaintiff has been limited to recovery of federal and state income taxes, penalties and interest therein and professional fees incurred, as a result of defendant's negligence and breach of contract.

With respect to damages allowed to be presented in this case, Plaintiff has itemized those on the schedule denominated "Itemization of Damages", attached hereto and included herein.

Interrogatory No. 12: State the names and addresses of all experts whom you propose to call as witnesses, the subject matter of their testimony, and attach to your answer copies of all written reports received from the same.

Supplemental Answer No. 12: In addition to Edward Kabala, Esquire, whose name, area of expertise and subject matter of testimony has been previously supplied, Plaintiff proposes to call the following experts as witnesses:

1. Nicholas J. Giampetro, Esq.  
920 Providence Road  
Suite 407  
Towson, Maryland 21286

The subject matter of the testimony offered by Mr. Giampetro will include the standard care of an attorney and of a competent pension adviser and the extent to which the conduct of Stuart Hack and the Stuart Hack Company fell short of that standard. Mr. Giampetro will also testify concerning the defendants' breach of their agreement to create and maintain a pension plan which would result in tax savings and build wealth for the owner and employees of Crown Motors.

Mr. Giampetro will also testify to the work he did to undo the results of the defendant's negligence and will further offer testimony regarding the issue of foreseeability and damages which occurred as a direct and proximate result of the defendants' negligence and breach of contract. Mr. Giampetro has not provided any written reports.

2. Theodore Rosenberg  
5007 W. Forest Park Avenue  
Baltimore, Maryland

Mr. Rosenberg is an actuary who will testify with respect to Plaintiff's monetary losses occasioned by his having to take involuntary withdrawals from his pension account pursuant to

advice from defendants. Mr. Rosenberg will testify with respect to the monetary losses sustained on the payment of taxes at the time of the withdrawal of money from the pension account in comparison with the taxes due at the time the money is paid at retirement.

Mr. Rosenberg will also testify with respect to the cost of money (interest) paid by Plaintiff as a result of the loss of credit directly and proximately caused by the defendants' negligence.

Mr. Rosenberg's report is attached hereto as well as his Curriculum Vitae.

3. Dan A. Harbertson, ASA, MAAA, EA  
Consulting Actuary  
92 Berrywood Drive  
Severna Park, Maryland 21146

Mr. Harbertson is an actuary who will testify to the same issues as Mr. Rosenberg as set forth herein. Mr. Harbertson's report is attached hereto as well as his Curriculum Vitae.

4. R. Scott Gregory, FSA  
R. Scott Gregory, Inc.  
Actuarial and Retirement Consulting  
329 Martins Cove Road  
Annapolis, Maryland 21401

Mr. Gregory is an actuary who, if called to testify, will testify concerning the same issues as Mr. Rosenberg will testify to. Mr. Gregory has not given Plaintiff a report. Mr. Gregory's Curriculum Vitae is attached, hereto and incorporated herein.

5. Wendy Martucci, CPA  
Martucci & Associates, P.A.  
800 Wyndhurst Avenue  
Suite 245  
Baltimore, Maryland 21210

Wendy Martucci is a Certified Public Accountant whose speciality is tax and accounting. Ms. Martucci will testify concerning work she performed for Plaintiff with respect to preparation of his tax return and returns for the pension trust and Plaintiff's corporation. She will also provide testimony with regard to her charges for work related to undoing damages due to the negligence of defendants' and to accounting practices generally, and to accounting related evidence. No report has been received from Ms. Martucci, but her Curriculum Vitae is attached hereto.

Interrogatory No. 13: State the amount of earned income reported by you each year on your personal federal income tax returns from 1980 to present.

Supplemental Answer No. 13:

<u>Year</u>	<u>Amount of Earned Income</u>
1988	\$200,000.00
1989	\$177,000.00
1990	\$177,000.00
1991	\$ 0.00
1992	\$ 0.00
1993	\$ 0.00
1994	\$ 0.00
1995	\$ 0.00

Interrogatory No. 14: State the name and address of the person(s) who prepared your federal income tax returns for 1980 to present.

Supplemental Answer No. 14:

Wendy Martucci, CPA  
Martucci & Associates, P.A.  
800 Wyndhurst Avenue  
Suite 245  
Baltimore, Maryland 21210

Interrogatory No. 16: State whether you have been audited by the IRS in connection with monies which you borrowed from the Catalina Enterprises, Inc. Pension Plan and, if so, state the following: (1) the date(s), (2) the nature of the tax return, (3) the result of the audit, and (4) the names and addresses of person(s) who represented you.

Supplemental Answer No. 16: The IRS conducted audits for the tax years 1984 through 1987, to the best of my recollection.

Interrogatory No. 18: State the name and address of every individual who has given you any advice or information pertaining to the tax consequences of borrowing from the Catalina Enterprises, Inc. Pension Plan or the tax consequences of pension planning generally.

Supplemental Answer No. 18: In addition to the attorneys who have represented me in this lawsuit, I have received information and advice from my present accountant, Wendy Martucci and from the Honorable Allan Schweit, now a judge on the Baltimore City Circuit Court.

Others giving me information and advice include Ronald Schiff, Esquire of Baltimore, Maryland; Edward Kabala, Esquire of Pittsburgh, Pennsylvania; Cindy Lawson, Department of Labor, Baltimore, Maryland; Stewart Copeland and Fred Handleman, both of the Internal Revenue Service, Baltimore, Maryland; Gerard Gumpertz, U.S. Department of Labor, 1730 K Street, N.W., Suite 586, Washington, D.C. 20006.

I also received information and advice from Larry Einstein and Lori A. Karimi, both from the Internal Revenue Service, 2 Hopkins Plaza, Baltimore, Maryland.

Interrogatory No. 19: State the name and address of any person not otherwise mentioned in answer to these interrogatories who has personal knowledge of facts material to this case.

Supplemental Answer No. 19:

Jeffrey Robinson, Esquire  
Ellicott City, Maryland

Chester H. Salkind, Esquire  
Executive Director  
American Society of Pension Actuaries  
Arlington, Virginia

Barry Berman, Esquire  
Weinberg & Green  
Baltimore, Maryland

Don Hannahs, CFP, CMFC  
10320 Little Patuxent Parkway  
Columbia, Maryland

Karl Auch  
Crown Motors  
5000 Liberty Heights Avenue  
Baltimore, Maryland 21207

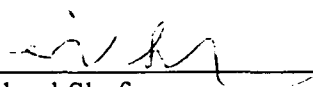
Thomas Bornhorst  
2236 Southland Road  
Woodlawn, Maryland

Thomas Bowden  
Blum Yumkas, Millman, Gutzman & Denick  
2 Hopkins Plaza  
Baltimore, Maryland

Lera Tyler  
Internal Revenue Service  
Baltimore, Maryland

VERIFICATION

I SOLEMNLY AFFIRM under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information and belief.

  
Richard Shofer

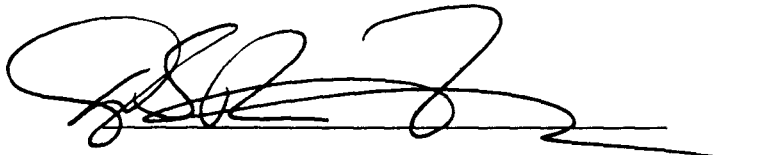


CERTIFICATE OF SERVICE

I hereby certify that on this 24<sup>th</sup> day of May, 1997, I ~~mailed~~ *hand delivered*, by U.S. Mail, ~~postage prepaid~~, a copy of the foregoing Supplemental Answers to the following:

Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204

John Tremain May, Esquire  
Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036



Douglas R. Taylor

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER,  
Plaintiff,

v.

STUART HACK COMPANY,  
et al.,

Defendants.

Case No. 88101069/CL79993

-----  
THE STUART HACK COMPANY,  
et al.,

Third-Party Plaintiff,

v.

GRABUSH, NEWMAN & CO., P.A.,

Third-Party Defendants.

CERTIFICATE OF GOOD FAITH IN SUPPORT OF  
DEFENDANTS HACK AND THIRD-PARTY DEFENDANTS  
GRABUSH MOTION FOR SANCTIONS AND MOTION IN LIMINE  
LIMINE TO EXCLUDE PLAINTIFFS' INTRODUCTION OF  
EVIDENCE NOT TIMELY PRODUCED IN DISCOVERY

Pursuant to Maryland Rule 2-431, I, Deborah M. Whelihan, state and certify that I made the following efforts to resolve discovery disputes with the plaintiff:

1. Beginning in August of 1996 and thereafter, I had discussions with the plaintiff's counsel and requested that the plaintiff supplement the plaintiff's written discovery as we had previously requested prior to the February 27, 1995 trial date.

2. On every occasion when I spoke to Mr. Taylor or personally met with him as a result of discovery depositions or court activities, I requested that Mr. Taylor provide us with the

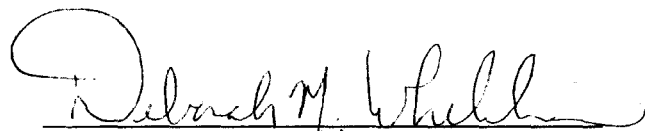
discovery that was necessary for the third-party defendant Grabush and the Hack defendants to defend against Mr. Shofer's claims. Specifically, I spoke with Mr. Taylor by telephone on January 13, 1997, February 14, 1997, February 21, 1997, March 19, 1997, April 2, 1997, April 29, 1997, May 2, 1997, May 6, 1997, May 7, 1997, May 9, 1997, May 14, 1997, May 21, 1997, May 23, 1997, May 25, 1997, and May 27, 1997 about the supplemental discovery. I discussed Mr. Shofer's overdue discovery with Mr. Taylor in face-to-face meetings on January 6, 1997, January 23, 1997, January 24, 1997, March 21, 1997, April 24, 1997, May 5, 1997, May 8, 1997, May 12, 1997, and May 26, 1997.

3. Although Mr. Shofer finally produced written supplemental discovery, that discovery was not produced with the supporting materials that were requested and that written discovery was produced after the discovery deadline and on the eve of the pre-trial conference.

Respectfully submitted,

JORDAN COYNE & SAVITS

By:



Deborah M. Whelihan  
33 Wood Lane  
Rockville, Maryland 20850  
(301) 424-4161

Mailing Address:

1100 Connecticut Ave., N.W.  
Suite 600  
Washington, D.C. 20036

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER,  
Plaintiff,

v.

STUART HACK COMPANY,  
et al.,

Defendants.

Case No. 88101069/CL79993

-----  
THE STUART HACK COMPANY,  
et al.,

Third-Party Plaintiff,

v.

GRABUSH, NEWMAN & CO., P.A.,

Third-Party Defendants.

ORDER

Upon consideration of the Motion for Sanctions and Motion in Limine to Exclude Plaintiff's Introduction of Evidence Not Timely Produced in Discovery, any Opposition thereto, and the entire record herein, it is this \_\_\_\_ day of \_\_\_\_\_, 1997, by the Circuit Court for Baltimore City, Maryland,

ORDERED, that the Motion is GRANTED; and it is further,

ORDERED, that the plaintiff will not be permitted to call as experts Dan A. Harbertson, ASA, R. Scott Gregory, FSA, and Wendy Martucci, C.P.A.; and it is further,

ORDERED, that plaintiff will only be allowed to call Nicholas J. Giampetro, Esquire as fact witness, not as an expert witness regarding the standard of care of an attorney and of a competent

pension advisor and on the foreseeability of Mr. Shofer's damages to be submitted in his proffer; and it is further,

ORDERED, that the plaintiff will not be allowed to introduce into evidence any reports of Theodore Rosenberg not produced to the defendants and the third-party defendant prior to May 16, 1997.

Albert J. Matricciani, Jr., Judge

copies to:

Deborah M. Whelihan  
Jordan Coyne & Savits  
1100 Connecticut Ave.  
Suite 600  
Washington, D.C. 20036

Janet M. Truhe, Esquire  
Truhe & Maier, P.C.  
Court Towers, Suite 505  
210 W. Pennsylvania Ave.  
Towson, MD 21204

Douglas Taylor, Esquire  
P.O. Box 4556  
Rockville, MD 20850

134  
DB

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER

Plaintiff

v.

CASE NO. 88102069/CL79993

THE STUART HACK COMPANY, et al

Defendants

-----  
THE STUART HACK COMPANY, et al

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

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CIVIL DIVISION

**OPPOSITION TO MOTION FOR SANCTIONS AND  
MOTION IN LIMINE TO EXCLUDE PLAINTIFF'S INTRODUCTION  
OF EVIDENCE NOT TIMELY PRODUCED IN DISCOVERY**

The plaintiff, Richard Shofer, (hereinafter referred to as "Shofer"), by his attorney, Douglas R. Taylor, in opposition to the Motion for Sanctions and Motion in Limine to Exclude Plaintiff's Introduction of Evidence Not Timely Produced in Discovery, respectfully states as follows:

1. That immediately following counsel's meeting with the Court on January 6, 1997, the undersigned agreed to prepare a letter which would memorialize the parties' agreement with respect to dates for trial, a pre-trial date and a discovery schedule. On the next day, counsel for the plaintiff produced such a letter, which is attached hereto and marked Exhibit #1. Copies were sent or faxed to all counsel. (In an effort to have all counsel execute the letter agreement, another copy was prepared on February 14, 1997, but was never signed by all counsel.)

1595

2. That your undersigned is appalled by the 11th hour tactics of opposing counsel to jointly file the aforesaid motion without ever once indicating to your undersigned that such a motion would be filed or that plaintiff was not in full compliance with the agreement of the parties regarding discovery. Indeed, plaintiff believes that he has fully complied with both the spirit and the letter of the parties' agreement. It is outrageous and totally unfounded to accuse plaintiff of "ambushing" the defendant or of purposefully withholding any requested information. There is absolutely no basis for such a reckless charge on the part of opposing counsel, and plaintiff suggests that the evidence in this case clearly establishes that plaintiff has been fully cooperative in complying with discovery requests, including making plaintiff available at any time for a deposition and changing dates for the deposition of Wendy Martucci and Nicholas Giampetro at counsel's request after both depositions had been scheduled and noted.

3. A cursory review on the pleadings filed in this case in 1996 will reflect that plaintiff was forced to file motions to depose both Stuart Hack and the principals of the third party defendant, Grabush, Newman & Co., in an effort to complete discovery in this matter. Those motions, which were opposed by their respective counsel, were preceded by efforts to obtain dates for these depositions. It took almost three months of trying to arrange a date for Mr. Hack's deposition before counsel informed plaintiff that Mr. Hack would not appear for a deposition in the absence of a court order. (See letters dated June 4, 1996, and June 10, 1997, Douglas R. Taylor to Janet Truhe, marked Exhibit #2 and Exhibit #3, respectively.) The same situation existed with the third party defendant. (See letter of September 20, 1996, from Douglas R. Taylor to Deborah M. Whelihan, marked Exhibit #4.)

4. In contrast, plaintiff has cooperated in the discovery effort. That cooperative spirit is reflected in the letter dated February 13, 1997, wherein the parties agreed to depose plaintiff's present accountants, Martucci & Associates, at a date and time convenient to counsel for defendant. (See letter dated February 13, 1997, marked Exhibit #5.) His expert witnesses were in fact named on February 14, 1997, as required by the agreement of the parties. The letter designating those potential expert witnesses were faxed to both opposing counsel on February 14, 1997, as required. At the time the experts were designated, plaintiff did not have the curriculum vitae of the experts not previously disclosed nor did he have any reports from those experts. That

information was orally provided to counsel. On April 18, 1997, plaintiff forwarded the biographies of three of the expert witnesses disclosed on February 14, 1997. At that time, opposing counsel was informed that reports and calculations were not yet available, but that they would be provided as soon as plaintiff had them. (See letter of April 18, 1997, from Douglas R. Taylor to counsel, marked Exhibit #6.)

5. The Hack defendants and the third party defendant seek to exclude any testimony from Wendy E. Martucci, C.P.A., and Nicholas J. Giampetro, Esquire, on the basis that they were not able to articulate opinions during their respective depositions. Such an argument is ludicrous on its face and is not even supported by the exhibits offered by the defendants or by the evidence in the record. It should be noted that Nicholas J. Giampetro, Esquire, has been listed as an expert witness in this matter since the time it was set for trial originally in 1995. Mr. Giampetro's deposition had already been taken earlier in preparation for that trial. Plaintiff elected to designate Mr. Giampetro as an expert witness on the issue of liability, in addition to damages, which prompted defendants' counsel to depose him again. Mr. Giampetro in fact offered his opinion that the Hack defendants were negligent when they rendered the advice they gave Richard Shofer in August of 1984. (See defendants' Exhibit #E, pp. 7-16.) The Hack defendants and third party defendant were well aware before this deposition that Nicholas J. Giampetro, Esquire, would provide testimony on the issue of damages and what work he did to undo the effects of improper pension account loans and prohibited transactions. The defendants requested the billing records from Mr. Giampetro, and those invoices were supplied to the defendants by the plaintiff.

That Wendy E. Martucci has been plaintiff's accountant since 1993. That she will testify with regard to any accounting work which she did which was related to undoing the effects to the improper pension account loans and prohibited transactions. That defendants requested copies of all of the personal income tax returns prepared by Ms. Martucci and copies of her bills and invoices sent to plaintiff. All of that documentation was produced. That Ms. Martucci explained during the course of her deposition that the records and invoices requested by defendants would have to be located and assembled, and such activity would take time to complete. If defendants claim that they were rushed in their deposition of Wendy Martucci, they could have noted it earlier. Indeed, the depositions of both Wendy Martucci and Nicholas Giampetro had been set at an earlier date, but were moved to May 8, 1997, at request of defendants' counsel. That plaintiff



expects Ms. Martucci to provide evidence with respect to the basis for the high cost of money incurred by plaintiff in borrowing money. That Ms. Martucci did in fact provide information in response to questions concerning various accounting services and with respect to work she did for plaintiff. The fact that she had no discussions about her testimony with plaintiff or his attorney, or that she was asked to be an expert witness in April of 1997 should not disqualify her as an expert, and is totally irrelevant to the substance of her testimony.

6. That plaintiff supplemented prior discovery as soon as the information was available. Certain documents requested by the defendants were not in possession of plaintiff. Billing records, tax returns, actuarial reports and calculations were in the possession of experts from which plaintiff had to obtain those documents. Theodore Rosenberg, plaintiff's actuary, had previously provided calculations with respect to the damages claimed by plaintiff. Those figures simply had to be updated, so that they would be current at the time of trial. Plaintiff explained in his deposition that Mr. Rosenberg would be asked to update those figures, but that the numbers would be current for the trial. Plaintiff explained that it was expensive to continually update the numbers, and plaintiff would supply them as soon as he had them. (Defendant's exhibit #A, pp. 36-42.) That plaintiff requested on at least two occasions that the Hack defendants supply him with current calculations of their expert, Richard Intner. That he was advised that Mr. Intner wanted to review the calculations of Theodore Rosenberg before he revised his figures. Despite the fact that the Hack defendants had Mr. Rosenberg's report and calculations on May 23, 1997, plaintiff never received the Intner calculations until June 6, 1997.

7. That the defendants were made aware that plaintiff wanted to obtain an independent actuarial opinion with respect to Mr. Rosenberg's methodology and calculations during plaintiff's deposition. (See defendant's Exhibit #A, pp. 41-42.) That Dan A. Harbertson, an actuary, did supply that independent review and submitted a report to that effect, which was made available to the defendants as soon as it was available to plaintiff.

8., That it is absolutely untrue that plaintiff has withheld or delayed discovery in this case. That such allegations are totally false and without any evidentiary foundation. That defendants have offered no evidence as to how they have been prejudiced or disadvantaged by the

receipt of any discovery at the time they received it. They have had the opportunity to depose all of plaintiff's experts and have availed themselves of that mode of discovery. Plaintiff has supplied documents and information requested by defendants as soon as it was available or in possession of plaintiff.

9. Neither of the cases cited by defendants in support of their motion is anywhere near on point. As previously stated, there has been no willful withholding of any information or documents requested by defendants.

In Hadid v. Alexander 55 Md. App. 344, 462 A 2d 1216 (1983), the defendant repeatedly failed to appear for depositions and repeatedly failed to produce requested documents. That is totally opposite to the case at bar, where plaintiff has been totally engaged in the discovery process.

Likewise, Bartholomee v. Casey 103 Md. App. 34, 651 A 2d 908 (1995), does not apply. In Casey, on the eve of trial, plaintiffs who had not supplemented previous discovery requests filed affidavits containing new allegations. Again, those facts have nothing to do with the facts in the instant case.

As previously noted, defendants have received all of the discovery which they have requested. They have articulated no harm or prejudice with respect to the timing of the receipt of any discovery because there is none. This motion is frivolous and should be summarily dismissed.

WHEREFORE, plaintiff requests that this Honorable Court dismiss the Motion For Sanctions And Motion In Limine To Exclude Plaintiff's Introduction Of Evidence Not Timely Produced In Discovery.

Respectfully submitted,



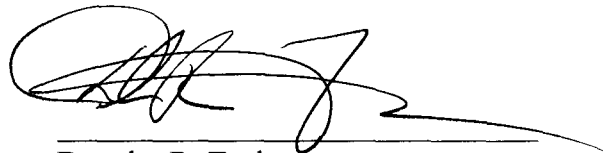
Douglas R. Taylor  
Attorney for Plaintiff  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

**Certificate of Service**

I hereby certify that on this 13<sup>th</sup> day of June, 1997, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Opposition To Motion For Sanctions And Motion In Limine To Exclude Plaintiff's Introduction Of Evidence Not Timely Produced In Discovery to the following:

Ms. Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204  
Attorney for Defendants, Hack and  
The Stuart Hack Company

John Tremain May, Esquire  
Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036



Douglas R. Taylor

Douglas R. Taylor  
Attorney at Law  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

January 7, 1997

Janet M. Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204

Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036

Re. Shofer v Hack, et al.  
Case No. 88102069/CL79993

Dear Counsel:

I am writing to you to set forth the agreement and understanding reached at the scheduling conference conducted in chambers by Judge Matricciani on January 6, 1997.

We have agreed to be bound by the terms and provisions of this letter in lieu of a formal scheduling order in this case. Our agreement is as follows:

1. Trial of the above case shall commence on June 26, 1997 at 9:30 a.m. The following dates have been reserved for this trial: June 26, June 27 (one half day), June 30, and July 1-3.
2. A pre-trial conference has been scheduled for May 27, 1997 at 5:00 p.m. in Judge Matricciani's chambers.
3. The Plaintiff shall designate his expert witnesses to be utilized in his case in chief on or before February 14, 1997.
4. The defendants and third party defendant shall designate their expert witnesses on or before April 11, 1997.
5. The Plaintiff shall designate any rebuttal expert witnesses on or before April 30, 1997.
6. The parties agree that all discovery shall be completed by May 16, 1997.

7. The parties shall work out a schedule of depositions among themselves with appropriate consideration to their respective schedules and that of the deponents

8. The parties shall work out a mutually agreeable deposition schedule so as to complete all depositions by the cut off date for discovery.

9. Plaintiff shall be entitled to depose each of the following named witnesses for up to four hours at a time, place and date to be agreed upon: Stuart Hack, Kenneth Larash, Harvey Newman and Barry Bopdroff.

10. Plaintiff Richard Shofer shall submit for a further deposition to be conducted by defendants at a time, date and place to be mutually agreed upon

11. The parties agree to work expeditiously Judge Matricciani shall be available for the resolution of any disputes, should they arise

Respectfully submitted,

Douglas R. Taylor

Agreed to:

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Douglas R. Taylor  
Attorney for Plaintiff

---

Janet M. Truhe  
Attorney for Defendants

---

Deborah M. Whelihan  
Attorney for Third Party Defendant

cc: Honorable Albert J. Matricciani, Jr., Judge.

Douglas R. Taylor  
Attorney at Law  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

June 4, 1996

Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204

RE: Shofer v. Hack

Dear Janet:

I am writing as a follow up to our telephone conversation of last week wherein you advised me that Mr. Hack was checking his vacation schedule prior to our scheduling his deposition here in Maryland. I appreciate your efforts in reminding Mr. Hack of our right to discovery under the rules, and of the importance of his cooperation if we are to complete all of the discovery necessary for an efficient and orderly disposition of this case.

However, I also note, in reviewing my own file of correspondence and memoranda, that we have been vigorously attempting to arrange depositions generally, and of Mr. Hack in particular, for the past ten weeks. Since the first available dates for depositions occur in the latter part of August, it will be almost twenty-six weeks from the time we began to arrange for depositions until we actually begin the process. I also observed that Mr. Hack has not been deposed for almost six years, and I am sure that you will agree that much has happened in this case since Mr. Hack's last deposition. Indeed, the nature and character of the case has changed, and I am sure that we will need in excess of twenty hours of deposition time with Mr. Hack in order to cover the important issues currently pending in the lawsuit. As I am sure that you will also agree, the case requires a great effort in trial preparation, and discovery is the heart of such preparation.

Mr. Shofer has expressed concern that I will not have adequate time to complete our discovery by the end of the present calendar year (it will be half over by the end of next month), and he has asked

me to obtain as quickly as possible a firm date on which we can commence Mr. Hack's deposition. As you are aware, perhaps more than anyone, it does not normally require a great effort to depose the principals in a lawsuit, and this task can normally be accomplished in a few weeks. In our case, we have now gone two and one half months and have not yet scheduled Mr. Hack's deposition. My client is the injured party, and he does not understand why the process of preparing for, and completing, this litigation cannot go forward immediately.

I hope to talk to you before the end of this week with the expectation that we will have a date on which to begin Mr. Hack's deposition

Your cooperation in this matter, as always, is appreciated

Very truly yours,

Douglas R. Taylor

CC: Deborah Whelihan, Esquire  
John May, Esquire

EXHIBIT # 3

Douglas R. Taylor  
Attorney at Law  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

June 10, 1996

Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204

RE: Shofer v. Hack, et al.  
Case No. 88102069/CL79993

Dear Janet:

My client, Mr. Richard Shofer, contacted me this morning and reminded me that we still do not have a date on which to commence Mr. Hack's deposition. Mr. Shofer expressed to me his concerns that there would not be sufficient time in which to prepare this case for trial if Mr. Hack's depositions do not commence in August. Mr. Hack's deposition is quite important, and, because he is in Florida, we are reluctant to schedule any other depositions until we lock in Mr. Hack for a minimum of 20 hours of August deposition time.

Accordingly, if we do not have confirmation of his availability for that period of time in August (excluding Wednesdays) by Wednesday, June 12, I am instructed by Mr. Shofer to file immediately a Motion To Compel. Since we have much material to review in deposition with Mr. Hack, and since he is in Florida, I would ask that we set aside three days in mid August in which to complete these depositions. We certainly want to avoid requesting Mr. Hack's presence again if we can complete the discovery in August.

Your cooperation and assistance in this matter is appreciated.

Very truly yours,

Douglas R. Taylor

CC: Deborah Whelihan, Esquire  
John May, Esquire

1605



EXHIBIT #4

Douglas R. Taylor  
Attorney at Law  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

September 20, 1996

Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, DC 20036

RE: Shofer v. Hack, et al  
Case No. 88102069/CL79993

Dear Deborah:

As I advised you by telephone yesterday, I have prepared notices of deposition of two principals of Grabush, Newman & Co., P.A. I want to depose Mr. Harvey Newman on Tuesday, October 15, 1996, at 9:00 A.M. and Mr. Barry Bondroff at 11:00 A.M. at the offices of Walls Reporting, Inc.

We have a number of persons we must depose if we are to complete discovery by the present cutoff date which is in March of 1997, only six months away. With a present trial date of June of 1997, we must utilize the time available, and Mr. Shofer has reminded me that we have been trying to clear dates and schedule depositions since at least March of this year.

I enclose copies of the Notices of Deposition for Mr. Newman and Mr. Bondroff as previously stated, and I hope to talk to you and Janet within the next few days to clear additional dates through the end of the year so that we may schedule other depositions and complete our pretrial preparation within the time constraints given us by the Court.

Your cooperation and assistance in this matter is appreciated

Very truly yours,

Douglas R. Taylor

1606

Douglas R. Taylor  
Attorney at Law  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

February 13, 1997

Janet M. Truhe, Esquire  
Janofsky & Truhe, P A  
Court Towers, Suite 505  
210 West Pennsylvania Avenue  
Towson, Maryland 21204

Re. Shofer v Hack, et al  
Case No. 88102069/CL79993

Dear Janet

I thank you for your letter of February 11, 1997.

I have no objections to your deposing Mr. Shofer's present accountants on the afternoon of Thursday, March 20, 1997. Mr. Shofer is checking with his accountants as to their availability, and I will let you know promptly if March 20 is agreeable to them. In the meantime, I suggest that we hold open that date for that purpose

I am also awaiting word from several other witnesses which I wish to depose as to the witnesses' availability on dates we had previously reserved, and I hope to confirm dates with you before the close of business next week

Very truly yours,

Douglas R. Taylor

cc. Deborah M. Whelihan, Esquire

EXHIBIT #6

Douglas R. Taylor  
Attorney at Law  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

April 18, 1997

Janet M. Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204

Deborah M. Whelihan, Esquire  
Jordan, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036

Re Shofer v. Hack, et al  
Case No. 88102069/CL79993

Dear Counsel:

I herewith enclose the curriculum vitae of three witnesses I had designated as experts in my letter of February 14, 1997. Those witnesses are Dan A. Harbertson, ASA, MAAA and Scott Gregory, both actuaries, and James T. Lasser, an appraiser who specializes in the valuation of assets.

I would expect Mr. Harbertson and Mr. Gregory to provide calculations involving the same subject matter which has been addressed by Mr. Rosenberg. Messrs. Harbertson and Gregory will provide computations establishing the different sums paid in taxes when taxable income is taken from a pension account prior to retirement as opposed to taxes paid after retirement.

I have not yet received any calculations from Mr. Harbertson or from Mr. Gregory. As soon as I have those calculations, I will forward copies to you.

Mr. Lasser will provide an estimate of the monetary losses sustained by Mr. Shofer, as sole owner of Catalina Enterprises, Inc. and Crown Motors, as a result of the corporation's loss of credit and its relationship with its bank. He will provide evidence of the diminution in value of the business and of Mr. Shofer's stock.

1608

I have not as yet received a report from Mr. Lasser. I will, of course, forward such documentation to you as soon as I receive it.

Very truly yours,

Douglas R. Taylor

Enclosure

1609

1609

RICHARD SHOFER

\*

IN THE

Plaintiff

\*

CIRCUIT COURT

v.

\*

FOR

THE STUART HACK COMPANY  
and  
STUART HACK

\*

BALTIMORE CITY

\*

Part 20

Defendants

\*

Case No. 88102069  
CL79993

\*\*\*\*\*

THE STUART HACK COMPANY  
and  
STUART HACK

\*

\*

Third Party Plaintiffs

\*

v.

\*

GRABUSH, NEWMAN & CO., P.A.

\*

Third Party Defendant

\* \* \* \* \*

**ORDER**

Upon consideration of the defendants' Motion for Sanctions and Motion In Limine to exclude plaintiff's introduction of evidence not timely produced in discovery, it is this 25th day of June, 1997, by the Circuit Court for Baltimore City, Part 20,

**ORDERED** as follows:

1. Expert witnesses identified pursuant to the discovery schedule are permitted to testify to any and all opinions which are not cumulative of other expert testimony.

2. The Court will prohibit the introduction into evidence of any expert opinions or liability theories

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which were not disclosed to the defendants prior to the  
May 16, 1997 discovery deadline.

  
\_\_\_\_\_  
ALBERT J. MATRICCIANI, JR.  
Judge

cc: Douglas R. Taylor, Esquire  
Janet M. Truhe, Esquire  
Deborah M. Whelihan, Esquire



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IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

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CIRCUIT COURT FOR  
BALTIMORE CITY

1997 JUL -8 PM 4:14

CIVIL DIVISION

RICHARD SHOFER, :  
 :  
 Plaintiff, :  
 :  
 v. :  
 :  
 STUART HACK COMPANY, :  
 et al., :  
 :  
 Defendants. :  
 ----- :  
 :

Case No. 8810<sup>2</sup>1069/CL79993

THE STUART HACK COMPANY, :  
 et al., :  
 :  
 Third-Party Plaintiff, :  
 :  
 v. :  
 :  
 GRABUSH, NEWMAN & CO., P.A., :  
 :  
 Third-Party Defendant. :

MOTION FOR JUDGMENT REGARDING  
DAMAGES OF THE THIRD-PARTY DEFENDANT

Pursuant to Maryland Rule 2-519, the third-party defendant, Grabush, Newman & Co., P.A. (hereinafter "Grabush"), by and through its respective undersigned counsel, respectfully requests that this Honorable Court enter judgment in favor of the defendants against the plaintiff because the plaintiff has failed to prove his claims regarding damages. In support of this Motion, the third-party defendant Grabush respectfully refers this Honorable Court's attention to the attached Memorandum of Points and Authorities which is incorporated as if fully set forth herein.

10/11/97

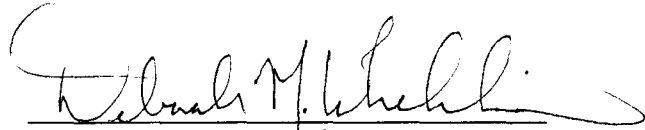


WHEREFORE, the third-party defendant Grabush respectfully requests that this Honorable Court enter judgment against the plaintiff in favor of the defendants.

Respectfully submitted,

JORDAN COYNE & SAVITS

By:



Deborah M. Whelihan  
33 Wood Lane  
Rockville, Maryland 20850  
(301) 424-4161

Mailing Address:

1100 Connecticut Ave., N.W.  
Suite 600  
Washington, D.C. 20036

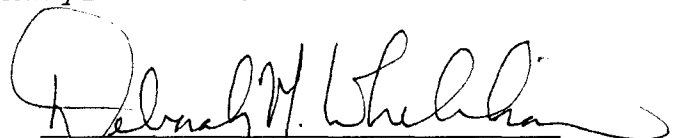
Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Motion for Judgment Regarding Damages of the Third-Party Defendant, accompanying Memorandum of Points and Authorities in Support of Motion, and proposed Order, were mailed, postage prepaid, this 9<sup>th</sup> day of July, 1997, to:

Douglas Taylor, Esquire  
P.O. Box 4556  
Rockville, MD 20850

Janet M. Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Ave.  
Towson, Maryland 21204



Deborah M. Whelihan

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER,  
Plaintiff,  
v.  
STUART HACK COMPANY,  
et al.,  
Defendants.

Case No. 88101069/CL79993

-----  
THE STUART HACK COMPANY,  
et al.,  
Third-Party Plaintiff,  
v.  
GRABUSH, NEWMAN & CO., P.A.,  
Third-Party Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR JUDGMENT REGARDING  
DAMAGES OF THE THIRD-PARTY DEFENDANT

In support of its Motion for Judgment Regarding Damages of the Third-Party Defendant, the third-party defendant Grabush, Newman & Co., P.A. (hereinafter "Grabush"), by and through its undersigned attorneys, states as follows:

I. APPLICABLE STANDARD

In a non-jury trial, the trial judge "is not compelled to make any evidentiary inferences whatsoever in the favor of the party against whom the motion for judgment is made." Pahanish v. Western Trails, Inc., 69 Md. App. 353, 517 A.2d 1122, 1127 (1986).

## II. ARGUMENT

In Maryland, it is well-established that, if compensatory damages are to be recovered, they must be proved with reasonable certainty, and may not be based on speculation or conjecture.

Asibem Associates, Ltd. v. Rill, 264 Md. 272, 286 A.2d 160 (1972); Lazorcak v. Feuerstein, 273 Md. 69, 327 A.2d 477 (1974); Charles County Broadcasting Co., Inc. v. Meares, 270 Md. 321, 311 A.2d 27 (1973). The plaintiff has the burden of presenting sufficient evidence from which damages can be determined on some rational basis other than by speculation and conjecture.

Association of Maryland Pilots v. Baltimore & Ohio Railway Co., 304 F. Supp. 548 (D.Md. 1969).

The only evidence of damages produced during the plaintiff's case was the plaintiffs' estimate of his taxes, penalties, and interest and the plaintiff's estimate of his professional fees based upon absolutely nothing more than speculation and conjecture by the plaintiff.<sup>1</sup>

### A. Penalties

As a result of plaintiff's failure to pay income taxes on monies that he borrowed from the pension in 1984, 1985 and 1986, the plaintiff contended that he had been assessed federal and state income tax penalties. As a factual and legal matter, however, the plaintiff may not recover "penalties" because it is

---

<sup>1</sup> It is questionable whether the plaintiff's damage expert, Mr. Rosenberg, was qualified to present actuarial testimony. See, Scott v. James Gibbons Co., 192 Md. 319, 64 A.2d 117 (1949).

undisputed that the defendants did not even know that the plaintiff had borrowed money from the pension until some time in late 1985 or in the Fall of 1986. And, assuming that the plaintiff did establish that his penalties were damages attributable to the defendants, the plaintiff should not be permitted to claim any penalties beyond those penalties that he may have incurred as of when the plaintiff learned the pension loans were taxable. Consequently, any penalties assessed against the plaintiff after November of 1986 should not be recoverable.

B. Interest

As a result of plaintiff's failure to pay income taxes on loans that he took from the pension in 1984, 1985 and 1986, the plaintiff claimed to have been assessed interest on the taxes that he owed.

Even assuming that the plaintiff had introduced adequate admissible evidence of the interest that he allegedly incurred, the plaintiff has no damages because he had the use of all of the money that he should have paid in taxes, including the interest thereon. If the defendants are required to pay the \$114,609.14 in tax interest which has been assessed, the plaintiff receives a windfall. It is well settled that a plaintiff's recovery should be reduced by any direct benefit that the plaintiff receives from the defendant's wrongful act. See, Restatement (Second) of Torts, §920A (1979); Levi v. Schwartz, 201 Md. 575, 95 A.2d 322 (1953) (where the defendant's tortious act has caused damage to plaintiff but in doing so has conferred

a special benefit upon him, the value of the benefit may be considered in mitigation of damages where that is equitable). In the instant case, the plaintiff will not be damaged by having to pay the "interest" portion of the taxes he currently owes because he has already had the use of (and, therefore, the interest earnings on) the money he should have paid in taxes.

Although there is no Maryland case on point, several courts have held that interest payments to the I.R.S. are not recoverable as a damage because the plaintiff has had the use of the money that rightfully belonged to the I.R.S. DCD Programs, Ltd. v. Leighton, 90 F.3d 1442, 1451 (9th Cir. 1996); Stone v. Kirk, 8 F.3d 1079, 1093 (6th Cir. 1993); Freschi v. Grand Coal Venture, 767 F.2d 1041, 1051 (2d Cir. 1985), vacated on other grounds, 478 U.S. 1015, 106 S.Ct. 3325, 92 L.Ed.2d 731 (1986); Eckert Cold Storage, Inc. v. Behl, 943 F.Supp. 1230, 1235 (E.D. Cal. 1996); Ackerman v. Price Waterhouse, 591 N.Y.S.2d 936, 946 (Sup. Ct. 1992); Alpert v. Shea Gould Climenko & Casey, 559 N.Y.S.2d 312 (App. Div. 1990) (interest owed to IRS on taxes as a result of disallowed deductions not recoverable in legal malpractice case) and cases cited therein. As the New York appellate court in Alpert explained:

the equities militate in favor of barring recovery of such interest rather than allowing plaintiffs the windfall of both having used the tax monies for seven years and recovering all interest thereon.

The interest portion of plaintiff's taxes is not recoverable, under either a negligence or contract theory, for another reason. Interest never would have continued to accrue on the unpaid taxes if the plaintiff paid the additional taxes that he owed when his amended returns were filed in 1986, and when he knew that he had taxable income. Any alleged damages arising out of plaintiff's inability to pay those taxes in 1986 could hardly have been foreseeable to Mr. Hack in 1984 when he was advising Shofer about borrowing from his pension.<sup>2</sup> Under the rationale of Stone v. Chicago Title Insurance Company of Maryland, 330 Md. 329, 624 A.2d 496 (1993), the defendants cannot be held responsible for the fact that the plaintiff chose not to pay his taxes when his tax debt came due, absent any knowledge on the part of the Hack defendants that Mr. Shofer had actually taken loans from his pension. It is undisputed in this case that Mr. Hack did not know the plaintiff was borrowing any money from his pension at the time the loans were taken and was not aware of the plaintiff's personal financial circumstances.

C. Professional Fees

The plaintiff failed to present any admissible evidence of the damages that he claims that he incurred from other professionals and failed to introduce evidence of the professional

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<sup>2</sup> This is especially true considering the fact that when Mr. Hack advised Shofer in August of 1984 that he could borrow from his pension, Shofer was able to borrow up to \$126,600.00 without any adverse tax consequences. This is because only loans in excess of \$50,000.00 above Shofer's personal contributions to the pension (which were \$76,600.00) were taxable as income.

fees that were not related to prohibited transactions. Evidence of the reasonableness of the value of the service rendered and not merely of the amount or payment of the bills is required. Kujawa v. Baltimore Transit Co., 224 Md. 195, 167 A.2d 96 (1961). Necessity for the fees must also be demonstrated by expert testimony. Metropolitan Auto Sales Corp. v. Koneski, 252 Md. 145, 249 A.2d 141 (1969); Wolf v. Levitt & Sons, Inc., 267 Md. 623, 298 A.2d 374 (1973).

Mr. Shofer also failed to prove that any of the fees incurred were fees paid by him. The evidence is clear that Mr. Shofer did not pay the professionals, but Catalina Enterprises, Inc. t/a Crown Motors did. It is well settled Maryland law that an individual stockholder cannot recover damages that are the damages of his corporation. See, Indurated Concrete Corp. v. Abbot, 195 Md. 496, 74 A.2d 170 (1950) (An action at law to recover for an injury to a corporation can be brought only in the name of the corporation, and not by an individual stockholder); Waller v. Waller, 187 Md. 185, 49 A.2d 449 (1946); Williams v. Mordkofsky, 901 F. 2d 158 (1990). Moreover, there was no evidence presented by the plaintiff that he was even indebted to his corporation as he claimed. Although Mr. Shofer testified that he would pay his debt to his corporation when his corporation paid him a salary, that testimony was not credible.

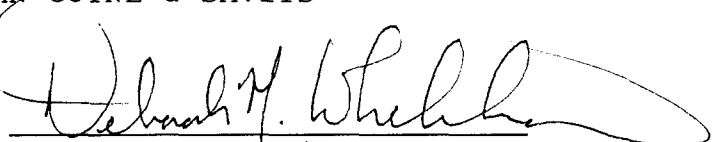
III. CONCLUSION

For all of the foregoing reasons, the third-party defendant Grabush requests that this Court enter judgment in favor of the defendants.

Respectfully submitted,

JORDAN COYNE & SAVITS

By:



Deborah M. Whelihan  
33 Wood Lane  
Rockville, Maryland 20850  
(301) 424-4161

Mailing Address:

1100 Connecticut Ave., N.W.  
Suite 600  
Washington, D.C. 20036

Counsel for Defendants



IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFR,  
Plaintiff,  
v.  
STUART HACK COMPANY,  
et al.,  
Defendants.

----- : Case No. 88101069/CL79993

THE STUART HACK COMPANY,  
et al.,  
Third-Party Plaintiff,  
v.  
GRABUSH, NEWMAN & CO., P.A.,  
Third-Party Defendant.

ORDER

Upon consideration of the Motion for Judgment Regarding Damages of Third-Party Defendant, any Opposition thereto, and the entire record herein, it is this \_\_\_\_ day of \_\_\_\_\_, 1997, by the Circuit Court for Baltimore City,

ORDERED, that the Motion for Judgment Regarding Damages of Third-Party Defendant is GRANTED; and it is further,

ORDERED, that judgment is entered in favor of the defendants against the plaintiff; and it is further,

ORDERED, that judgment is entered in favor of the third-party defendant against the defendants.

\_\_\_\_\_  
Albert J. Matricciani, Jr., Judge

copies to:

Douglas Taylor, Esquire  
P.O. Box 4556  
Rockville, MD 20850

Janet M. Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Ave.  
Towson, Maryland 21204

Deborah M. Whelihan  
1100 Connecticut Ave., N.W.  
Suite 600  
Washington, D.C. 20036

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IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

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BALTIMORE CITY

1991 JUL 17 A 7:28

CIVIL DIVISION

RICHARD SHOFER,  
Plaintiff,  
v.  
STUART HACK COMPANY,  
et al.,  
Defendants.

Case No. 8810<sup>2</sup>069/CL79993

-----  
THE STUART HACK COMPANY,  
et al.,  
Third-Party Plaintiff,  
v.  
GRABUSH, NEWMAN & CO., P.A.,  
Third-Party Defendant.

CLOSING ARGUMENT OF THIRD-PARTY DEFENDANT

The evidence shows that Mr. Shofer himself is solely responsible for his claimed misfortune.

This Court should reject any arguments made by Mr. Shofer that anyone but he is responsible for his alleged damages for the following reasons:

In August of 1984, Mr. Shofer had two relatively brief conversations with Mr. Hack. Mr. Shofer conceded that he has no recollection of those conversations -- he only stated that he received Mr. Hack's August 9, 1984 letter (plaintiff's Exhibit No. 5) as a result of those conversations. Mr. Hack, on the other hand, has records that show the substance of his conversations with

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a.n. 8/6/97

Mr. Shofer, and Mr. Hack recalls being asked hypothetical questions by Mr. Shofer about two financing ideas; one idea being whether Mr. Shofer could borrow from his voluntary account and the other idea being whether his voluntary account could be used as collateral for a loan from a lender like Maryland National Bank. Mr. Shofer did not ask Mr. Hack about any tax consequences. And, Mr. Shofer did not contact his accountants, Grabush Newman & Co., P.A., about the tax consequences, if any, of his loans or ask his accountants to research the allowability of those pension loans. The evidence is undisputed that Mr. Shofer never had any further conversations with Mr. Hack about those ideas and that Mr. Shofer then, on his own, began to borrow significant sums from his voluntary account. By June of 1985, before his accountants had any inkling of the loans that Mr. Shofer was making to himself, Mr. Shofer had borrowed almost \$300,000.<sup>1</sup>

The evidence proves that Mr. Shofer made the loans to himself, without seeking any professional advice about the terms of the loans or the amounts that could be borrowed because Mr. Shofer was confident that he knew how to take the loans.

In my opening, I told you that the evidence would show that Mr. Shofer thought that he knew it all and that he acted without consulting anyone. In fact, the evidence shows that and more. Based upon the testimony from Mr. Shofer, Mr. Larash, and Mr. Hack, this Court can certainly find that Mr. Shofer purposefully

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<sup>1</sup> On August 9, 1984, Mr. Shofer borrowed \$60,000, although he repaid that loan by August 23, 1984 when he borrowed another \$150,000.



c

attempted to keep Mr. Hack and Grabush, Newman & Co., P.A. from discovering the loans that he made because he did not want the Stuart Hack Company or Grabush, Newman & Co., P.A. from learning that he had taxable income.

Despite Mr. Shofer's disingenuous protestations about his happy relationship with Maryland National Bank, Mr. Shofer admits that his back was to the wall and his company was in tremendous disfavor with his commercial lender. Mr. Shofer's reluctant admissions are corroborated by his own witnesses, Mr. Larash, Pamela Somers, and Nicholas J. Giampetro, Esquire. Mr. Shofer, always the optimist, thought that his business would turn around and that, in the future, he would have more money. It is not hard to come to the conclusion that the financially savvy Mr. Shofer was aware that his enormous borrowings from his pension might have tax consequences that Mr. Shofer could not pay when he was filing his 1984 tax returns. It is not difficult to conclude that Mr. Shofer intended to keep Mr. Larash from questioning the tax consequences of the pension loans when, in July of 1985, Mr. Shofer told Mr. Larash that he had spoken with Mr. Hack to determine that the loans were allowable. It follows logically that Mr. Shofer then purposefully withheld the specifics of his borrowings from the Stuart Hack Company, by not supplying data from the plan until late 1985 or early 1986.

Mr. Shofer has the burden of proving his claims by a preponderance of evidence and he has failed to carry that burden. There is no credible evidence that Mr. Shofer was a personal client

of Stuart Hack or the Stuart Hack Company. There is no credible evidence of causation, as neither Mr. Shofer nor his experts established that he would have borrowed from his pension plan if he had known of the taxable consequences of the borrowings.

Moreover, Mr. Shofer presented no credible, admissible evidence of any damages that he personally sustained. Mr. Shofer has no evidence of what he actually paid in taxes, penalties, or interest as a result of his loans. The evidence establishes that Mr. Shofer had other tax problems unrelated to the pension loans. Mr. Shofer did not submit any notice of assessment or any other documentary evidence of his taxes, interest, and penalties. As to his professional fees, Mr. Shofer submitted no properly authenticated or admissible evidence of the fees that the professionals charged. Moreover, the evidence clearly established that the professionals were paid by Catalina Enterprises, Inc., and not Mr. Shofer personally. Mr. Rosenberg's calculation of tax interest was purely hypothetical. There was absolutely no evidence, beyond Mr. Rosenberg's harmless projections, of any interest for the professional fees that was charged or paid by Mr. Shofer. While Mr. Shofer claimed that he was indebted to his business for those professional fees, Mr. Shofer never submitted any documentary evidence that his claims were true. This ephemeral promise does not give rise to a legal obligation. Mr. Shofer merely stated that he would not pay Catalina Enterprises, Inc. until Catalina Enterprises paid off its debt to him. For all of

the above reasons, the third-party defendant asks this Court to render a judgment in favor of the defendants.

Turning to the third-party complaint, the defendants are not entitled to contribution for the arguments made to this Court in its Motion for Judgment. The evidence is clear that Mr. Shofer never sought tax advice about the pension loans from Grabush Newman & Co., P.A. when he began his borrowings. Mr. Shofer himself acknowledges that he felt his accountants acted properly in advising him. It was reasonable for Mr. Larash, in July of 1985, to conclude that Mr. Shofer's borrowings were not taxable based upon Mr. Shofer's statements to him about Mr. Shofer's purported conversations with Mr. Hack and based upon the lack of a form 1099 from the pension plan, declaring taxable income to Mr. Shofer.

The 1985 federal tax return was prepared properly based upon the information available to Grabush, Newman & Co., P.A. in February of 1987. Mr. Shofer had not provided information to anyone about the source of his borrowings and Mr. Shofer had not made a decision about whether he would amend his 1984 tax returns. Mr. Shofer's 1985 tax returns were prepared in conjunction with Mr. Shofer's wishes and with other advice from Nicholas J. Giampetro, Esquire and from the defendants. Consequently, showing a calculation of \$80,000 in loans minus voluntary contributions of \$76,600 equaling taxable income of \$3,400 was proper.

Finally, Mr. Shofer had the duty to amend his tax returns. Mr. Shofer's testimony was that he would amend his 1984 return regardless of his accountants' advice. The evidence established



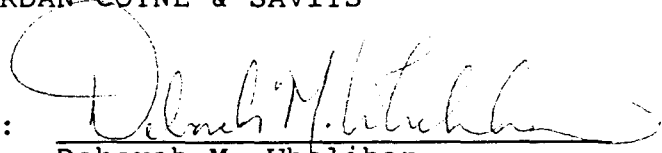
that Mr. Shofer's amended 1984 and 1985 tax returns were the product of debate among the professionals. Mr. Shofer was advised by Mr. Hack that he did not have to amend. The recommendation of Grabush, Newman & Co., P.A. to file amended tax returns was consistent with the standard of care and its ethical obligations.

For all of the above reasons, the third-party defendant requests that this Court enter judgment in its favor.

Respectfully submitted,

JORDAN COYNE & SAVITS

By:

  
Deborah M. Whelihan  
33 Wood Lane  
Rockville, Maryland 20850  
(301) 424-4161

Mailing Address:

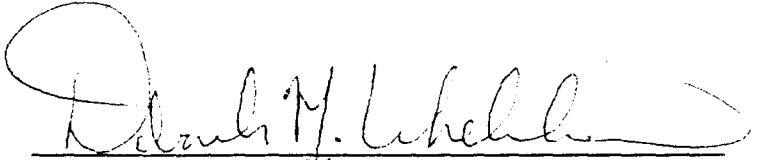
1100 Connecticut Ave., N.W.  
Suite 600  
Washington, D.C. 20036

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Closing Argument of Third-Party Defendant, was mailed, postage prepaid, this 15th day of July, 1997, to:

Douglas R. Taylor, Esquire  
P.O. Box 4556  
Rockville, MD 20850

Janet M. Truhe, Esquire  
Ward, Janofsky & Truhe, P.C.  
Court Towers, Suite 505  
210 W. Pennsylvania Ave.  
Towson, MD 21204

  
Deborah M. Whelan

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RICHARD SHOFER

Plaintiff

v.

THE STUART HACK COMPANY  
and  
STUART HACK

Defendants

-----  
THE STUART HACK COMPANY  
and  
STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

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FOR

BALTIMORE CITY

Part 20

CASE NO. 88102069  
CL79993

**PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION FOR JUDGMENT**

The plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, in opposition to Defendants' Motion for Judgment, respectfully states as follows:

1. In their Motion for Judgment, defendants state that plaintiff "must present some evidence as to each of the following elements in order to recover in a professional negligence action: (1) the professional's employment; (2) the breach of a reasonable duty; (3) proximate cause; and (4) damages." Conceding by silence that plaintiff has proved the first two elements necessary in a professional malpractice action, defendants argue that plaintiff has failed to prove "proximate cause" between the defendants' negligence and the damages sustained by plaintiff, or the damages themselves.

2. With respect to the issue of "proximate cause," i.e., the link between defendants' negligent advice and the resulting damages, there is ample evidence that plaintiff would not have

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even considered borrowing from the pension account if all the consequences of such borrowings were made known to him. He alleged in Paragraph 13 of the Third Amended Complaint that "had [he] been reasonably and properly advised by defendants as to the tax consequences of such loan transactions, he would not have had any reasonable basis to borrow from his voluntary account in the Plan."

Plaintiff's testimony was that he was considering several options to provide financing for his business operations. He already had a relationship with a commercial bank, and he was interested in an available source of financing with costs lower than what he was paying. Had defendants' advice been complete and accurate, such information and advice would have ruled out the pension plan as a loan source.

3. Plaintiff's objective of locating and using a source of funds which would reduce his costs and help his business could not be achieved by the use of the pension plan as such a source. The letter of August 8, 1984, contains no information or warnings about loans which could produce or generate liability for additional income taxes, penalties and interest or could be construed as premature distributions (requiring the payment of additional taxes) or result in prohibited transactions which could potentially disqualify the entire plan and even result in the loss of the company.

4. Had defendants' properly advised plaintiff, there would have been no reasonable basis for the plaintiff to have even considered using the pension plan as a loan source at all. In fact, defendants' letter of August 8, 1984 is so defective in what it fails to tell plaintiff, that a reasonable conclusion from reading the letter is that the pension plan may indeed be a "preferred" or advantageous source of loans. Nothing could be further from the truth as later events proved. By failing to point out all the factors which would disqualify the pension plan as a loan source for financing business operations, the defendants' letter strongly suggests that plaintiff go ahead and make the loans about which he has inquired. Having made the pension plan appear to be the ideal source of funding, it seems a bit disingenuous for defendants' to argue that there is no "proximate cause" linking their negligent advice to the damages sustained by plaintiff once he acted on the advice given to him.

5. The contrast between the type of advice provided by Mr. Hack in the August 8, 1984, letter and that supplied by Louis Omansky, a Hack Company attorney, in a letter to plaintiff dated October 6, 1976, (Plaintiff's Exhibit #3) is striking. Mr. Omansky provides a careful analysis of the proposed loan transactions suggested by plaintiff, and details the potential tax consequences of such a loan, including advice that plaintiff consult his attorney and his accountant before proceeding with the proposed loans. How different from Mr. Hack's letter! Mr. Hack's advice appears to be a carte blanche for proceeding to borrow money from the pension account, where plaintiff is advised that he "can borrow up to 100%" of your voluntary account, with a "reasonable" interest rate and reasonable payback period (Plaintiff's Exhibit #5). Where cost and availability of funds were plaintiff's prime requirements for making a loan, defendants' letter of August 9, 1984, clearly suggests that the pension account is the best source for such loans.

6. Damages flowed as a direct and proximate result of the defendants' negligent advice. Plaintiff's damages in this action were limited to the additional federal and state income taxes generated by the loans, and the interest and penalties thereon and plaintiffs' professional fees and costs attributed to such additional taxes.

7. Plaintiff submitted his amended tax returns for 1984 and 1985 and his tax returns for 1986 which contain the additional income taxes incurred by virtue of the pension loans (see Plaintiff's Exhibits #11, #13, #14). Kenneth Larash, plaintiff's accountant who prepared the returns, testified that the amended returns were prepared solely to report the additional taxes and interest and penalties generated by the loans. There was no other reason to prepare such returns, and the only additional taxes were those generated by the loans.

8. Theodore Rosenberg, plaintiff's actuary, testified that he utilized the amended returns for 1984 and 1985 and the original return for 1986 in doing his calculations. He testified that he verified both the federal and state income taxes shown on the returns with the appropriate taxing authorities. Defendants offered no evidence that the numbers reflected on the returns and verified by both Mr. Larash and Mr. Rosenberg were not in fact accurate.

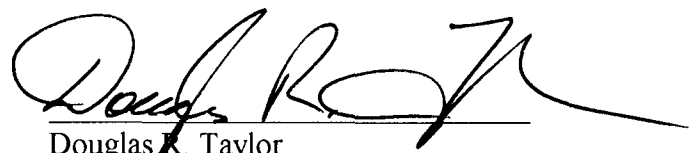
9. With respect to professional fees, plaintiff provided testimony concerning the fees he had paid and how those fees were billed and calculated. Mr. Larash of Grabush, Newman and Nicholas Giampetro submitted separate written statements which attributed portions of their fees to matters directly related to the defendants' defective loan advice. Defendants never challenged this evidence.

While many billings were rendered to plaintiffs' corporation, plaintiff nonetheless testified that he is ultimately responsible for these costs and expenses and that he will pay them. He testified that the corporation has not paid him a salary in the last several years, and that there would be offsetting credits and debits when all of the accounting is complete. Under those circumstances, these costs and expenses remain plaintiff's and he should be reimbursed for them.

10. Defendants assert that plaintiff was contributorily negligent as a matter of law. Plaintiff acted reasonably and responsibly in contacting the defendants concerning the advisability of borrowing from the pension plan. Armed with a letter endorsing the use of the pension as a source of financing, plaintiff had no idea that anything more on his part was necessary. Plaintiff's actions were consistent with what a reasonable person would have done under the circumstances and there is simply no issue of contributory negligence in this matter.

WHEREFORE, plaintiff prays that this Honorable Court deny Defendants' Motion for Judgment and enter a judgment in favor of plaintiff which judgment shall include his additional taxes, interest, penalties and professional fees incurred in this matter.

Respectfully submitted,



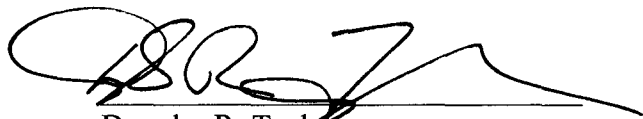
Douglas R. Taylor  
Attorney for Plaintiff  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

Certificate of Service

I hereby certify that on this 16<sup>th</sup> day of July, 1997, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Plaintiff's Opposition To Defendants' Motion For Judgment to the following:

Ms. Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204  
Attorney for Defendants, Hack and  
The Stuart Hack Company

John Tremain May, Esquire  
Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036

  
Douglas R. Taylor



RICHARD SHOFER

Plaintiff

v.

THE STUART HACK COMPANY  
and  
STUART HACK

Defendants

-----  
THE STUART HACK COMPANY  
and  
STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

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IN THE

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BALTIMORE CITY

Part 20

CASE NO. 88102069  
CL79993

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION FOR JUDGMENT**

Plaintiff, Richard Shofer, by and through his attorney, Douglas R. Taylor, submits the following Memorandum In Opposition To Defendants' Motion for Judgment.

**I. PROXIMATE CAUSE**

Defendants raise the issue of a lack of the proof of "proximate cause" between defendants' negligence and the damages sustained by plaintiff as one of the basis for their Motion For Judgment.

The two cases cited by defendants in support of this principle are easily distinguished. In Home Federal Savings & Loan Association vs. Spence, 259 Md. 575, 270 A 2d 820 (1970), both the trial court and the Court of Appeals found no cause of action against the defendant, an attorney, for two different reasons. The trial court dismissed the action against the attorney on the basis of contributory negligence of the plaintiff bank. It appeared that the plaintiff bank had already lost a considerable amount of money with respect to the financing of homes being

constructed by a nearly insolvent builder, and that one of the bank's officers and the builder had entered into a scheme for what appeared to be a refinancing of loans on several properties in question. The loans were made and releases were not obtained with respect to the existing liens because the builder, once in possession of the money, did not pay them off. Since the bank's own officers were aware of the builder's situation, and already knew about the prior liens on the property, the fact that the attorney submitted an erroneous title certification with respect to these properties was irrelevant.

The appellate court took the case a step further and noted that given the bank's stake in these properties, there was really nothing the bank could have done but to make the loans and hope that the builder procured releases for the liens. Again, the title report submitted by the attorney was irrelevant as to what the bank's actions were going to be. The bank was going to make the loans regardless of what the title report disclosed, and the bank saw the erroneous title report here as a fortuitous circumstance whereby it could sue the attorney and recover losses which occurred by virtue of its own mismanagement and negligence.

Such facts are totally opposite those in the case at bar. Here, the plaintiff was seeking a suitable and low cost alternative to commercial bank financing as a source of loans for his business and investments. At the time he sought advice from the defendants, his financial circumstances were much better than they later became once the terrible consequences of making these loans engulfed him. At the time he sought this advice, he was considering several options for borrowing money. Given these circumstances and goals, would it be advisable to borrow money from the pension account? That was the question. The fact that plaintiff had not borrowed money from the pension account until he received defendants' advice that he could do so clearly supports the conclusion that defendants' advice was the critical factor in the decision to make such loans.

Likewise, Fishow vs. Simpson, 55 Md. App. 312, 462 A 2d 540 (1983) is also inapplicable because it involves a suit by a disgruntled client against her attorney where the underlying basis of the suit is dissatisfaction with the result of the trial. Those are not the facts here.

In Home Federal, supra, the court distinguishes the facts in that case from those where a "lender or purchaser, relying upon an attorney's certificate, makes an irrevocable commitment" (at

page 826). Where that certificate is erroneous and damages result, a cause of action is established.

That situation is really analogous to the case at bar. Here, Mr. Hack's letter of August 9, 1984, is like a certificate, and that certificate contains false information which plaintiff relied on to his detriment. Where an attorney gives a client advice which is erroneous, and the client relies on that advice to his detriment, the attorney is responsible for the resulting damages. Kendall vs. Rogers, 31 A 2d 312, 181 Md. 606 (1943). In the instant, plaintiff has established negligent advice, reliance on that advice and damages. He is entitled to judgment.

## II. DAMAGES

Contrary to defendants' assertions, plaintiff present ample evidence of the losses he sustained by virtue of additional taxes, penalties and interests and professional fees. Those points have already been covered. However, it should be noted that tax liabilities can be proven without the necessity of introducing tax notices from the IRS or state authorities, or in having a witness from the IRS appear at trial. The case cited by defendants to support a lack of proof concerning tax liability and damages is, again, not on point. In re Marriage of Stuart, 805 S.W. 2d 309 (Mo. App. 1991). In that case, the husband's CPA never appeared for depositions to give evidence of his tax liability nor had the tax liability ever been calculated on a tax return and so the testimony was excluded. In the case at bar, plaintiff's former accountant, a CPA, testified and his completed tax returns were introduced at trial.

Furthermore, Elizarras vs. Bank of El Paso, 631 F 2d 366 (5th CIR. 1980) appears miscited, since conversations with bank officials about interest and penalties did not occur in the instant case. Mr. Rosenberg, plaintiff's actuary, did testify that he verified the amounts of taxes assessed (those figures being identical to those on the tax returns) and he also obtained the interest rates charged by the IRS for the applicable years. Over objection, Mr. Rosenberg testified to those figures and his calculations.

## III. PROFESSIONAL FEES

Plaintiff disputes defendants' assertion that testimony is "undisputed" that plaintiff did not sustain damages for professional fees personally. On the contrary, plaintiff testified that he "was obligated" to reimburse his company for all monies which his company had paid in this litigation

on his behalf. Simply because defendants find that testimony not credible does mean that there has been no evidence of that fact. In fact, plaintiff testified in some detail to the fact that he has not been receiving a salary from his company, his employer, and that an accounting of monies due and owing between him and the company will eventually take place.

Plaintiff does believe the "collateral source" rule is applicable here, and the defendant wrongdoers should not be able to claim, in mitigation of the damages they have caused, monies paid out on plaintiff's behalf by his employer. This principle is well established and applies to sources other than insurance. It should be applied here, 8 M.L.E. Damages Section 95, p.87; Caulk vs. Baltimore & Ohio Railroad Company, 306 F. Supp. 1171 (1969); 25 C.J.S. Damages, Section 99.

IV. THE "PRUDENT MAN" STANDARD OF CARE

Defendants argue that plaintiff's expert, Edward Kabala, testified that plaintiff had failed to act "prudently" in not contacting Mr. Hack sometime after he began to take out loans on Mr. Hack's earlier written and oral advice.

The transcript will reflect the actual exchange, but plaintiff suggests that what defendants' counsel asked Mr. Kabala did not concern the standard of care to be exercised by plaintiff in this matter. Mr. Kabala was asked whether it would not have been more prudent for the plaintiff to have contacted the defendants again, after a period of time during which the loans were made. Mr. Kabala, who had just testified about changes which had occurred in the tax laws during the 1980's, answered "Yes." However, Mr. Kabala had previously testified that it was certainly reasonable and prudent for the plaintiff to have relied on his expert pension consultant and administrator for advice concerning the making of these loans. The defendants had already committed negligence and plaintiff had already sustained damages during the time period when defendants' counsel asked Mr. Kabala about plaintiff's recontacting the defendants.

The elements of negligent conduct which defendants suggest plaintiff is responsible consist of three elements. They are (1) the recognition of the risk involved in his conduct; (2) the realization of the unreasonable character of the risk; and (3) the amount of skill, care, preparation or warning to be given or excised. 57A Am Jur 2d Negligence, Section 152, p. 214.

Here, plaintiff, armed with a letter authorizing the loans, had no recognition of any risk, and therefore had no idea of the character of the risk, and had no concept that any action on his

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part was necessary. The primary negligence of the defendants obliterated any inkling that plaintiff should have contacted defendants again. Why should he? He had the answers to his questions in the form of a letter dated August 9, 1984.

V. CONCLUSION

For all of the above reasons, plaintiff prays that Defendants' Motion For Judgment be dismissed and that judgment be entered herein for plaintiff.

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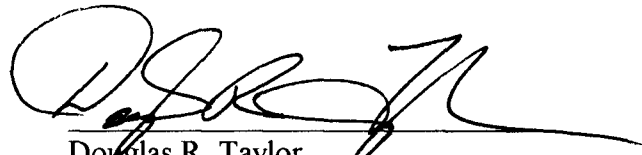
Douglas R. Taylor  
Attorney for Plaintiff  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

Certificate of Service

I hereby certify that on this 16<sup>th</sup> day of July, 1997, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Memorandum In Support Of Plaintiff's Opposition To Defendants' Motion For Judgment to the following:

Ms. Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204  
Attorney for Defendants, Hack and  
The Stuart Hack Company

John Tremain May, Esquire  
Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036

  
Douglas R. Taylor



RICHARD SHOFER  
Plaintiff

v.

STUART HACK  
AND  
THE STUART HACK CO.

Defendants

\* \* \* \* \*  
THE STUART HACK CO., et al.

Third Party  
Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.  
Third Party  
Defendant

\* \* \* \* \*

\* IN THE  
\* CIRCUIT COURT  
\* FOR  
\* BALTIMORE CITY

\* Case No. 88102069/CL79993

ORDER

Plaintiff's Motion to Reconsider Order of June 25, 1997 Excluding Certain Evidence and Defendants' response thereto having been considered by this Court, it is this 8th day of August, 1997, hereby ORDERED that Plaintiff's Motion to Reconsider is DENIED and Plaintiff's Exhibits 30, 31 and 36 remain excluded from the evidence in this case.

Albert J. Matricciani, Jr.  
Albert J. Matricciani, Jr.



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JUL 29 1997

ALBERT J. MATRICCIANI, JR.

RICHARD SHOFER  
Plaintiff

v.

STUART HACK  
AND  
THE STUART HACK CO.  
Defendants

\* \* \* \* \*

THE STUART HACK CO., et al.  
Third Party  
Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.  
Third Party  
Defendant

\* \* \* \* \*

\* IN THE  
\* CIRCUIT COURT  
\* FOR  
\* BALTIMORE CITY  
\* Part 20  
\*  
\* Case No. 88102069/CL79993

MEMORANDUM AND ORDER

The plaintiff, Richard Shofer, (Shofer) filed suit against defendants Stuart Hack (Hack) and the Stuart Hack Company (Hack Company) for negligence and breach of contract arising from Hack's advice to Shofer with regard to loans from Shofer's pension plan. Hack and the Hack Company brought a third party claim against Grabush, Newman and Company (Grabush Newman) for contribution. This matter<sup>1</sup> came before the Circuit Court for Baltimore City, Part 20 on June 26 through July 3, 1997 for a

<sup>1</sup> The case has a history in the Maryland courts. See, Shofer v. Hack, 324 Md. 92 (1991) and Shofer v. Hack, 107 Md. App. 585 (1996). As a result of an order entered on November 7, 1996 by this Court, the case proceeded to trial on Counts I and II of the plaintiff's Third Amended Complaint.

bench trial. After careful consideration of the evidence presented and the arguments and submissions of counsel for the respective parties, the Court issues the following findings of fact and conclusions of law:

**I. FINDINGS OF FACT**

1. Shofer is the sole owner and president of Catalina Enterprises, Inc., a used car dealership which does business in Baltimore City under the name of Crown Motors.

2. In the late 1960's Catalina Enterprises established a pension plan for its employees. Shofer is the sole trustee of the pension plan and is also a plan participant.

3. The Hack Company is a pension consulting and administration firm. Hack is an employee of the Hack Company.

4. In the mid-1970's, Shofer's accountants, Grabush Newman suggested to the plaintiff that he contact the Hack Company for revisions to the pension plan document to bring this document into compliance with the Employee Retirement Income Security Act of 1974 (ERISA).

5. The Hack Company completed this work and agreed to continue as the plan administrator. In its capacity as plan administrator, the Hack Company contracted to perform regular annual administration and special work. Regular annual

administration included overseeing employee census and asset data requests; reviewing asset reports prepared by the plan's accountant or bank; calculating eligibility and vesting; deposit calculation; renewal computer run; progress reports; contribution statements; annual 5500 forms<sup>2</sup>; summary annual reports and annual statements. (Defendant's Exhibit 1.) Special work items included processing employee terminations; balancing plan assets; investment evaluation; plan amendments; technical questions requiring research and/or advice; actuarial studies; deposit estimates; calculating salary and deposit amounts based on total profit figure; discussions with client, CPA, attorney or bank regarding estimating plan deposits, changing plan deposits, estate planning, year-end tax planning, TEFRA, other technical questions not related to annual administration; FASB 35 and 36 numbers for financial statements; IRS audits; response to IRS questions regarding 5500 forms and special beneficiary designations. (Defendant's Exhibit 1.)

6. The Hack Company acted as the plan administrator until 1986, and each year the Hack Company renewed its contract with Catalina Enterprises by sending an engagement letter. The engagement letters were addressed to Catalina Enterprises. (Defendant's Exhibits 1,2.)

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<sup>2</sup> 5500 forms are annual reports filed with the IRS and the Department of Labor listing the assets and liabilities of a pension plan.

7. When Catalina Enterprises first retained the Hack Company, Shofer had infrequent contact with the Hack Company and Hack.

8. In 1982, the frequency of this contact increased. At that time, Shofer contacted Hack and his accountants at Grabush Newman to inquire into the legality and the tax consequences of the pension plan financing the accounts receivable of Catalina Enterprises.

9. The plan began to finance the accounts receivable and Shofer periodically spoke with Hack to ensure that continued financing was legal under the then existing pension law.

10. In the summer of 1984, Crown Motors owed a substantial amount of money to Maryland National Bank, and the bank wanted to see improvement on Crown's balance sheet before it would lend any further money to Crown. Shofer saw that if he repaid his debt to Crown Motors, the company could make some progress on its debt to the bank.<sup>3</sup> Shofer told Glen Wilson, the loan officer at Maryland National, that he was planning to borrow \$250,000 from his pension to repay Crown Motors so that the bank could extend an additional line of credit to Crown.

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<sup>3</sup> Crown loaned Shofer approximately \$270,000 which enabled Shofer to repay a debt to Maryland National Bank. Shofer borrowed this money from Maryland National in order to pay off a debt from an unsuccessful stock investment.

11. Shofer was under pressure from the bank to improve Crown Motor's balance sheet.

12. On August 3, 1984, Shofer telephoned Hack with three questions<sup>4</sup>: (a) whether the funds in the Catalina Enterprises pension plan could be used as collateral for loans; (b) whether Shofer could borrow money from the pension plan and; (c) whether Shofer's voluntary account could be given special treatment for purposes of these loans. (Plaintiff's Exhibit 5.) The telephone conversation lasted no more than a few minutes.

13. Shofer did not tell Hack that he had definite plans to borrow from his pension plan or that he intended to use the pension as collateral for a loan. Shofer did not tell Hack the amount that he intended to borrow from the pension, the reason that he intended to borrow from the pension or the number of loans that he intended to take.

14. Hack informed Shofer that Shofer could borrow up to 100% of his voluntary account. Hack then contacted Barry Berman, a pension lawyer at the law firm of Weinberg & Green, and Berman confirmed that Shofer could borrow up to 100% of his voluntary account.

---

<sup>4</sup> Neither Shofer nor Hack recall the substance of this phone conversation. However, the conversation was summarized in a letter from Hack to Shofer dated August 9, 1984. (Plaintiff's Exhibit 5.)

15. Shofer called Hack again on August 7, 1984 and stated that he needed a letter indicating that Shofer could borrow up to 100% of his voluntary account and that the voluntary account could be used as collateral for a bank loan. Hack complied with a letter dated August 9, 1984. This letter provides:

You questioned whether assets of your money purchase pension plan and profit sharing plans can be used as collateral for loans, whether you can borrow against these plans and whether there is any special treatment for your voluntary account under these plans.

First of all, let's distinguish between the voluntary account and the employer account. The employer account cannot be put up as collateral for a loan, and loans to participants against their employer account are limited to a total of \$50,000 for all plans for up to a maximum of five years (For a longer period of time if used for the purchase or substantial improvement to a primary residence). Further, we would recommend that any loans against an employer account should be fully collateralized (this means collateral in addition to the value of the account itself).

There is an entirely different treatment for voluntary accounts. First, there is no limit on the amount that can be borrowed against the account or the length of time for which it can be outstanding. Also, the account itself can stand as collateral for a loan from a bank or another source. The loan agreement will have to include a provision that you cannot withdraw money from your voluntary account, and thus dissipate the collateral however.

The law is pretty clear on the inability to use employer account values as collateral for a loan. There is no law on restrictions of using voluntary account money for collateral for a loan. The TEFRA provisions on the limits on loans apply only to employer accounts and specifically do not apply to employee voluntary accounts. In my opinion, you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account. The terms of the loan must be reasonable as to the interest rate and pay back period.

(Plaintiff's Exhibit 5.)

16. At the time of Shofer's inquiry, his basis in his voluntary account was \$76,600 (Plaintiff's Exhibit 27.) Thus, Hack's letter instructed Shofer that he could borrow \$50,000 from the employer account and \$76,600 from the voluntary account for a total of \$126,600.

17. Upon receiving Hack's oral advice, but before receiving Hack's letter which was mailed on August 9, 1984, Shofer borrowed \$60,000 from the plan on August 9, 1983. The loan was used to repay part of the debt which Shofer owed to Crown Motors so that Crown, in turn, could repay Maryland National Bank and receive an extended line of credit for the purchase of additional inventory. To process this loan, Shofer wrote himself a check from the pension and issued a promissory note to the plan which was payable on demand. (Plaintiff's Exhibit 6.) Shofer set the rate of interest and did not secure the loan. Shofer did not inquire of Hack as to how to borrow money from a pension.

18. Shofer repaid this loan.

19. Shofer took a second loan of \$150,000 on August 23, 1984. (Plaintiff's Exhibit 6.) The purpose of this loan was to repay Shofer's debt to Crown Motors.

20. Shofer took a third loan of \$50,000 on September 5, 1984 (Plaintiff's Exhibit 6) and used that money to repay his



debt to Crown Motors.

21. On February 21, 1985, Shofer borrowed \$35,000 from the pension. (Plaintiff's Exhibit 6.) This money was used as a down payment on two investment properties in the Virgin Islands.

22. Shofer borrowed from the pension for the fifth time on February 25, 1985. (Plaintiff's Exhibit 6.) This \$3,000 loan was also used for the Virgin Islands properties.

23. The sixth loan from the pension occurred on July 30, 1985, when Shofer borrowed \$12,000 (Plaintiff's Exhibit 6) to purchase furniture for the Virgin Islands properties.

24. Shofer borrowed for the seventh time on August 13, 1985. (Plaintiff's Exhibit 6.) At that time, Shofer withdrew \$25,000 from the pension and used the money to refurbish the Virgin Islands properties.

25. On August 21, 1985, Shofer took his eighth loan from the pension. (Plaintiff's Exhibit 6.) He used this \$5,000 loan to refurbish the Virgin Islands properties.

26. On September 30, 1986, Shofer borrowed from the plan for the ninth time. (Plaintiff's Exhibit 6.) Shofer used this \$35,000 loan to purchase a condominium at Harbor Court in

Baltimore.

27. Excluding the first \$60,000 loan which Shofer repaid, Shofer borrowed \$315,000 from the pension in 1984, 1985 and 1986.

28. Shofer did not contact Hack regarding the advice contained in the August 9, 1984 letter before taking additional loans in 1984, 1985 and 1986.

29. Shofer was aware that the tax code was applicable to transactions involving the pension. (Defendant's Exhibits 3, 26).<sup>5</sup>

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<sup>5</sup> Defendant's Exhibit 3 is a letter from Shofer to Barry Blumberg at Maryland National Bank dated February 24, 1982. In this letter Shofer stated that Catalina Enterprises was in need of more working capital than Maryland National Bank was willing to loan. The letter indicated that the pension would begin to finance the accounts receivable of Crown Motors. In discussing the tax consequences of these transactions Shofer wrote:

#### TAX CONSEQUENCES TO THE TRUST

The Trust understands that it will be subject to income tax at corporate rates on net finance income derived from financing the accounts receivables of Crown. This is one of the areas that the Trust has sought to avoid, but it becomes necessary at this time.

#### TAX CONSEQUENCES TO CROWN

There would, however, come a period of time when Crown Motors must again start financing some of its own receivables.

Crown Motors now has total deferred income in excess of \$800,000. As Crown Motors starts selling receivables to the pension Trust instead of financing the accounts itself, it follows that Crown's gross accounts

30. Shofer, however, did not ask Hack about the tax ramifications of borrowing money from his pension and failed to consult with his personal accountants at Grabush Newman regarding the tax ramifications of these loans before withdrawing the money from his pension.<sup>6</sup>

30. During the years that Shofer was borrowing from his pension, Grabush Newman was performing accounting services for

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receivable balances will drop and so will deferred income. As deferred income drops, earned income picks up. Consequently, it is vital that Crown Motors maintain an adequate level of accounts receivable itself so that taxable earned income from the reduction of deferred income does not become a major problem for the company.

Defendant's Exhibit 26 is a letter from John A. Molino of the Hack Company to Shofer dated August 14, 1980. The letter indicates that the pension plan borrowed \$4,300 from the profit sharing plan and that this loan was a prohibited transaction. The letter further warns that the IRS and the Department of Labor had "stepped up" enforcement of prohibited transaction rules and advises Shofer to follow prohibited transaction laws in the future. The letter recommends that Shofer file a form 5330. The letter indicates that tax will be due as a result of the loans and recommends that Shofer contact his accountant "for additional information on how to compute the tax on this particular prohibited transaction."

Although the instant action does not involve taxes assessed as a result of prohibited transactions, Defendant's Exhibits 3 and 26 demonstrate that Shofer was a sophisticated businessman who was aware of the complicated interplay between the tax code and pension law. At trial, Shofer testified that he believed that the withdrawals from the pension were not treated as taxable income because they were loans. This testimony seems incredible and simplistic in light of the detailed discussions outlined above.

<sup>6</sup> In light of this failure to disclose the loans from the pension, an inference may be drawn that Shofer was attempting to conceal the extent of his transactions with the pension plan.

Shofer, Catalina Enterprises and the Catalina Enterprises pension plan. Kenneth Larash was the accountant overseeing Shofer's account with Grabush Newman. Larash prepared Shofer's personal and corporate income tax returns and the pension's 990T<sup>7</sup>. Larash also performed work on the pension's general ledger each year.

31. On June 17, 1985 Larash was working on the general ledger of the pension and learned that Shofer had borrowed \$200,000 from the pension in 1984. These loans were not reported as income on Shofer's 1984 tax return.

32. In the fall of 1986, Grabush Newman prepared Shofer's 1985 personal tax returns. These returns did not list the 1985 loans from the pension as taxable income.

33. The failure to report the loans on the 1984 and 1985 returns was discovered in 1986 when another accountant at Grabush Newman, Alan Marvel, was reviewing Shofer's file and discovered the problem.

34. Larash notified Shofer of the problem (Plaintiff's Exhibit 7) and Shofer, Larash and Marvel met to discuss the issue. At this meeting, Shofer was not convinced that the loans from the pension were taxable. The accountants suggested that

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<sup>7</sup> A 990T form is filed with the IRS when a pension receives taxable income.

Shofer contact Nicholas Giampetro, a pension attorney, and Shofer did so. Shofer also wrote to Hack and requested his assistance. (Plaintiff's Exhibit 8.)

35. This letter from Shofer was the first notice to Hack that Shofer had been borrowing substantial sums from his pension. Hack was not aware of this issue prior to 1986 because Shofer was late in sending the asset data required to prepare the 1984 form 5500. (Defendant's Exhibits 5, 6, 7, 8.) The information needed to complete the 1984 form 5500 was not forwarded to the Hack Company until 1986. (Defendant's Exhibit 10.) The 1984 form 5500 indicated that there were no loans from the plan. (Defendant's Exhibit 9.) Shofer did not read this document but signed it under penalties of perjury.

36. Another meeting occurred in May of 1987. Shofer, Hack, Marvel and Larash attended it. Hack asserted that the loans from the plan were not taxable, but the accountants disagreed. Hack counseled Shofer that, in the event that the loans were taxable, Shofer should not file amended tax returns because the loans might not be detected by the IRS and the statute of limitations was about to run. The accountants disagreed with this strategy and counseled Shofer to file amended returns reporting the loans from the pension in 1984 and 1985 as income. The accountants also advised Shofer that he should report the 1986 loans as income on his 1986 tax return which had not been filed as of the

date of the meeting.

37. Hack filed amended returns for 1984 and 1985 and listed the loans from the pension as income on his 1986 tax return. (Plaintiff's Exhibits 11, 13, 14.) The amended returns and the original 1986 tax return triggered additional federal and Maryland state taxes, penalties and interest charges. Hack was audited as a result of these disclosures.

38. Because this case involved alleged malpractice on the part of Hack and Grabush Newman the Court heard the testimony of several experts:

a. Shofer presented the testimony of Edward Kabala who testified as follows:

(1) Kabala is a Pennsylvania attorney who practices primarily in the area of employee benefits law.

(2) Kabala reviewed the pension plan, Hack's deposition and the letter of August 9, 1984 from Hack to Shofer.

(3) After reviewing these documents, Kabala opined that Hack had deviated from the

standard of care applicable to a pension plan administrator or consultant.<sup>8</sup>

(4) Kabala testified that the August 9, 1984 letter was incorrect in stating that there was no limit on the amount that Shofer was permitted to borrow from his voluntary account and that the loan could remain outstanding for an unlimited period of time. According to Kabala, section 72(p) of the Internal Revenue Code imposes monetary and time limits on loans from pensions.

(5) In addition, Kabala testified that the letter incorrectly stated that the voluntary account can stand as collateral for a bank loan. According to Kabala, the use of the account as collateral for a loan is also subject to the limitations of IRC § 72(p).

(6) With regard to the statement in the August 9 letter indicating that the TEFRA<sup>9</sup>

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<sup>8</sup> According to Kabala the standard of care applicable to a pension consultant/plan administrator is the same standard of care applicable to an attorney.

<sup>9</sup> TEFRA refers to the Tax Equity and Fiscal Responsibility Act of 1982 which amended IRC § 72(p).

provisions imposing limits on loans from pensions apply only to employer accounts and not to employee voluntary accounts, Kabala testified that TEFRA does not distinguish between voluntary employee and employer accounts.

(7) Finally, Kabala testified that Hack owed Shofer a duty to render advice as to the tax consequences of the loans from the Catalina Enterprises pension plan by virtue of Shofer's status as a plan participant, and his positions as President of Catalina Enterprises and fiduciary to the plan.

b. Hack and the Hack Company presented the testimony of Edward Burrows who testified as follows:

(1) Burrows is the past president of the American Society of Pension Actuaries, and has performed pension consulting and administrative services throughout his career.

(2) Burrows testified that Hack had no obligation under the facts of this case to



advise Shofer of the tax consequences of the loans.

(3) In support of this conclusion, Burrows noted:

(a) the brief nature of the loan inquiry from Shofer;

(b) that Shofer did not ask Hack for tax advice and provided no details concerning the loans;

(c) that Hack was aware that Shofer consulted regularly with Grabush Newman for tax advice;

(d) that it would have been inappropriate for Hack to render tax advice because Hack was not an accountant and Hack had no knowledge of Shofer's tax situation.

c. Hack and the Hack Company presented the testimony of Richard Itner, a Baltimore accountant. Itner testified as

follows:

(1) Grabush Newman was negligent in preparing Shofer's 1984 and 1985 tax returns because the accountants at Grabush Newman were not aware that the loans from the pension should have been reported as taxable income;

(2) Grabush Newman was negligent in failing to advise Shofer that he had the option of not filing an amended tax return for 1984. According to Itner, a taxpayer is under no legal duty to file an amended return when a mistake has been made.

d. Grabush Newman called Bennett Goldstein a practicing CPA who testified that

(1) Grabush Newman's failure to detect the taxable loans from the pension was not a deviation from the standard of care.

(2) Shofer had a legal and ethical obligation to amend his tax

returns.

### III. CONCLUSIONS OF LAW

#### A. Negligence

1. To establish a cause of action sounding in negligence, the plaintiff must prove (1) that the defendant owed a duty to the plaintiff or to a class of which the plaintiff was a member; (2) that the defendant breached the duty; (3) that the breach of the duty was the legally cognizable cause of harm suffered by the plaintiff; and (4) that the plaintiff suffered damages. Jacques v. First National Bank, 307 Md. 527 (1986).

2. In determining whether a tort duty exists, the Court must consider the nature of the harm likely to result and the relationship that exists between the parties.

Where the failure to exercise due care creates a risk of economic loss only, courts have generally required an intimate nexus between the parties as a condition to the imposition of tort liabilities. This intimate nexus is satisfied by contractual privity or its equivalent.

Id. at 534.

The Jacques court set forth three factors to be considered in determining whether the equivalent of contractual privity exists: (1) the particular skill required of the defendant's business; (2) the nature of the defendant's business with respect to the public interest; and (3) the foreseeability of economic harm in light of the business setting. Id. at 540-45.

3. In the context of legal malpractice claims, Maryland courts have recognized a sufficient nexus where there is not strict privity between the plaintiff and defendant, but where the plaintiff is a third party beneficiary to an attorney-client contract. Flaherty v. Weinberg, 303 Md. 116 (1985). A third party beneficiary duty arises when two parties enter into an agreement with the intent to confer a direct benefit on a third party allowing the third party to sue on the contract despite the lack of privity. Id. at 125. In order for a third party beneficiary claim to succeed, however, the plaintiff, must be a part of the class of persons specifically intended to be the beneficiary of the defendant's undertaking. Id. at 131 (citing Clagett v. Dacy, 47 Md. App. 23, 420 A.2d 1285 (1980)). The test is whether the intent to benefit actually existed, not whether there could have been an intent to benefit a third party. Id.

4. In the instant case, there is no privity of contract between Shofer and the Hack Company. The letters of engagement admitted into evidence indicate that the Hack Company contracted with Catalina Enterprises, not Shofer. (Finding of Fact 6.) Nor was Shofer a personal client of the Hack Company. Catalina Enterprises is not a party to this case. In addition, although Shofer was a trustee of the pension and the owner of Catalina Enterprises, his close connection with Catalina did not create a contractual duty on the part of the Hack Company to render him personal tax advice.

5. In the absence of contractual privity, the Court must determine whether a duty exists by virtue of the factors discussed in Jacques and Flaherty supra. With regard to the three factors enumerated in Jacques, the Court finds that as a pension consulting business which determined employee eligibility, calculated participant benefits, issued annual participant reports, prepared various tax forms, monitored changes in pension law and advised plan participants, (Finding of Fact 5) the Hack Company administered a pension plan which managed the retirement funds of plan participants and was therefore a business related to the public interest. In addition, the Court finds that the operation of a pension consulting business requires special knowledge and skills.

In addressing the last Jacques factor, the Court concludes that the economic harm which befell Shofer was not foreseeable. At the time that Hack rendered the advice in question, Shofer did not inform Hack that he had definite plans to borrow from the pension, the amounts that he intended to borrow from the pension, the reason that he intended to borrow from the pension or the number of loans that he intended to make. (Finding of Fact 13.) Under these circumstances and with so little information to guide him, Hack's duty, if any, was to answer the questions correctly. To the extent that the August 9, 1984 letter did not address the ultimate tax consequences incurred here, it is excusable because it was not reasonably foreseeable that Shofer would borrow the amounts that he did and/or fail to report the loans on his

1662

original 1984 and 1985 tax returns.

6. This conclusion is not altered by application of the third party beneficiary theory set forth in Flaherty. The Hack Company contracted with Catalina Enterprises and agreed to provide pension administration services. (Findings of Fact 5,6.) These services were intended to benefit the plan participants, and Shofer, as a participant, was a third party beneficiary to the contract. Thus, Hack owed some duty to Shofer by virtue of Shofer's status as a third party beneficiary. This duty however, was not unlimited in its scope and the Court believes that it was not nearly as broad as plaintiff's expert opined. The record before the court indicates that Hack was a pension consultant and not a tax advisor, and that Shofer had in the past consulted with his accountants at Grabush Newman for personal tax advice. (Findings of Fact 5,8,38b(3)(c)-(d).) In light of these findings, the Court concludes that Hack was not under a duty to render tax advice. This conclusion is supported by the brief and hypothetical nature of Shofer's loan inquiry and Hack's lack of knowledge of Shofer's personal financial situation.

7. Assuming arguendo, that Hack owed a duty to render accurate tax advice to Shofer and that he breached that duty, Shofer is also obligated to demonstrate that the breach of duty was the proximate cause of Shofer's economic damages. In addressing issues of proximate cause the Court must first

determine whether the defendant's conduct was a "cause in fact" of the plaintiff's injuries. Peterson v. Underwood, 258 Md. 9 (1970). "Cause in fact is an aspect of proximate cause and addresses whether the defendant's conduct actually produced an injury." Id. at 16. Stated differently, the plaintiff must demonstrate that "but for" the negligent actions of the defendant the plaintiff would not have been injured. Id. If lay testimony together with the reasonable inferences that may be drawn from that testimony does not show a cause in fact relationship, the plaintiff may present the opinion of an expert who testifies that, based on the facts in evidence, the plaintiff's actions were the cause of the defendant's injuries. Id. at 17.

If cause in fact is established, the Court must also determine the point in time at which an actor's liability for a particular act ends. Peterson, 258 Md. at 16. "Thus, although an injury might not have occurred 'but for' an antecedent act of the defendant, liability may not be imposed if, . . . the injury is . . . [too] remote in time and space from defendant's original negligence . . . ." Id.

A plaintiff will satisfy his burden of proof with regard to proximate cause if he introduces evidence establishing a reasonable probability or likelihood that the defendant's act caused the plaintiff's injury or damage. Id. at 17. A mere scintilla of evidence, however, is not sufficient to sustain the plaintiff's burden of proof. Fowler v. Smith, 240 Md. 24 (1965).

8. In the instant case, the evidence indicates that Shofer borrowed money from his pension at a time when he was in debt to Catalina Enterprises and was under pressure from Maryland National Bank to make progress on the Catalina Enterprises balance sheet. (Findings of Fact 10, 11.) Shofer did not testify that he would have done anything differently had he known that there would be tax consequences to borrowing from his pension, and Shofer's expert did not testify that Hack's failure to advise Shofer of the tax consequences was the cause of Shofer's damages. Moreover, although Hack advised Shofer that he could borrow up to \$126,600 from the pension, Shofer did not follow this advice and borrowed \$315,000.

In addition, Shofer's damages were not foreseeable to Hack at the time of the loan inquiry. As is indicated above, Shofer presented a hypothetical question in the context of a brief telephone conversation. (Finding of Fact 12.) Shofer asked Hack to address several options for use of the pension funds and did not indicate whether he intended to borrow the amount that he actually borrowed or the number of loans that he intended to take. (Finding of Fact 12, 13.) In light of these facts, the Court finds that Shofer has not sustained his burden of proving that Hack's negligence was the proximate cause of Shofer's injuries.

9. Even assuming that Hack was negligent and that this negligence was the proximate cause of Shofer's damages, Shofer's



contributory negligence may act as a bar to recovery. A plaintiff is contributorily negligent when he fails to exercise ordinary and reasonable care for his own protection. Menish v. Polinger Co., 277 Md. 553 (1976). To be contributorily negligent, the plaintiff must perform or fail to perform an act which is the proximate cause of the plaintiff's injury. Hooper v. Mougin, 263 Md. 630 (1971). In order to successfully invoke the doctrine of contributory negligence, the defendant must demonstrate that the plaintiff knew or should have known of a dangerous situation and failed to exercise ordinary care to protect himself. Schwartz v. Hathaway, 82 Md. App. 87 (1990).

10. In this case, Shofer withdrew large amounts of money from his pension on the basis of a hypothetical question posed to the plan consultant during a brief telephone conversation. (Finding of Fact 12.) Shofer did not follow the advice provided in Hack's August 9, 1984 letter, did not inquire as to the tax ramifications of the loans and did not consult with his accountants at Grabush Newman to determine whether there would be tax consequences to the loans. (Findings of Fact 16, 17, 30.) Shofer did not inform Hack or Grabush Newman that he had taken the loans and did not forward asset data reflecting the loans from the pension to Hack in a timely manner. (Findings of Fact 30, 35.) In fact, the evidence suggests that the plaintiff may have deliberately concealed the pension loans from the defendants.

11. With regard to the issue of proximate cause, the Court finds that had Shofer followed the advice in Hack's letter and limited the loan amount to \$126,600 he would not have incurred the tax liability at issue in this case. In light of Shofer's knowledge of the applicability of the tax code to pension transactions, (Finding of Fact 29) it was clearly foreseeable that the number of loans and the amount of loans went beyond the scope of the advice sought or given and would generate tax consequences.

12. Accordingly, the Court concludes that Shofer's actions were taken in disregard of Hack's advice and, in view of Shofer's demonstrated experience with pension tax issues, were a proximate cause of his economic damages. Thus, Shofer was contributorily negligent<sup>10</sup> and this negligence is a bar to his recovery in this action.

13. Shofer has not demonstrated convincingly that Hack had a duty to offer tax advice and has further failed to demonstrate that Hack's alleged negligence was the proximate cause of Shofer's injuries. In addition, Shofer was contributorily negligent in failing to follow the advice set forth in Hack's letter. Thus, the Court finds that Shofer is not entitled to

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<sup>10</sup> Shofer's failure to make reasonable tax inquiries concerning the loans is somewhat undercut by the evidence which indicated that neither Hack nor Grabush Newman would have provided helpful advice on this issue.

recover under the negligence count of his complaint. As no recovery is permitted under this count, it is not necessary to address the damages requested.

#### B. Breach of Contract

14. Shofer alleges that he entered into a contract with Hack and the Hack Company and that Hack and the Hack Company breached the contract by rendering incomplete and inaccurate tax advice. These allegations are not supported by the evidence admitted at trial. Shofer did not contract with the Hack or with the Hack Company. Beginning in the 1970's and continuing until 1986, the Hack Company contracted with Catalina Enterprises. Each year, the Hack company renewed its contract and forwarded a letter of engagement to Catalina Enterprises. (Finding of Fact 6.) Although Shofer was not a party to the contract, he may attempt to recover by virtue of his status as a third party beneficiary to the contract between Catalina Enterprises and the Hack Company. (Conclusion of Law 6.) It was not, however, within the scope of the contract between Catalina and the Hack Company, to act as a personal tax consultant to plan participants who were not clients of the Hack Company. Accordingly, the Court finds that the defendants did not breach a contractual obligation and Shofer is not entitled to recover under Count II of the Third Amended Complaint either.

Therefore, for the aforementioned reasons it is this 5th day of September, 1997 **ORDERED**, by the Circuit Court for Baltimore

City, Part 20, that

(1) Judgment is entered for the defendants, Stuart Hack and the Stuart Hack Company and against the plaintiff, Richard Shofer.

(2) Defendants' third party claim for contribution against Grabush Newman and Company is DISMISSED.

(3) The costs of this action are to be paid by the plaintiff.

  
\_\_\_\_\_  
ALBERT J. MATRICCIANI, JR.  
JUDGE

FILED

13 9 P.B.

OCT 3 1997

RICHARD SHOFER

Plaintiff

CIRCUIT COURT FOR  
BALTIMORE CITY

v.

CIRCUIT COURT

STUART HACK

FOR

and

BALTIMORE CITY

THE STUART HACK COMPANY

Part 20

Defendants

CASE NO. 88102069/CL79993

THE STUART HACK COMPANY, et al.

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

Case: 88102069/CL	
APPEALS	
CV CLERK FEE	50.00
CT OF SP AP	30.00
TOTAL	110.00
REPT # 10104	
REC # 687	
OCT 03 1997	11:50 AM

**NOTICE OF APPEAL**

Mr. Clerk:

You will please note an appeal to the Maryland Court of Special Appeals from the Memorandum and Order entered in the above captioned matter on September 5, 1997.

Douglas R. Taylor  
Attorney for Plaintiff  
P.O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

(P.R.)  
PHC's memo  
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10/3/97  
DR

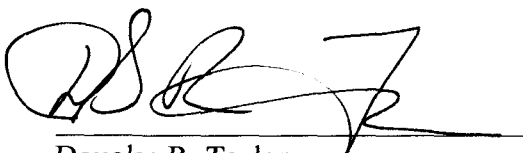
1170

Certificate of Service

I hereby certify that on this 31<sup>st</sup> day of October 1997, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Notice of Appeal to the following:

Ms. Janet Truhe, Esquire  
Janofsky & Truhe, P.A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204  
Attorney for Defendants, Hack and  
The Stuart Hack Company

John Tremain May, Esquire  
Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036

  
Douglas R. Taylor

10/11

DOC 2-14-98

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DEC 17 '97

CSA/PHC Form No. 2

CIRCUIT COURT FOR  
IN THE COURT OF SPECIAL APPEALS

RICHARD SHOFR

\*

\*

vs.

\* PHC No. 932

\* September Term, 1997

STUART HACK et al.

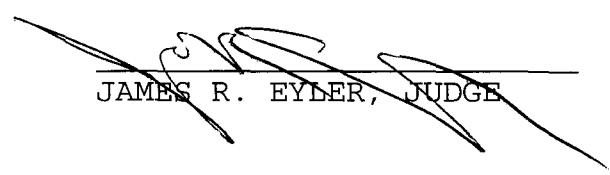
\*

10-3-97

O R D E R

The Court of Special Appeals, pursuant to Maryland Rule 8-206(a)(1), orders and directs that the above captioned appeal proceed without a Prehearing Conference.

BY THE COURT

  
JAMES R. EYLER, JUDGE

Date: DEC 16 1997

cc:\* Patricia Bertorelli, Chief Deputy Clerk  
Circuit Court for Baltimore City  
Douglas R. Taylor, Esquire  
Janet Truhe, Esquire  
Deborah M. Whelihan, Esquire

\*Mr./Ms. Clerk: Will you kindly place this Order with the record in this cause (Your 88102069B/CL 79993). The time within which a transcript must be ordered pursuant to Maryland Rule 8-411(b)(1) and the record prepared and filed with this Court pursuant to Maryland Rule 8-412(a)(1) shall begin to run from the date of this Order.

1672

1418 D.G.

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

Richard Shofer

Appellant

v.

The Stuart Hack Company, et al.

Appellees

FILED

FEB 13 1998

CIRCUIT COURT FOR BALTIMORE CITY

PHC No. 932  
September Term, 1997

L.D. GRADETT, CLERK

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RECEIVED COURT OF SPECIAL APPEALS OF MARYLAND

\* \* \* \* \*

**Motion for Extension of Time to Transmit Record**

Appellant, Richard Shofer, by his attorney, Douglas R. Taylor, pursuant to Maryland Rule 8-412 (d), moves this Honorable Court for an extension of time to transmit the record in the above captioned appeal and for reasons states as follows:

1. A Notice of Appeal was timely filed in the above matter on October 3, 1997. That this Court issued an order on December 16, 1997 that this appeal proceed without the necessity of a prehearing conference.

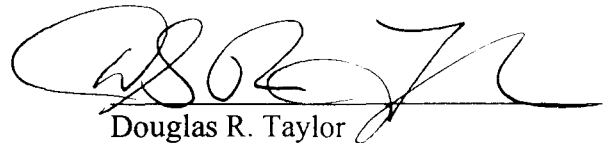
2. That the bench trial in the case required five days, and, in addition, included a one half day motions hearing and another date for closing arguments, all of which make up the transcript in this matter. That because of the length of the trial and the hearings, additional time is required to complete the transcript of proceedings in this case, all of which must accompany the record when it is transmitted. That attached hereto, and prayed to be incorporated herein, is a copy of a

1673



letter received from the court reporter, Deposition Services, Inc., indicating that additional time is required to complete the transcription.

Wherefore, Appellant moves that this Honorable Court extend the time for the transmission of the record for a period of ~~thirty~~ <sup>Forty Five</sup> (45) days, from February 16, 1998 to April 2, 1998.



Douglas R. Taylor  
Attorney for Appellant  
P. O. Box 4566  
Rockville, Maryland 20850  
(301) 565-0209

**Points and Authorities**

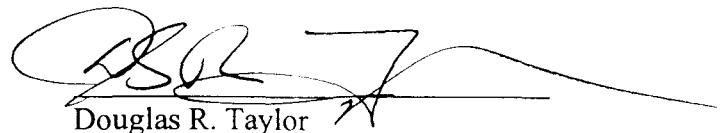
1. As stated above.
2. Maryland Rule 8-412 (d).

**Certificate of Service**

I hereby certify that on this 1/17<sup>th</sup> day of February, 1998, I sent, by U. S. Mail, postage prepaid, a copy of the foregoing Motion For Extension of Time to Transmit Record, to the following:

Janet M. Truhe, Esquire  
Truhe & Maier, P. A.  
Court Towers, Suite 505  
210 W. Pennsylvania Avenue  
Towson, Maryland 21204

Deborah M. Whelihan, Esquire  
Jordon, Coyne & Savits  
Suite 600  
1100 Connecticut Avenue, N. W.  
Washington, D. C. 20036



Douglas R. Taylor



LESLIE D. GRADET  
CLERK

# Court of Special Appeals

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*Grades*  
*(142) 86*

KATHARINE M. KNIGHT  
CHIEF DEPUTY

February 27, 1998

Patricia Bertorelli, Clerk  
Circuit Court for Baltimore City  
111 North Calvert Street, Room #448  
Baltimore, Maryland 21202

Re: Richard Shofer v. Stuart Hack et al.  
PHC No. 932, September Term, 1997  
No. 88102069/CL79993 in Circuit Court for Baltimore City

Dear Ms. Bertorelli:

By Order dated February 25, 1998, this Court extended the time to transmit the record to April 2, 1998.

Very truly yours,

Leslie D. Gradet  
Clerk

LDG: am

cc : Douglas R. Taylor, Esquire  
Janet M. Truhe, Esquire  
Deborah M. Whelihan, Esquire

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**MSA SC 5458-82-152** — 5

**Dates:** 2010/02/17

**Description:** Case numbers received from J. Hollander -

BALTIMORE CITY CIRCUIT COURT (Paternity Papers) Arrington v. Rodriguez, 1989, Box 169  
Case No. 119070 [MSA T3351-923, CW/16/31/25]

File should be named msa\_sc5458\_82\_152\_[full case number]-####

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**2010-02-22 C Baker scanned 164 pages, created pdf and uploaded pdf to msaref for folder #2.**

**2010-02-22 C Baker scanned 292 pages, created pdf and uploaded pdf to msaref for folder #3.**

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Rolnik v. Union Labor Life  
Ins. Co., 1987, Case No. 87313071

Case is split between 2 boxes:

Box 387 [MSA T2691-2026, HF/8/35/8]

Box 388 [MSA T2691-2027, HF/8/35/9]

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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Shofer v. The Stuart Hack  
Co., Box 128 Case No. 88102069 [MSA T2691-2232, HF/11/30/3]

See also for "brick binders":

Box 527 [MSA T2691-2631, HF/11/38/18]

Box 528 [MSA T2691-2632, HF/11/38/19]

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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Attorney Grievance  
Commission v. Yacono, 1992, Box 1953 Case No. 92024055 [MSA T2691-4591,  
OR/12/14/65] **File not in Box**

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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Feldmann v. Coleman,  
1993, Box 391 Case No. 93203022 [MSA T2691-5466, OR/22/08/037]

**2010-02-19 F. Leach scanned 30 pages, created pdf and uploaded pdf to msaref**

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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Jefferson v. Ford Motor  
Credit Corp., 1993, Box 470 Case No. 93251040 [MSA T2691-5545, OR/22/10/20]

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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Shofer v. The Stuart Hack Co. and Blum, Yumkas, Mailman, 1993, Box 518 Case No. 93285087 [MSA T2691-5593, OR/22/11/20]

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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Booth v. Board of Appeals, 1993, Box 589 Case No. 93330026 [MSA T2691-5665, OR/22/12/45]

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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Scott v. Dept. of Public Safety, 1993, Box 603 Case No. 93342002 [MSA T2691-5679, OR/22/13/11]

**2010-02-19 F. Leach scanned 139 pages, created pdf and uploaded pdf to msaref**

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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Stubbins v. Md. Parole Comm'n., 1993, Box 616 Case No. 93354003 [MSA T2691-5692, OR/22/13/24]

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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Fitch v. DeJong, 1994, Box 109 Case No. 94077005 [MSA T2691-5817, OR/28/9/2]

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BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Bowden, 1987, Box 142 Case No. 18721501 [MSA T3372-984, CW/2/23/13]

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BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Redmond, 1988, Box 191 Case No. 48828071 [MSA T3372-1282, HF/11/23/43]

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BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Parker, 1990 Box 100 Case Nos. 290213034,35 [MSA T3372-1476, OR/16/16/8]

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Box 104 Case Nos. 290221060,61 [MSA T3372-1480, OR/16/16/12]

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BALTIMORE CITY CIRCUIT COURT (Criminal Transcripts) State v. Monk, 1991, Box 78 Case No. 591277019 [MSA T3657-403, OR/17/11/21]

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BALTIMORE CITY CRIMINAL COURT (Transcripts) Eraina Pretty, 1978, Box 43 Case Nos. 57811846, 57811847, 57811848, 57811858, 57811859, 57811860 [MSA T496-3990, OR/18/22/41]

**Case 57811847 and Case 57811858 have pull slips in the record center box that indicate the files were sent back to Baltimore City Circuit Court attn: Jack Blake in 1993.**

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BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Johnson (or Johnson-Bey),

1987, Box 11 Case No. 28701917 [MSA T3372-853, CW/2/20/26]

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System design by Dr. Edward C. Papenfuse and Nancy Bramucci.  
Programmed in *Microsoft SQL Server and Cold Fusion 7.0* by Nancy Bramucci.  
Technical support provided by Wei Yang, Dan Knight, Tony Darden, and Matt Davis.  
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